The European Legal Forum
Forum iuris communis Europae

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The European Legal Forum (E) 2-2008, 61 - 80

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Forum iuris communis Europae

2-2008
pp. I-61 - I-120
8th Year March/April 2008

Section I

PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

The Rome I Regulation: Much ado about nothing?

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I. Introduction

1. General comment

1. The Regulation of the European Parliament and the Council on the law applicable to contractual obligations *(Rome I)* has converted the 1980 Rome Convention into a Community instrument.[2] Besides the change of legal nature, the original intention was to take advantage of this transformation in order to modernise some of its provisions. However, the end result is not very promising. We have missed out on an important opportunity to improve the text and, in particular, to solve some of its main problems, namely (i) the determination of the law applicable to the external aspect of agency contracts, (ii) the relationship between article 5 (consumer contracts) and the unilateral conflict-of-laws rules contained in some Directives, (iii) the effectiveness *vis-à-vis* third parties of an assignment of credits, (iv) or the unification of the conflict rules applicable to insurance contracts. The Review Clause contained in Article 27 is eloquent proof of the fact that the Community legislator is not absolutely satisfied with its work.[3]

2. The purpose of this article is not to offer a critical view of the Rome I Regulation (or Rome I). Simply, it attempts to make a general presentation of the new text, highlighting the main differences to the Convention and exploring the policy reasons that lie behind them.

2. Legal nature. Special position of the United Kingdom and Denmark

3. The genesis of the new instrument can be summarized in a few sentences. According to the procedure laid down in the TEC (Articles 67 and 251), the Commission submitted a proposal on 15 December 2005 (the Commission's Proposal).[4] This proposal had been in discussion on the Committee on Civil Law Matters since May 2006 and a final agreement between the Council and the Parliament was reached by the end of 2007. Unlike the Rome II Regulation,[5] the Rome I Regulation did not require a "reconciliation process" (see Article 251.3-4 TEC).

4. The Rome I Regulation is Community law. It is a *regulation* and, therefore, it has general application, is fully binding and is directly applicable in all Member States (article 249 TEC). The Regulation takes effect automatically and simultaneously in all Member States, as there is no need for it to be transposed or implemented by national legislation. Once it has entered into force, it shall replace the Rome Convention (Article 24.1 Rome I) and, therefore, any reference to the Convention shall be understood to also refer to the Regulation (Article 24.2 Rome I).

5. The legal basis of this Regulation are Articles 61 (c) and 65.b TEC. Accordingly, the position of the United Kingdom and Ireland, on the one hand, and Denmark, on the other, are subject to special rules (see Article 69 TEC). Ireland has exer-

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2 Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I Regulation), not yet published in the Official Journal.

3 According to this Clause, the Commission shall submit three reports and, if appropriate, proposals to adapt the Regulation on three aspects (i) insurance contract, (ii) consumer contracts and (iii) the effectiveness against third parties of assignments of claims. Unlike the former, the third report must be submitted within two years from the date of entry into force of the Regulation.

4 Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), 15 December 2005, COM (2005) 650 final. This proposal was preceded by a 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 January 2003, COM (2002) 654 final. This paper and the replies are accessible at www.europa.eu.int .

5 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"), (OJ 31 July 2007, L 199 at 40).

cised the opting-in right, *i.e.* it has expressed its wish to participate in the adoption of this Regulation and is therefore bound by it (see Recital 44 Rome I). The United Kingdom, on the contrary, has not exercised this right so far (see Recital 45 Rome I), but it is not unlikely that it will eventually take a favourable decision on the text in the next few months. Denmark, on the other hand, does not have the right to opt-in, and therefore it has not taken part in the adoption of this Regulation. Consequently, the Rome I Regulation does not apply to Denmark. Danish judges will continue applying the 1980 Rome Convention. The same consideration holds for the territories referred to in Article 299(3) of the TEC (such as the French overseas territories, Aruba or the Netherlands Antilles, see Article 24.1 Rome I).

6. The European Court of Justice has jurisdiction to give preliminary rulings concerning the validity and interpretation of the Regulation. The conditions are laid down in Article 68 TEC. Pursuant to this provision, when an interpretative question is raised in a case pending before a national court, against whose decision there is no judicial remedy, that court shall request the Court of Justice to determine it, if it considers that a decision on the issue is necessary in order to give its ruling.

3. Hermeneutic circle

7. From the outset, it is worth mentioning that this Regulation is a part of the Community Private International Law system. Accordingly, this system, as Recital 7 clarifies, provides the "hermeneutic circle" within which the new instrument has to be placed. The provisions of the Rome I Regulation must be interpreted and construed in a way consistent with the Brussels I Regulation[6] and with the Rome II Regulation.[7] Both instruments are the main elements of the "systematic criteria of interpretation". In addition, the 1980 Rome Convention provides the "genetic criteria of interpretation". This implies, for example, that when the wording of a provision is the same in both texts, the Convention and the Regulation, the interpretation, in principle, should also be the same (see *infra* para. 52 with some examples).[8]

II. Scope of application

1. Universal character

8. The Rome I Regulation establishes a uniform regime of conflict-of-laws rules applicable to contractual obligations. Like the 1980 Rome Convention and the Rome II Regulation, the Rome I Regulation has universal character: any law designated by the Regulation shall apply whether or not it is the law of a Member State (Article 2 Rome I). This implies that the Regulation is applicable, without any additional link with the European Community, more broadly than the mere judicial competence of the corresponding Member State; i.e. the Regulation determines the law applicable *ad intra and ad extra,* that is, to "intra-Community cases" and to "extra-Community cases". Hence, for example, the Regulation even applies to a contract concluded and executed in a third country between two extra-Community firms which, for any conceivable reason, come to a Member State to litigate.[9]

2. Sphere of material application

9. The Regulation determines the law applicable (a) in civil and commercial matters (b) to contractual obligations (Article 1.1 Rome I).

2.1. Concept of "civil and commercial matters"

10. The Regulation only applies to *civil and commercial matters*. This concept is an autonomous concept of Community law. Its meaning must be uniform and independent of the national laws of Member States. This autonomous meaning must be drawn, first, from the objectives and general scheme of the Community text and, second, from the general principles underpinning the corpus of national legal systems. This ensures that the Community norm is applied uniformly in all Member States. Moreover, the meaning of this concept must be *prima facie* consistent in all community legal texts (*supra* para. 7). Accordingly, the reference to the interpretation given by the ECJ to the same concept in the context of the Brussels I Regulation (Article 1.1 Brussels I) is an unavoidable hermeneutic reference for the Rome I Regulation. Specifically, the ECJ has pointed out some features of this term: (a) The relevant element for characterising an issue as a "civil and commercial matter" is the legal relationship between the parties and not the nature of the court where the case is litigated. This means that the Rome I Regulation must also be applied to decisions rendered in civil matters by criminal, labour or admin-

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[6] Council Regulation (EC) 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (OJ 2001, L 12 at 1).

[7] *Supra* footnote 4.

[8] Hence, the Explanatory Report of the Convention (Giuliano-Lagarde Report) remains a very useful tool for interpreting the Regulation. However, this is an "in principle" idea that imposes the burden of argument on those who want to depart from the interpretation of the Convention. But it does not imply that the provisions of the Regulation shall *necessarily* mean the same in both instruments (see ECJ 8 November 2005 – C-443/03 – *Götz Leffler v Berlin Chemie AG* [2005] ECR I-9611 = [2005] EuLF I-212 and recently, *A.-K. Bitter*, "Auslegungszusammenhang zwischen der Brüssel I-Verordnung und der künftiguen Rom I-Verordnung", *IPRax,* 2008, p. 96 *et seq.*).

[9] On the problem of the legal basis for giving the instrument a universal character, see *A. Bonomi*, "Conversion of the Rome Convention into an EC Instrument", *Y.P.I.L.,* 2003, p. 53 *et seq.*, p. 59; *F. Garcimartín*, "The Rome II Regulation: On the way towards a European Private International Law Code" = [2007] EuLF I-77 *et seq.*, p. 78; *H. Heiss*, "Die Vergemeinschaftung des internationalen Vertragsrechts durch Rom I und ihre Auswirkungen auf das österreichische internationale Privatrecht", *JBl,* 2006, p. 750 *et seq.*, p. 751; *P. Lagarde*, "Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)", *Rev.crit. DIP*, 2006, p. 331 *et seq.*, p. 332; *E. Lein*, "Proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I) COM (2005) 650 Final, 15.12.2005", *Y.P.I.L.,* 2005, p. 391 *et seq.*, p. 393 with further references; *Groupe européen de droit international privé (GEDIP)*, Réponse au Livre vert de la Commission sur la transformation de la Convention de Rome en instrument communautaire ainsi que sur la modernisation, 2003, p. 9, in available at www.gedip-egpil.eu; *Max-Planck Institute for Comparative and International Private Law*, Comments on the European Commission's 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, RabelsZ, 68 (2004), p. 1 *et seq.*, p. 11.

istrative courts.[10] (b) The mere fact that one of the parties in the case is a public authority does not mean that the Regulation is not applicable. The key point is the fact that the Public authority is "*…acting in the exercise of its public powers and the case derives from that act*".[11] Hence, public contracts characterized by this feature are excluded from the scope of the Rome I Regulation.

11. The Regulation clarifies that the concept of civil and commercial matters *does not include revenue, customs or administrative matters*. Unlike in the Rome II Regulation, a reference to the liability of the State for acts or omissions in the exercise of State authority ("*acta iure imperii*") was considered superfluous in the context of Rome I due to the nature of its object (i.e., contractual obligations).

2.2. Concept of "contractual obligations". List of exclusions

12. The concept of *contractual obligations* is also an autonomous concept, whose interpretation must be uniform and independent from the national laws of the Member States. The Brussels I Regulation may also in this case provide a useful hermeneutic reference for interpreting the term "contractual obligations" (Article 5.1 Brussels I). With regard to this latter text, the ECJ has stated that contractual obligations encompass "*…legal obligations freely consented to by one person towards another*".[12]

13. The Regulation contains a list of exclusions (Article 1.2 Rome I). This list is practically the same as in the Convention. There are no substantive changes and only minor adjustments seeking to align the wording with the Brussels I Regulation and with the Rome II Regulation.

14. In particular, the Rome I Regulation – as the Rome Convention – does not apply to the status and legal capacity of natural persons, with the exception foreseen in Article 13 Rome I. This rule is aimed at protecting a party who in good faith believed to be making a contract with a person of full capacity and who, after the contract has been entered into, is confronted with the incapacity of the other contracting party.[13] According to its wording, in a contract entered into 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 another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence. During the negotiations, an extension of this provision to include *legal persons* was submitted. However, it was finally rejected mainly due to the difficulties associated with applying the concept of "capacity" to legal persons in this context.[14] Therefore, the question of whether a rule similar to Article 13 can be applied to a legal person depends on the Private International Law rules of each Member State.

15. The Regulation does not apply either to obligations arising from family law: wills and succession, matrimonial relationships, parentage, marriage or affinity, including matrimonial property regime and maintenance obligations. The new wording of these exclusions (letters (b) and (c) of paragraph 2 of Article 1 Rome I) has been taken from the text of Rome II, including the corresponding recital (Recital 8 Rome I).[15]

16. Some additional points are worthy of note. *First,* the Regulation maintains the exclusion as to 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 (Article 1.2 (d) Rome I). The latter category includes instruments such as bills of lading (see Recital 9 Rome I) or similar documents issued in connection with transport contracts, bonds, debentures, guarantees, letters of indemnity, certificates of deposit, warrants and warehouse receipts; but only to the extent that they are negotiable and, even in this case, the exclusion only encompasses those obligations that arise *from the instrument's negotiable character*. Though the interpretation of this sentence has raised some difficulties in practise, the Regulation keeps the wording of the Convention. In principle, and according to a number of rulings of European courts, this means that the exclusion covers the rights and obligations of the issuer of the instrument *vis-à-vis* any holder in due course, such as the delivery of the merchandise in the case of a bill of lading or the payment of the debt in the case of a bond. It goes without saying that neither the contracts pursuant to which such instruments are issued nor contracts for the purchase and sale of such instruments are excluded.[16]

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[10] See *P. Lagarde*, *loc.cit.,* p. 333 (giving the example of the labour contract concluded by the French public administration). Note that the Rome II Regulation clarifies this point in Recital 8. Although the Rome I Regulation does not contain a parallel recital, it is subject to the same approach.

[11] See, *F. Garcimartín*, *loc.cit.,* p. 80 with a reference to the case-law of the ECJ.

[12] See, among many others, ECJ 20 January 2005 – C-27/02 – *Petra Engler v Janus Versand GmbH* [2005] ECR I-481. On the application of the Rome I regulation to "prize awards" notified to consumers, *D. Martiny*, "Neue Impulse im Europäischen Internationalen Vertragsrecht", *ZEuP,* 2006, p. 60 *et seq.,* p. 65-66. However, as said, the transposition of concepts should be taken *cum granu salis*. The ECJ has elaborated the definition of "contractual obligations" in relation to Article 5.1 of the Brussels I Regulation which is a rule on jurisdiction. The sense and purpose of this provision is obviously different from the sense and purpose of Article 1 of the Rome I Regulation. It implies that both concepts may not *always* have the same meaning; see, *E. Lein*, *loc.cit.,* p. 392; Max Planck's Comments on the Green Paper, *cit.,* p. 88. But the burden of argument falls upon those who advocate departing from the principle of continuity of concepts, *supra* footnote 8.

[13] See, *Giuliano-Lagarde* Report, Article 11.

[14] Legal persons raise not only problems of capacity as such, but also problems related to their legal representation, which may require a different analysis from that applicable to natural persons. The Rome I Regulation was not considered the right place to deal with those issues and, for this reason, an extension of the rule contained in Article 13 to legal persons was rejected.

[15] For a critical consideration on the wording of these exclusions, in particular the reference to the "applicable law" to characterize non-marital relationships, see Max Planck Institute for Comparative and International Private Law, *Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, available at www.mpipriv.de and RabelsZ, 2007, p. 225 *et seq.*; also *P. Lagarde*, *loc.cit.,* p. 333-334.

[16] *Giuliano-Lagarde* Report, Article 1. Arguably, in the Regulation, the concept of "negotiable instrument" will call for an autonomous interpretation.

17. The Regulation also maintains the exclusion of choice-of-courts and arbitration agreements already contained in the Convention. During the elaboration of the text some arguments were invoked to delete this exclusion; *i.a,* it was said that the application of the Rome I Regulation to those clauses would ensure a uniform conflict-of-laws rule for those (substantive or contractual) aspects not harmonized by other more specific instruments such as the 1958 New York Convention on Arbitration or the Brussels I Regulation.[17] However, either (a) the risk of conferring competence to the Community on arbitration matters or (b) the difficulties in identifying what substantive aspects remain outside those instruments advocated in favour of maintaining the exclusion. In particular, in the context of the Brussels I Regulation, this exclusion will allow the European Court of Justice to develop a uniform regime for those material-law elements directly linked to the conditions laid down in Article 23 of that Regulation.[18]

18. The Rome I Regulation contains the same exclusion as the Convention regarding (a) company-law matters, (b) trusts, (c) and the external dimension of agency contracts or legal representation (i.e. "*the issue of whether an agent is able to bind a principal, or an organ is able to bind a company, corporate body or unincorporated, to a third party*"). The Commission's Proposal included a special rule dealing with this latter issue, *i.e.* the law applicable to the external aspects of agency contracts.[19] This approach was however soon abandoned. The difficulties in reaching an agreement on the appropriate connecting factor and the fact that this question was not considered a crucial element of the new text contributed to maintaining the text of the Convention in this case, too. This means that each Member State will apply its national conflict-of-laws rules.[20]

19. Finally, the Regulation eliminates the exclusion referring to insurance contracts (with the exception of collective insurance, *infra*) and adds an exclusion regarding *culpa in contrahendo.* As to the latter, this provision makes it clear that the Rome I Regulation does not determine the law applicable to liability arising from dealings prior to the conclusion of a contract. The reason is very simple: The obligations arising from dealings prior to the conclusion of a contract are covered by Article 12 of the Rome II Regulation and therefore have to be excluded from Rome I (see Recital 10 Rome I). However, this exclusion is more formal than substantive: Article 12 of the Rome II applies as connecting factor the law applicable to the contract (*i.e. "…the law that applies to the contract or that would have been applicable to it had it been entered into…"*), and therefore entails an implicit cross-reference to the Rome I Regulation. *Prima facie,* this should prevent any gap or inconsistency between the two texts.[21]

3. Sphere of application in time

20. The Regulation is applicable eighteen months from its entry into force (which will take place twenty days following its publication in the Official Journal, Article 29 Rome I). From the standpoint of the operators, the relevant date is that of the conclusion of the contract: the Regulation applies to contracts concluded eighteen months after the date of its entry into force (Article 28 Rome I). The Rome I Regulation clarifies the difference between the date of "entry into force" of the text and the date of "application in time", and expressly establishes that it only applies to contracts concluded after the latter, so as to avoid the problems posed by the Rome II Regulation.[22]

4. Internationality and domestic cases

21. The Regulation applies to situations involving a conflict of laws (Article 1 Rome I), *i.e.,* to contractual relationships linked to more than one legal system. The clarification of the Giuliano-Lagarde Report in relation to the 1980 Rome Convention can be helpful in understanding this provision: "*These are situations which involve one or more elements foreign to the internal social system of a country (for example, the fact that one or all of the parties to the contract are foreign nationals or persons habitually resident abroad, the fact that the contract was made abroad, the fact that one or more of the obligations of the parties are to be performed in a foreign country, etc.), thereby giving the legal systems of several countries claims to apply".*[23]

22. The Regulation retains the rule of the Convention regarding those cases where the internationality of the relationship is purely based on the choice of the parties (Article 3.3 Rome I). The wording, however, departs slightly from the Convention, in order to make it parallel to the Rome II Regulation (Article 14.2 Rome II). The meaning of that provision is well-known. The Rome I Regulation allows the parties to choose the law applicable to their contractual obligations (*infra*). The parties can choose any law, even if it has no objective connection with the contract. Nevertheless, Article 3.3 Rome I introduces an exception in order to prevent parties from internationalising a domestic case merely by choosing a foreign law. Where all other elements of the situation are located in one country other than the country whose law has been chosen, the choice is valid, and the foreign law will apply, but without prejudice to the application of the "internal mandatory rules" of the law of the former country. This article means that the autonomy of the parties has material-law effects, not conflict-of-laws effects: they can carry out a dy-

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17 See, for example, the analysis of the *Max Planck Institute*, Comments on the Green Paper, cit., comment to question 6.

18 See, elaborating this idea, *M. Virgos/F. Garcimartín*, Derecho procesal civil internacional, 2nd ed., 2007, p. 284-290. Note, however, that Article 23 of the Brussels I Regulation does not apply to forum selection clauses in favour of the courts of a third country.

19 See Art. 7 of the Commission's Proposal.

20 See, recently, on this issue, *S. Schwarz*, "Das Internationale Stellvertretungsrecht im Spiegel nationaler und supranationaler Kodifikationen", RablesZ, 2007, p. 729 *et seq.,* with further references.

21 On this issue, in the context of the Commission's Proposal, see *M. Lehmann*, "Der Anwendungsbereich der Rome I –Verordnung- Vertragsbegriff und vorvertragliche Rechtsverhältnisse", in *Ferrari/Leible* (ed.), Ein neues Internationales Vertragsrecht für Europa, 2007, p. 17 *et seq.,* pp. 34-49.

22 See, on this problem, www.conflictoflaws.net, comments on Rome II.

23 *Giuliano-Lagarde* Report, Article 1.

namic incorporation of a foreign law to govern their contractual relationship, but within the limits set forth by the provisions of the law with which the case is objectively connected which *cannot be derogated from by agreement*. To avoid the confusions raised by the term "mandatory rules" in the Rome Convention, the Rome I Regulation makes a difference between "overriding mandatory rules" (referred to in Article 9) and "rules that cannot be derogated from by agreement" (referred to in Articles 3.3., 3.4, 6.2 or 8).

Unlike the 1980 Rome Convention, the Rome I Regulation does not make reference to the fact that the parties have chosen a foreign law accompanied by a forum selection clause. Nevertheless, this difference should not have any hermeneutic relevancy (in fact, this is expressly recognized by Recital 15 Rome I).

23. Paragraph 4 of Article 3 Rome I, extends the same principle to harmonized sectors of Community law (*i.e.,* common standards in the Community). Where all the elements of the case are located in two or more different Member States, the choice by the parties of the law of a third State shall not debar the application of the mandatory rules set forth by the Community law. To the extent that the Community provisions are mandatory, the condition that *"all the relevant elements…are located in one or more Member States"* does not make much sense: even though not all the elements are situated within the Community, the Community provisions shall apply if they are mandatory and declare themselves applicable to the case (see, ECJ C-381/98, "Ingmar case). In other words, what determines the application of a mandatory provision of Community law is not the fact that all the elements are located in the EU, but the scope of cross-border application unilaterally defined by the Community instrument itself (by the so called "non member country clauses") or inferred by interpretation from its sense and purpose, as in the Ingmar Case.[24] Hence, Article 3.4 of the Rome I Regulation is not very helpful.

When the harmonized rules are contained in a Directive that permits Member States to implement it differently (as is the case where the Directive sets forth a minimum standard that can be raised by national law), it is necessary to designate the national applicable law *in concreto.* The Regulation, following the Rome II Regulation, opts for the application of the *lex fori,* instead of the application of the law designated by Articles 4 *et seq.* Rome I (that is, the law of the Member State that would have been applicable, had the parties not chosen the law of a third country).[25]

In addition, the new Regulation improves the wording of the Rome II Regulation. Article 1.3 Rome I establishes that, for the purpose of Article 3.4 Rome I, Denmark must be considered a Member State. If the parties choose Danish law, where mandatory community rules are in force, Article 3.4 Rome I should not be applied as parties are not "evading" a common EC standard.[26] Though, as said, Rome II does not contain a similar reference, the same will apply, by analogy, in the context of this instrument.

24. It is also worth pointing out that, unlike the Commission's Proposal, the final text of the Regulation does not apply to purely internal conflicts (Article 22.2 Rome I). In this sense, there are no changes in comparison with the system of the Convention. Each Member State is free to decide whether to extend the rules of the Rome I Regulation to purely internal conflicts or not.

5. Relation with existing international conventions

25. Once the Regulation has been adopted, Member States are pre-empted from undertaking obligations with non-Members which affect the rules contained therein. In the future, the competence to conclude or accede to international conventions belongs to the EC (but see Recital 42 Rome I, copying Recital 37 Rome II: "*The Commission will make a proposal to the European Parliament and 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, containing provisions on the law applicable to contractual obligations*").

26. The Regulation respects the international conventions concluded before its adoption (Article 25 Rome I). Accordingly, Member States can continue to apply the conflict rules contained in international conventions to which they are parties, and which lay down conflict-of-laws rules relating to contractual obligations; such as, the 1955 Hague Convention on the sale of goods. This clause also encompasses uniform material-law conventions that define their sphere of application by means of a unilateral rule, such as the 1980 Vienna Convention on the sale of goods.[27] The Regulation imposes on Member States an obligation to notify the Commission of the list of those conventions, and this list has to be published in the Official Journal (Article 26 Rome I).

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[24] See, recently, *J. Hoffmann/V. Primaczenko*, "Die kollisionsrechtliche Absicherung des Verbraucherschutzes in Europa", IPRax, 2007, p. 173 *et seq*., pp. 174-177. Note the difference between Article 3.4 Rome I which requires that "*all other elements* are located in one or more Member States" and the "non-member State clause" such as Article 6 II of the Directive 93/13/EC which only requires that the contract "has *a close connection* with the territory of the Member States". Furthermore, Article 3.4 Rome I only applies if a choice of law is made, while there are some Community standards that may be applicable even if there is no choice of law, see *U. Magnus/P. Mankowski*, Joint Response to the Green Paper, pp. 8-9, available at www.ec.europa.eu. These differences entail that the minimum EC standards laid down by the Directives are not really ensured by Article 3.4 Rome I but by Article 23 Rome I (*infra)*. The joint interpretation of both provisions may lead to the following results: (a) if all the elements are located in the Community and the parties choose the law of a non-member State, Article 3.4 Rome I shall apply; (b) if all the elements are not located in the Community, but the contract "has a close connection with the Community", the "non-member country clause" of the corresponding Directive shall prevail under Article 23 Rome I (at least in Consumer Directives, the application of Article 23 seems more reasonable than the application of Article 9, due to the restrictive definition of overriding mandatory rules contained in paragraph 1 of this provision). This result is rather paradoxical.

[25] See, for critical comments on this solution, *F. Garcimartín*, *loc.cit* p. 79; *E. Lein*, *loc.cit.,* p. 402.

[26] On this issue, in the context of Rome II, *F. Garcimartín*, *loc.cit.,* p. 79.

[27] Hence, for example, if the 1980 Vienna Convention is applicable according to its article 1.1.a, the provisions of this instrument shall apply even though if, according to the rules of the Rome I Regulation, the law applicable to the contract would be that of a non-contracting State. See, citing the example of Conventions relating to contracts of carriage, *Giuliano-Lagarde* Report, Article 21.

The Commission's Proposal included an exception, in favour of the application of the Regulation, where all the material aspects of the situation were located within the Community (Article 23.2 of that Proposal). However, following the approach in the Rome II Regulation, this exception was finally deleted.[28]

27. On the contrary, the Regulation prevails over the conventions concluded *exclusively* between two or more Member States before its adoption (Article 25.2 Rome I). The difference with the former rule is that, in this case, there are no third-countries involved.

6. Relationship with other provisions of Community law

28. In relation to other Community instruments, the Regulation lays down the principle of *lex specialis.* The Rome I Regulation is not detrimental to the application of other acts of the Community institutions which, *in relation to particular matters,* lay down conflict rules relating to contractual obligations (Article 23 Rome I). Unlike the Commission's Proposal (see Article 23.2 of that Proposal), the final draft of this provision does not contain any reference, either direct or indirect, to the internal market clause or to the principle of mutual recognition. However, Recital 40 echoes that concern and states that the Rome I Regulation *"should not prejudice the application of other instruments laying down provisions designated to contribute to the proper functioning of the internal market insofar 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… the Directive on electronic commerce".*

The relationship between the general conflict-of-law rules applicable to torts or contracts, on the one side, and the principle of mutual recognition, on the other, is controversial. In fact, the question of *"if and under what conditions"* the principle of mutual recognition modifies the application of the general conflict-of-laws rules is one of the thorniest issues in Community Law. Unfortunately, Recital 40 Rome I (which replicates Recital 35 of the Rome II Regulation) does not shed light on this problem and merely states something that may seem obvious.

29. It is also regrettable that the Rome I Regulation has not fully harmonized the conflict-of-laws regime applicable to consumer contracts. As has been said, the second generation of Directives on consumer protection has incorporated a unilateral conflict rule aimed at ensuring that the consumer does not lose the protection granted by the corresponding Directive if the parties choose the law of a third country as applicable to the contract (the so-called "non-Member State clause").[29] Basically, the condition that triggers the application of this rule is that the contract has a close connection with the territory of one or more Member States (or in the case of the timesharing Directive, that the immovable property is situated in the EU). Member States have concretized the concept of "close connection" in very different ways and with very different consequences. Some Member States, for example, have "replicated" the provision of the Directive; whereas others have required that the law of a Member State were applicable in the absence of choice. As to the consequences, some have opted for the application of the *lex fori*, whereas others have opted for the law most closely connected with the contract. Unfortunately, according to Article 23 of the Rome I Regulation, these domestic conflict rules remain in force (note that Article 3.4 only applies when *all* the relevant elements are located in the Community, *supra* para. 23 and corresponding footnote).

30. One final comment. The Commission's Proposal included a paragraph in its Article 22 aimed at ensuring consistency between the Rome I Regulation and a possible optional instrument in the context of the European Contract Law project. This reference has been redrafted and moved to the recitals, where it is stated: *"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"* (Recital 14 Rome I).

III. General rule: Autonomy of the Parties

31. The Regulation maintains the same principle as the Convention: a contract shall be governed by the law chosen by the parties (Article 3.1 Rome I). The parties are absolutely free to choose any State Law. No objective connection between the law chosen and the contractual relationship is called for. The parties may also change the applicable law at any time (Article 3.2 Rome I) and can choose different laws for different parts of the contract (Article 3.1 *in fine* Rome I).

32. There are no differences either as to the regime applicable to the choice-of-law clause. The choice of the parties has to be express or implicit. A judge can only accept that an implicit choice exists if it can be *"clearly demonstrated by the terms of the contract or the circumstances of the case".* The Regulation departs slightly from the wording of the Convention. But it does not intend to introduce any substantive change, only to clarify some of the doubts raised by the different language versions of that text.[30] The aspects of the choice-of-law clauses related to the existence and validity of the consent of the parties shall be determined by the national law designated by Articles 10, 11 and 13 Rome I (Article 3.5 Rome I).

33. It is noteworthy that the final text is much closer to the Convention than the Commission's Proposal, in particular in two aspects.[31] *Firstly,* The Commission's Proposal laid down a

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[28] See, F. Garcimartín, *loc.cit.,* pp. 81-82.

[29] See Article 6.2 Directive 93/13/EEC on unfair terms in consumer contracts; Article 9 Directive 94/47/EC on time-sharing; Article 12.2 Directive 97/7/EC on the protection of consumers in respect of distance contracts; Article 7.2 Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees; Article 12.2. Directive 2002/65/EC concerning distance marketing of consumer financial services.

[30] See, *P. Lagarde*, *loc.cit.,* p. 335.

[31] See, a general defence of the Commission's approach, *O. Lando/P.A.*

presumption according to which if the parties had agreed to confer jurisdiction to one or more courts or tribunals of a Member State, they should also be presumed to have chosen the law of that Member State. The Commission considered that this presumption would reduce legal uncertainty: it offered a clear signal to the judges as how to interpret choice-of-court clauses for the purposes of determining the applicable law. However, the rationale of this presumption was highly dubious. Had the parties wanted to make a choice as to the applicable law, they would have probably introduced the corresponding clause.[32] If not, it was probably because either: (i) they only agreed on the choice-of-court clause, not on the choice-of-law clause, or (ii) they simply did not think of the applicable law problem. In both cases, the presumption would lead judges to infer a willingness (a tacit choice) when this willingness did not exist. For this reason, the addition of that presumption in the text was rejected during the negotiations, and it is only mentioned in a recital as "one of the factors" that a judge may take into account in considering whether a choice of law is clearly demonstrated (Recital 12 Rome I).[33]

34. Secondly, the Commission's Proposal allowed the parties to choose a non-State law ("*The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community*"). This part of the provision was also rejected during the negotiations. On the one hand, it was considered that this possibility would provoke great uncertainty (what institutions would be competent to recognize those principles and rules?),[34] and this uncertainty would be an incentive to litigate. On the other hand, it was argued that practitioners do not really demand that provision.[35] The possibility defended in the Commission's Proposal was more an academic than a practical concern. Naturally, the rejection of that proposal does not limit the autonomy of the parties at the material-law level. Accordingly, Recital 13 Rome I clarifies that the parties are always allowed to incorporate *by reference in their contract to a non-State body of law or an international convention.* Hence, parties can refer to a non-State law as *lex contractus*. However, this incorporation by reference takes place *within the limits* of the domestic mandatory provisions of the *State-law* applicable to the contract (as determined under the conflict-of-laws rules of the Regulation).[36]

IV. Default rule: Article 4

1. Introduction

35. In the absence of a choice of law, the Regulation lays down a default rule applicable to all types of contracts, apart from those that are subject to a special rule, i.e. transport, insurance, consumer and labour contracts.

36. The new rule departs significantly from the rule of the Convention. The Convention was based on a structure of *"general principle + rebuttable presumptions + escape clause"*. According to this structure, (a) if the parties did not choose the law applicable to their contract, this law would be determined by the *closest connection principle*, namely the contract would be governed by the law of the country with which it has the closest connection (Article 4.1 Convention). (b) In order to concretize this principle, the Convention added a general *presumption* in favour of the law of the country of the habitual residence of the party which had to effect the characteristic performance of the contract (Article 4.2 Convention), and two specific presumptions for contracts over immovable assets (Article 4.3 Convention) and transport contracts (Article 4.4 Convention). (c) Finally, the Convention laid down an *escape clause* where all the circumstances demonstrated that the contract had a closer connection with another country (Article 4.5 Convention).

37. The regime of the Convention had posed two main types of problems.[37] On the one hand, the structure of the default rule was not clear. In particular, the relationship between those three elements, i.e. the general principle, the presumptions and the escape clause, had provoked different interpretations. Judges and legal scholars differed as to whether the presumptions had to be understood either as "strong presumptions", i.e. only in extraordinary circumstances could their application be disregarded, or as "weak presumptions", i.e. the judges must in all cases have proved that the escape clause was not applicable. On the other hand, the identification of the characteristic performance of the contract in complex relationships, such as distribution or franchising, was not easy and actually gave rise to different understandings among the courts of the Member States.

2. New Article 4

38. The new provision intends to overcome those two difficulties by simplifying the structure of the rule and clarifying its application by means of a contractual typology. The point

Nielsen, "The Rome I Proposal", *J.P.I.L.,* 2007, p. 29 *et seq.,* pp. 30-35.

[32] See, with further references, *P. Lagarde*, *loc.cit.,* p. 335. Also, *H. Magnus/P. Mankowski*, Joint Response, *.cit.,* p.17; *H. Heiss*, *loc.cit.,* p. 758; *E. Lein*, *loc.cit.,* p. 399; *GEDIP*, Résponse, *cit.,* p. 10.

[33] Note that recital 12 only foresees forum selection clauses in favour of the courts of Member States, whereas the Regulation has a universal scope of application. The reason to limit the scope of the presumption to the forum selection clauses in favour of the court of a Member State is based on the principle *id quod plerumquem accidit*. If the parties have chosen the courts of a third country, they will very likely litigate in that country, where obviously the Regulation does not apply. Nevertheless, the recital must not be interpreted *a contrario.* That is, it does not imply that *from the standpoint of a European Court,* the fact that the parties have given exclusive jurisdiction to the court of *a non-Member State* has not relevance at all to infer the tacit willingness of the parties.

[34] See, *P. Lagarde*, *loc.cit.,* p. 336; *P. Mankowski*, "Der Vorschlag für die Rom I- Verordnung", IPRax, 2006, p. 101 *et seq.,* p. 102.

[35] See, with further references, *H. Magnus/P. Mankowski*, Joint Response, *cit.,* p. 14.

[36] See, *P. Lagarde*, *loc.cit.,* p. 336. This distinction (incorporation by reference *vs* conflict autonomy) should not be overvalued. Mandatory provisions in the area of contract law are exceptional, therefore, it can be said that "the practical difference between a conflictual choice or a *materiellrechtliche Verweisung* tends to be marginal", *H. Magnus/P. Mankowski*, Joint Response, *cit.,* p. 14.

[37] See, Green Paper, *cit.,* p. 30; *F. Ferrari*, "Objektive Anknüpfung", in *Ferrari/Leible* (ed.), *op.cit.,* p. 57 *et seq.; H. Heiss*, *loc.cit.,* p. 761; *E. Lein*, *loc.cit.,* p. 403; H. *Magnus/P. Mankowski*, Joint Response, *cit.,* pp. 19-21; P. *Mankowski*, *loc.cit.,* p. 103; *D. Martiny*, *loc.cit.,* pp. 71-74; *Max-Planck*, Comments on the Green Paper, *cit.,* pp. 39-40.

of departure of the new rule is not the general principle of the closest connection but a catalogue of eight types of contracts laying down the applicable law for each of them. Then, it adds a solution for those contracts that cannot be characterized under any of those eight types (or that may be characterized under two or more, which would lead to contradictory results). And, finally, it closes the provision with an escape clause parallel to the one contained in the Convention, but which is drafted in line with the text of the Rome II Regulation.[38]

3. Catalogue of types of contracts

39. The general presumption contained in the Convention has been broken down in the following catalogue.[39]

(a) A contract of sale of goods shall be governed by the law of the country where the seller has his habitual residence. Recital 17 Rome I clarifies that the term "contract of sale of goods" should be interpreted in the same way as when applying Article 5.1 of the Brussels I Regulation.[40]

(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. Recital 17 Rome I also clarifies that the term "contract for the provision of services" should be interpreted in the same way as in Article 5.1 of the Brussels I Regulation.

(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 located.

(d) However, and notwithstanding the former point, 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. This exception mirrors the applicable law in Article 22.1 II of the Brussels I Regulation. However, note that the consequences of each rule are very different. Article 22.1 II of the Brussels I Regulation confers *exclusive jurisdiction*, while Article 4.1 of the Rome I Regulation is a rule on applicable law, which does not prevent the parties from choosing a different law (Article 3 Rome I) or the judges from applying the escape clause (Article 4.3 Rome I).

(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. These two paragraphs, (e) and (f), have been included to solve some of the interpretative problems raised by the Convention.[41] To a certain extent, what these two provisions do is to clarify that in these types of contract, the characteristic obligation is the one carried out by the franchisee or the distributor. In its Proposal, the Commission also argued that these rules were aimed at protecting the franchisee or the distributor as the weaker parties of the contractual relationship.

(g) A contract of 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. The rationale of this provision is easy to understand: auctions are organized markets in which all participants must be governed by the same law regardless of where the seller is located. The final sentence, i.e. "if such a place can be determined", is intended to solve the problem of e-auctions or similar cases in which there is not a physical location and, therefore, "the place of the auction" cannot be identified. Cases where the offers are made at a distance, by telephone or mail, but *the location of the auction* can be identified are covered by the rule.

(h) A contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third parties buying and selling interests in financial instruments, as defined by Article 4(1)(17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

40. The last paragraph may be worthy of further explanations. In simple terms, what this paragraph establishes is that contracts concluded in an organized financial market, typically a stock exchange, shall be governed by the law of that market. This category was not contained in the Commission's Proposal. The *rationale* of this rule is similar to that explained above. Financial markets are usually organized markets, with a set of common rules applicable to all participants and transactions that take place "*within*" each corresponding market. Accordingly, it seems reasonable that all contracts concluded in those markets must be governed by the same law, *i.e.* the law under which the market is organized. In fact, the application of a single law, irrespective of the nature, nationality or habitual residence of the parties, is an essential feature of organized financial markets.

The definition of *financial markets* is taken from Directive 2004/39/EC (=*MiFID Directive*). This instrument differentiates between "regulated markets", "multilateral trading facilities (MTF)"and "systematic internalisers" (see, Article 4.1 (7), (14) and (15) MiFID). The definition within Article 4.1 (h) of the Rome I Regulation tries to include the first two categories. Unlike the MiFID, which only covers European markets, the Regulation has a universal scope of application. Therefore,

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[38] It is worthy of note that the Commission's proposal opted for a different approach converting the presumptions into fixed rules and abolishing the exception clause. The Commission argued that the possibility of a choice of law overcame the rigidity of this rule. However, this approach was rejected from the early stages of the negotiations in the Council, where it was argued that the application of the presumptions was not going to lead to a reasonable solution in all imaginable cases. Furthermore, the possibility of a choice of law to overcome this drawback was not realistic in cases of non-sophisticated parties. See, for a critical reaction to the Commission's Proposal, *H. Heiss*, *loc.cit.,* p. 761-762, *loc.cit.,* pp. 339-340; *P. Mankowski*, *loc.cit.,* p. 105; *Max-Planck*, Comments on the Commission's Proposal, *cit.,* Comment to Article 4.

[39] As for the two specific presumptions of the Convention, transport contracts are moved to an autonomous provision (Article 5), and contracts over immovable property are the object of two particular rules (letters c and d of the list).

[40] See *M. Virgos/F. Garcimartín*, *loc.cit.,* pp. 153-154. Note that this concept has its origin in the 1980 Vienna Convention on the sale of goods, and therefore this instrument also provides a useful hermeneutic reference.

[41] See, for example, *H. Kenfack*, "Rome I et contrats de distribution: protéger les interest des distributeurs sans léser les fournisseurs", *La Semaine Juridique,* 25 January 2006, p. 127.

Article 4.1 (h) of the Regulation also applies to financial markets of third countries that meet that definition; *i.e.* that are *functionally equivalent* to the multilateral trading facilities and regulated markets foreseen in the MiFID. This is the reason why a cross-reference to Article 4.1 of the MiFID is avoided, and instead Article 4.1 Rome I includes its own definition (see Recital 18 Rome I employing the term "such as" to express this idea).[42]

The concept of *contract* is broad enough to encompass not only buying and selling of securities, but also any other transactions (pledges of securities or lending, for example) entered into in those "platforms", regardless of whether or not there is a central counterparty (see Recital 18 Rome I). On the contrary, the transaction for provision of services between financial entities that may be members or participants in those markets and their clients are not included in this category (*infra)*.

The law applicable is identified by a reference to the law "that governs the market". In principle, this law is not determined by the Rome I Regulation, but by the terms and conditions of access to a market or by regulatory rules (typically, each country recognizes a set of financial markets as "national markets"). Article 4.1 (h) of Rome I clarifies that the same legal order shall apply to the private law aspects of the transactions concluded in that market.

41. Contracts concluded in Securities Settlement Systems (SSS) are not included in the wording of Article 4.1 (h) of the Regulation. They are subject to the general rule (i.e., Articles. 3 and 4.2 Rome I). In this case, a specific presumption was not considered necessary mainly due to the fact that the correct functioning of those systems, even from a conflict-of-laws standpoint, is ensured by Directive 1998/26/EC. According to Article 2 (a) of this Directive, a "system", in order to be considered as such for the purpose of that instrument, has to be governed by the law of a Member State chosen by the participants. This choice of law is required if it is to qualify as an SSS for the purpose of that instrument and it ensures the application of a single law to all participants and their transactions in the system. The prevalence of this Directive is confirmed by Recital 31 Rome I (where it is stated "*Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2 (a) of Directive 1998/26/CE")*. In relation to SSSs of third countries, a uniform regime will very likely be ensured under Article 3 of the Regulation.

42. Unlike the Commission's proposal, the final text does not contain any specific rule dealing with intellectual or industrial property rights. The original rule was deleted for lack of agreement on a single and all-encompassing solution.[43] The variety of types of contracts that can be found in this field made it very difficult to find a rule that would work well for all cases. It goes without saying that if there is a transfer or assignment of those rights in the context of a franchise or distribution contract, the special rule foreseen for these contracts will apply.

43. The Regulation retains the characteristic performance criterion for contracts for which no special rule is laid down, such as contracts related to industrial or intellectual property rights, or complex contracts that cannot be categorised under any type or that can be covered by more than one (which leads to contradictory results). These contracts shall be governed by the law of the country where the party which is required to effect the characteristic obligation of the contract has his habitual residence.

4. The concept of habitual residence

44. The concept of *habitual residence* is defined in Article 19 Rome I. This definition applies to the whole text; *i.e.* not only to Article 4 Rome I, but to any other provision of the Regulation using this concept. The definition is taken from the Convention, but is aligned with the wording used by the Rome II Regulation (Article 23 Rome II).

45. In order to define that concept, the Regulation differentiates between legal persons and natural persons.

(a) The habitual residence of legal persons (companies and other bodies, corporate or incorporate) shall be the place of central administration. The same solution is contained in the Rome II Regulation (Article 23.1). The concept of central administration has to be differentiated from the concepts of "principal place of business" and "registered office" (see Article 60 of the Brussels I Regulation). These two other concepts are not relevant for the purpose of the Rome I Regulation, which only employs the term "central administration". Unfortunately, neither the text nor the recitals contain a definition of this concept. However, Recital 13 of the Insolvency Regulation, though referring to a formally different concept (the Centre of Main Interests of the Debtor), may be of help in resolving difficult cases.[44]

(b) The Regulation does not lay down a general rule for the determination of the habitual residence of natural persons, only a specific rule for those contracts concluded by a natural person acting in the course of his or her business activities. In this case, the habitual residence shall be considered to be his principal place of business.[45] Otherwise, i.e. when the contract is concluded in the course of his private sphere, the habitual residence shall be located where the person in question usually lives. This difference makes sense when a natural person lives in one country (the Netherlands, for example) and carries out his business activities in a different country (in Belgium, for example).

46. Nevertheless, if the contract is (a) concluded in the course of operations of a secondary establishment (branch,

[42] Note that the cross-reference to the MiFID in the definition of "financial instruments" does not contravene this idea. The MiFID defines "financial instrument" in a descriptive form (shares, bonds, options, futures, swaps, and so on) and not by reference to the Community or to Community law.

[43] See, in particular, *Max-Planck Institute*, Comments to the Commission's Proposal, Comment to Article 4.

[44] See, *M. Virgós/F. Garcimartín*, The European Insolvency Regulation. Law and Practice, pp. 39-48.

[45] The only reason that may be given to depart from the solution adopted for legal persons is that in the case of natural persons it does not seem appropriate to use the expression "central administration".

agency or any other establishment); (b) or, if under the contract, the performance is the responsibility of that establishment, this establishment shall be considered to be the place of habitual residence (Article 19.2 Rome I). This rule, which is taken from the Convention (Article 4.2 II), may pose some difficulties when each of those activities (the conclusion of the contract and the performance) are linked to two different establishments, and these are located in different countries. Arguably, the solution depends on which of them has more relevance according to the particular circumstances of the case.

47. The relevant date for determining the location of the habitual residence is the time of the conclusion of the contract (Article 19.3 Rome I). Not surprisingly, this rule enshrines the principle that a movement of the habitual residence after the conclusion of the contract does not entail a change in the applicable law.

5. Double function of the closest connection principle

48. The clause of the "closest connection" fulfils a double function in the Regulation. On the one hand, it works as an escape clause: where it is clear from the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in any of the specific rules or the general rule, the law of that other country shall apply (Article 4.3 Rome I). The wording of this clause is taken from the Rome II Regulation. The terms "it is clear" and "manifestly most closely connected" are intended to convey the idea that the application of this clause should be restricted to exceptional cases. In practise, the provision should work as a rebuttable presumption in a strong sense: the law applicable to the contract shall be the one designated by paragraphs 1 and 2 of Article 4, unless the interested party clearly proves to the judge that the contract is manifestly most closely connected with a different country.

49. On the other hand, the Regulation also retains the principle of the closest connection as a "last resort clause". When the contract can neither be subsumed under any of the categories of the catalogue enumerated in paragraph 1, nor be subsumed under the general rule of the characteristic performance, then it shall be governed by the law of the country with which it is most closely connected (Article 4.2 Rome I). This may apply to contracts involving mutual performance by the parties in terms that can be regarded as characteristic on both sides, such as barter contracts or swaps.

50. In both cases, the application of the closest connection clause calls for: (a) taking into account all the circumstances of the case, (b) identifying the connections of the contract with different countries, (c) and, finally, balancing these connections under the general principles of contractual law. Recital 21 *in fine* clarifies that, when applying this clause, judges shall, among other circumstances, take into account whether the contract in question has a very close relationship with another contract. In general terms, a key element to asses the relevance of the different connections is the reasonable expectation of the parties.

V. Transport contract

51. In the context of the general rule applicable by default, the Convention contained a special rule for contracts for the carriage of goods (Article 4.5 of the Convention). This rule departed from the general presumption, and called for a combination of connecting factors. The closest connection was presumed to be with the country where the carrier had his principal place of business if it coincided also with the country in which (i) the place of loading, (ii) the place of discharge or (iii) the principal place of business of the consignor was situated. Contracts for carriage of passengers were subject to the main rule (Article 4.2 Convention). These rules applied to any type of contracts, since contracts of carriage were expressly excluded from the special rule dealing with consumer contracts (see Article 5.4 (a) Convention, except for contracts of "package tours").

52. The Regulation also lays down a special rule for contracts for carriage but moves it to an autonomous provision (Article 5 Rome I). This provision maintains the difference between transport for (a) goods and for (b) passengers.

(a) Contracts for the carriage of goods are basically subject to the same rule as in the Convention, with some minor adjustments. According to the new text (Article 5.1 Rome I), if the parties have not chosen the applicable law, the contract shall be governed by the law of the country of the habitual residence of the carrier, provided that (i) the place of receipt, (ii) the place of delivery or (iii) the habitual residence of the consignor is also situated in that country. If these requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply. This new connecting factor prevents a direct application of the closest connection in situations where all the relevant connecting factors are disperse; it was considered an appropriate solution since it will likely coincide with the courts where the contract is litigated and will presumably meet the expectancies of the parties.

The new provision on contracts for carriage of goods has to be read in conjunction with Article 19 and Recital 22 Rome I. The former defines the concept of "habitual residence" and also establishes that the relevant time to concretize the connecting factor is the date of conclusion of the contract (*supra,* paras. 44-47). The latter clarifies that the Regulation does not intend to modify the interpretation of the concept of "contracts of carriage of goods" with respect to the Convention. Accordingly, two ideas are expressed in that recital: *first,* that single-voyage charter parties and other contracts whose main purpose is the carriage of goods should be treated as contracts for the carriage of goods (this idea was stated in Article 5.4 *in fine* of the Convention); *secondly*, that the term "consignor" should refer in general to any person who consigns goods to the carrier and the term "the carrier" should mean the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself (this idea comes from the Giuliano-Lagarde Report). In addition, the terms "place of loading" and "place of discharge" have been replaced by terms that were considered more appropriate from a legal standpoint: "place of receipt" and "place of delivery".

(b) Contracts for the carriage of passengers are also governed by a special rule, which lays down a regime which is very different from that of the Convention (Article 5.2 Rome II). The purpose of the new rule is to strike a balance between, on the one hand, the interest of the carrier in having legal certainty *ex ante* by allowing him to select the same law as applicable to all contracts and, on the other hand, the interest of the passenger in not being subject to unforeseeable regimes with no relevant connection to the contract. In order to meet these objectives, the new rule lays down a "three step approach". *Firstly,* the contract is governed by the law chosen by the parties. However, unlike the Convention, the Regulation limits the menu of eligible laws. The parties may only choose between: (i) the law of the country where the passenger has his habitual residence; (ii) the law of the country where the carrier has his habitual residence; (iii) the law of the country where the carrier has his place of central administration;[46] (iv) the law of the country where the place of departure is situated; (v) the law of the country where the place of destination is situated. This list is exhaustive. The new rule does not allow the parties to choose a law other than those just enumerated. *Secondly,* if the parties have not chosen the applicable law –or the law chosen does not meet the abovementioned conditions- the transport contract will be governed by 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 located in that country. When the transport implies different stops for the same passenger, these two concepts are to be understood as the *initial* departure and *final* destination; when there are different passengers with different places of departure and destination the reference shall be to the carriage of the passenger to whom each contract is related. *Thirdly,* if these conditions are not met, i.e., the habitual residence of the passenger does not coincide either with the place of departure or with the place of destination, the contract shall be governed by the law of the country where the carrier has his habitual residence, according to Article 19 Rome I.

53. In both cases, the Regulation maintains the application of the escape clause: in the absence of a choice of law, 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 this other country shall apply (Article 5.3 Rome I).

VI. Consumer contracts

54. Regarding the provision on consumer contracts, the Regulation retains: (a) its universal scope of application, *i.e.* the rule offers a conflict-of-laws protection to both EU and non-EU consumers, irrespective of their place of habitual residence; (b) and the "principle of most favourable law", *i.e.* a choice of law in a consumer contract is valid but it cannot deprive the consumer of the protection afforded to him by the law applicable by default. In this sense, the final result departs significantly from the Commission's Proposal which limited the application of the provision to EU resident consumers and laid down the application of the law of the place of the consumer's habitual residence (without the possibility of choosing a different law, not even in favour of the consumer).[47] In turn, as regards the Rome Convention, the Regulation extends the material scope of application of the rule and clarifies the definition of "passive consumer". These new elements are taken from Article 15 of the Brussels I Regulation.

1. Scope of application

55. The special rule for consumer contracts is contained in Article 6 Rome I. The scope of application of this rule is defined by a material element, as it only applies to consumer contracts, and by a territorial element, as it only protects the so-called "passive or sedentary consumers". Consumer contracts that do not meet these conditions are governed by the general rules, namely Articles 3 and 4 (see Article 6.3 Rome I).

1.1. Material scope of application

56. Article 5 of the Convention applied to contracts concluded between a consumer and a professional the object of which was *the supply of goods or services* (and associated financing contracts). The new provision, Article 6 Rome I, applies to any contract regardless of its object. The only relevant element is subjective: the parties must be a professional and a *natural* person acting outside his trade or profession (=a consumer). The provision, therefore, includes B2C and, arguably, C2B contracts;[48] but not C2C. The expression "for the purpose *that can be regarded as being outside* his trade or profession" comes from the Convention and is intended to protect the reasonable expectations of the professional. If a natural person, though acting for a private purpose, holds himself out as a professional, the good faith of the other party is protected and the case will not be governed by Article 6.[49]

57. As in the case of the Convention, the Regulation contains a list of exclusions. The new list is larger than that of the Convention. Article 6 Rome I does not apply to the following cases:

(a) *Contracts for the supply of services where the services are*

[46] The term "habitual residence" is also determined by Article 19 Rome I. The difference between letters (b) and (c) makes sense when the contract is concluded by a secondary establishment of the carrier. In this case, according to Article 19.1 II Rome I, the place of habitual residence will be the country where this secondary establishment is located. If the carrier has different establishments in different countries, letter (c) of Article 5.2 allows the carrier to choose one law for *all contracts* regardless of the location of the establishment through which each group of contracts was concluded or performed. In application of Article 19.3 Rome I by analogy, the relevant time to determine the location of the central administration is the date of conclusion of the contract.

[47] See Commissions Proposal, Article 5. See, in favour of abandoning the most-favourable-law principle and applying only the law of the place of habitual residence of the consumer, *E. Lein*, *loc.cit.,* p. 405; *Max Planck Institute*, Comments on the Commission's Proposal, p. 39. The other relevant aspect of the Commisssion's Poroposal, i.e., the restriction of Article 5 to consumers with habitual residency in the Community was strongly criticized, see *H. Heiss*, *loc.cit.,* p. 764; *P. Lagarde*, *loc.cit.,* p. 342; *D. Solomon*, "Verbrauchverträge", in *Ferrari/Leible* (ed.), *op.cit.,* p. 89 *et seq.,* pp. 94-96; *Max Planck Institute*, *Ibid.,* p. 41.

[48] As to C2B contracts, the wording of the provision seems to include them. The reference in Article 6.4 (d) to public takeover bids (where the consumer/investors is the seller of the shares) confirms this understanding.

[49] See *Giuliano-Lagarde* Report, Comment to Article 5.

to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence (typical examples: accommodation in a hotel or a language course). The same exclusion was contained in the Convention (Article 5.4 (b)). The rationale behind this exclusion is that the contract is supposed to be most closely connected with the country where the service is supplied and the consumer cannot reasonably expect the law of his country to be applied, even if the professional directed his activities to the latter country.[50] The argument is persuasive. However, the conclusion that one should draw from this argument is not the general application of Article 3 Rome I (*i.e.*, choice of law without any constrains) and Article 4 Rome I, but the application of the law of the country where the service is provided. It is somehow a paradox that in the case of a consumer contract for the provision of a language course in Switzerland, the consumer is considered as if he were a professional and, therefore, the parties have absolute freedom to choose the applicable law (*i.e.*, the consumer can be deprived of the protection afforded to him by Swiss Law).

(b) *Contracts of carriage other than contracts relating to package travel within the meaning of the Directive 90/314/CE.* In the Regulation, contracts for carriage are governed by a special rule (Article 5 Rome I*).*

(c) *Contracts relating to a right in rem or in immovable property or a tenancy of immovable property other than contracts relating to a right of use on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.* This includes, for example, mortgage contracts and other contracts involving the taking of security interest in relation to immovable property. The comment made in relation to letter (a) can also be applied here. Naturally, the reference to the timesharing Directive is not limited by its territorial scope of application.

(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 financial services.* This exclusion has to be read together with Recitals 28 29, 30 and 31. The exclusions foreseen in letters (d) and (e) of Article 6 are mainly due to the enlargement of its scope of application. As has been said, Article 5 of the Rome Convention only applied to contracts of sale of goods or provision of services. The term "goods" did not include transferable securities.[51] Accordingly, Article 5 of the Convention did not apply to contracts for the sale of shares and other financial instruments. In principle, under the new wording of Article 6, those contracts would be included. This called for the addition of new exclusions that were considered necessary to ensure the correct functioning of financial markets.

In order to understand the reach of this exclusion, it could be useful to break it down into the three different elements it contains: (i) financial instruments; (ii) public issuances or offers and public takeover bids; (iii) and the subscription and redemption of units in collective investment.

(i) *Financial instruments.* The concept of financial instruments is defined by a cross-reference to the MiFID Directive (Directive 2004/39/CE). As Recital 30 clarifies, financial instruments are those instruments referred to in Article 4 of the MiFID Directive. The list is contained in Section C of this Directive and it includes, *i.a.* transferable securities, units in collective investment undertakings, options, futures, swaps, and so on. From a legal standpoint, a financial instrument can be characterized as a bundle of contractual rights and obligations. Furthermore, they are a standardized product and, therefore, must be governed by one single law; financial markets could not work if the law applicable to the financial instruments varied depending on the habitual residence of the holder (when it is not a professional). The *ratio* of the exclusion is precisely to prevent this risk. As Recital 28 points out, it is important to ensure that the rights and obligations which constitute a financial instrument are not covered by the general rule applicable to consumer contracts, as that could lead to the applicability of different laws to each of the instruments issued, therefore changing their nature and preventing their fungible trading and offering. It may be argued that this exclusion would be partially unnecessary in many cases taking into account Article 1.2 letters (d) (negotiable instruments), (f) (company law) or (h) (trusts). But legal risk is very costly in the financial world, and it was considered preferable not to leave any loophole whatsoever.

(ii) *Rights and obligations constituting the terms and conditions governing the issuance or offer of securities to the public and public take-over bids for transferable securities.* This exclusion covers public offerings on primary and secondary markets (*i.e.* IPOs and public offerings of securities and public takeover bids). The rational behind this rule is also explained in Recital 28 Rome I. If Article 6 were applicable, the issuer or the offeror may come across the application of multiple mandatory rules depending on the habitual residence of the investor. This may not only increase the cost of cross-border retail offers, but may even result in unsolvable contradictions if the applicable laws have different regimes as regards, for example, the allocation of the securities in the case of over-subscription. In turn, the scope of this exclusion must be defined with the help of Recital 29. It encompasses the contractual terms related to the purchase of the securities, such as the methods and time limits for the delivery of the securities and the payment, the allocation of securities, the rights in the event of over-subscription, withdrawal rights and, in general, all the relevant contractual aspects of an offer binding the issuer or the offeror to the investor. The term "transferable securities" must be defined by reference to Article 4 of the MiFID Directive (see Recital 30 Rome I). It typically includes shares, depositary receipts, and bonds.

It may be worth clarifying that this exclusion covers not only new issues but also public offers of existing securities (in the context of a private to public operation) and the contrac-

[50] *Ibid.* See, criticising this exclusion, *Max Plank Institute*, Comments on the Commission's Proposal, *cit.*, pp. 44-45.

[51] See, *Giuliano-Lagarde* Report, Commentary to Article 5, though in other language versions of the text it was not so clear, see *Max Plank Institute*, Comments on the Green Paper, *cit.*, p. 49.

tual relations between the underwriters and the investors when the public offer is carried out by means of a "Firm-commitment underwriting", i.e. the underwriters purchase the issue and sell on the securities to the investors. In all these cases, the terms and conditions (in the abovementioned sense) are excluded from the interference of Article 6 Rome I. This is explained in Recital 29. An explicit reference to the Prospectus Directive and to the Takeover Directive was avoided due to their restricted scope of application (for example, they only apply to the EU market); however, these two instruments constitute a useful reference for interpreting this provision of the Regulation.

(iii) *Units in collective investments.* The concept of financial instruments encompasses units in collective investments (see Section C of Annexx II of the MiFID Directive). But, as in the former case, there are also contractual rights and obligations associated with the investment in collective investment undertakings that are not necessarily covered by that term since they are not intrinsic attributes of the instrument as such. In order to eliminate this loophole, letter (d) of Article 6.4 includes a reference to the "subscription and redemption" of those units. According to this reference, all subscribers are governed by the same rules as to issues such as the right to redeem at any time or the right to receive certain information; in general, all issues pertaining to the functioning, the structuring, the management, operation and administration of the fund should be subject to a single law, regardless of the habitual residence of the subscribers.

As the provision itself clarifies, Article 6 Rome I does apply to financial services (i.e., commercialization, transmission of orders, or investment advice). That is, the marketing or the direct selling of the financial instruments is not covered by the exclusion. Recital 26 Rome I develops this idea, and states that this exclusion does not cover investment services and activities and ancillary services provided by a professional to an investor, as referred to in Sections A and B of Annex I the MiFID Directive or contract for the sale of units in collective investment undertakings. In the latter case, it means that if the units are sold by a third party, the contract will be subject to Article 6 Rome I, while if the units are sold by the management company, the contract will be excluded.

(e) The same rationale explains the last exclusion within Article 6 Rome I: *contracts concluded within the type of system falling within the scope of Article 4 (1) (h)* (*supra* para. 40). Those markets cannot work if the applicable law could be limited by the mandatory rules of the habitual residence of the investor, if the seller is a professional, as may well be the case (see Recital 28 *in fine* Rome I)

58. Although the issue was raised, the final text does not contain any rule for those individuals who opt for professional status under the MiFID. Annex II of this instrument allows clients of investment firms, who would otherwise be classified as retail clients, to be considered professionals if they meet certain conditions. These conditions somehow guarantee that the client is financially sophisticated and experienced and can be deprived of certain mandatory protection. However, considering the practical difficulties in including an exception in that sense (for instance, what would happen if the investor were qualified as a professional only in relation to certain instruments, but not to others?), it was deemed preferable not to make an automatic exclusion of all "MiFID professionals" for the purposes of Article 6 Rome I.

2. Territorial scope of application

59. Article 6 Rome I only protects the so called "passive consumer", i.e. those cases where it is not the consumer who goes to the market of the professional but the professional who goes or directs his activities to the market of the consumer. The key element is the "*targeted activity criterion*".[52] Following the formula of Article 15 of the Brussels I Regulation, the provision foresees two hypotheses.

(a) Where the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence and the contract falls within the scope of such activities (Article 6.1 (a)). The last condition is very relevant for understanding the exact scope of this provision (see Recital 25). The typical case is that the professional has a branch or establishment in the consumer's habitual country of residence of and the contract is concluded in or through this *particular* establishment. It does not apply, however, where the contract is concluded in a different country, for instance, in the course of a journey by the consumer, even if the professional also has a branch in the country of the consumer. In this latter case, it cannot be said that the contract was concluded in the framework of the *particular* activities that the professional is carrying out in the country of the consumer.[53]

(b) Where the professional, by any means, directs such activities to the consumer's habitual country of residence, or to several countries including that country, and the contract falls within the scope of such activities. The typical fact pattern here is that the professional does not have a branch in the country of the consumer (or if it does, this particular branch is not involved in the conclusion of the contract), but directs its activities to that country and the contract is concluded at a distance or in person following a specific invitation addressed to the consumer or consumers of that country (i.e., under the framework of these activities). The concept of "directs its activities" is defined in Recital 24 Rome I by a reference to the declaration that accompanied the Brussels I Regulation. Its states that "*the mere fact that an internet site is accessible is not sufficient…, although a fact 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*".

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[52] On this criterion, recently, but with critical views, *L. E. Gillies*, "Choice-of-Law rules for electronic consumer contracts: replacement of the Rome Convention by the Rome I Regulation", *J.P.I.L.*, 2007, p. 89 *et seq.*

[53] This was especially relevant for the banking industry. It ensures, for example, that when a Spanish consumer opens a bank account in the Portuguese branch of a Portuguese bank, the law applicable to the contract is Portuguese law, even if that bank also has branches in Spain.

3. Applicable law

60. If these circumstances are met, the law applicable in the absence of choice is the law of the country where the consumer has his habitual residence. The concept of habitual residence is not defined by Article 19 Rome I (*supra* para. 45.b). Accordingly, it will be an autonomous concept defined by material or factual elements.

61. If the parties have included a choice-of-law clause, the law applicable shall be that chosen by the parties. However, this may not have the result of depriving the consumer of the protection afforded to him by such provisions of the law applicable by default that cannot be derogated from by contract (Article 6.2 Rome I). That is, the law applicable by default sets the minimum standard of protection. Hence, the principle of most favourable law continues to govern in this sector. The difficulties associated with the application of this principle in practise were not persuasive enough so as to convince the negotiators to depart from the system of the Convention. In addition, the Regulation remains silent as regards issues such as (a) whether the determination of the most favourable law has to be carried out *ex officio* or by the consumer; (b) whether the comparison is to be made rule by rule, institution by institution or law by law as a whole.

4. Loophole of the text. Relationship with the Directives

62. Article 6 of the Regulation results in a paradoxical difference of treatment between consumers. Passive consumers are protected by the rule, while active or mobile consumers are not, and accordingly *they are treated as if they were professionals*, i.e., they are subject to Articles 3 and 4 Rome I, as is any other professional. The historical reason in the Convention for excluding active consumers from the special provision on consumer contracts was the idea - in colloquial terms - that the consumers do not travel abroad with their law in their backpack. If a German consumer goes to New York and buys a product there, he does not expect to be protected by German law. From the point of view of the professional, if he is not directing his activities to the German markets, he should not be subject to German law on consumer protection. This is a sensible argument. But the right conclusion we should draw is not that active consumers have to be treated as professionals, but that active consumers have to be treated as foreign local consumers. In the example, the German consumer does not expect to be protected by German consumer law in the New York market, but he does expect to be protected by New York consumer law. However, according to the regime of the Convention, which is maintained under the Regulation, active consumers are treated as professionals and, in this example, a choice of law in favour of any law of the world will be perfectly valid and effective.

63. In relation to active consumers inside the EU, i.e., those who go - directly or indirectly - from one Member State to another Member State and buy a product in the latter, this result is *partially* mitigated by the Directives (*supra* para. 23).

VII. Insurance contracts

64. The conflict-of-laws regime applicable to insurance contracts under the Rome Convention was rather complex.[54] The Convention differentiated three hypotheses: (a) Contracts of insurance covering risks situated in the territories of third countries and reinsurance contracts, which were subject to the conflict-of-laws rules of the Convention (*i.e.* Arts. 3, 4 and also 5, if applicable);[55] (b) Contracts of insurance covering risks located in a Member State of the EU (or of the EEA) and concluded with a European insurer, which were subject to the conflict-of-laws rules contained in the corresponding Directives (i.e., Articles 7 and 8 Directive 88/357/EEC and Article 32 Directive 2002/83/EC); and (c) Contracts of insurance covering risks located in a Member State of the EU and concluded with a non-European insurer, which were subject to the national conflict-of-laws rules of the Member States.

65. The Commission's Proposal partially reduced this complexity, but preserved the conflict rules contained in the Directives.[56] At least from a better-regulation standpoint, this situation was not satisfactory. It maintained the dispersion of rules between Community instruments and, what was even worse, the differences among Member States since the national rules implementing the Directives were not fully consistent. Therefore, the idea of including all the conflict rules dealing with insurance contracts in only one instrument (Rome I) was very sensible. All interested parties, however, expressed one concern: for the time being, and without further consultations with the insurance sector, this codification should not entail any substantive change in the conflict-of-laws regime. This policy decision underpins Article 7 of the Regulation.[57] In particular, it calls for maintaining the two-track approach, *i.e.* one set of rules for risk located in the Community and another set for those located in third countries, though both of them recollected in one instrument (Rome I). The result is not completely satisfactory,[58] but it was not possible to go further without an impact assessment study. At least, it has the advantage of reducing the dispersion of rules among different instruments and among different legal orders (see also Article 27.1 (i) Review Clause).

66. According to this approach:

(a) For *reinsurance contracts*, and for insurance contracts covering mass *risks located in third countries*, the general regime of the Regulation applies, *i.e.,* Articles 3, 4, but also Arti-

[54] See, recently and with further references, *J. Basedow/J.M. Scherpe*, "Das international Versicherungsvertragsrecht und Rom I", *FS Heldrich,* 2005, p. 511 *et seq.*; *A. Staudinger*, "Internationales Versicherungsvertragsrecht – (k)ein Thema für Rome II?", *Ferrari/Leible* (ed.), *op.cit.,* p. 226 y ss., pp. 227-228. also, *H. Magnus/P. Mankowski*, Joint response, *cit.,* pp. 11-12.

[55] See *Giuliano-Lagarde* Report, Comment to article 1: "Insurance contracts, where they cover risks situate outside the Community, may also, in appropriate cases, fall under Article 5 of the Convention".

[56] See article 22 and Annex of the Proposal.

[57] Even the "cut-out" contained in Article 3.3 of the Directive 2002/83/EC regarding insurance contract based on collective agreements has been incorporated in article 1.1 (j) of the Regulation (slightly modified).

[58] See, for example, *Max Plank Institute*, Comments to the Commission's Proposal, *cit.*, pp. 48-49.

cle 6 (see Article 7.1 Rome I *a contrario).*[59]

(b) For insurance contracts covering *large risks*, regardless of where the risk is located, the law applicable shall be the law chosen by the parties in accordance with Article 3 Rome I. If the parties have not chosen any law, the contract shall be governed by the law of the country where the insurer has his habitual residence (Article 7.2 Rome I). The provision also includes an escape clause: 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 (Article 7.2 *in fine* Rome I).[60] For the definition of large risks, Rome I refers to Article 5 (d) of the Directive 73/239/EEC.

The reason to include insurance contracts of large risks in Article 7, instead of leaving them outside its scope of application and subject to the general rules (Articles 3 and 4), is to ensure the application of paragraph 4 of Article 7, dealing with compulsory insurance, also in this case.

(c) For the remaining cases, *i.e.* insurance contracts covering "mass risks" located in a Member State (including Denmark), the Regulation establishes that the parties have a limited choice-of-law menu (Article 7.3 Rome I). The parties may choose among: (i) the law of the Member State where the risk is located at the time of the conclusion of the contract; (ii) the law of the country where the policy holder has his habitual residence; (iii) in the case of life insurance, the law of the Member State of which the policy holder is a national; (iv) for contracts covering risk limited to events occurring in a Member State other than the Member State where the risk is located, the law of that Member State; and finally, (v) where the policy holder 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 located in different Member States, the law of any of the Member States concerned or the law of the country where the policy holder has his habitual residence. The law chosen may give parties a further autonomy and this is recognized by the Regulation: where in the cases set out in letters (i), (ii) and (v) the Member State (note that the reference is to a *Member State*, not to a *country*) referred to grants greater freedom of choice, the parties may take advantage of that freedom. This rule may seem rather absurd, in particular in the context of a Regulation,[61] but as with the others, it was taken from Directive 88/357/EC (see Article 7.1 (d) of this Directive) and the underlying policy decision - here also - was to maintain the *status quo*.

Where the parties have not chosen the law applicable (or the clause is not effective), this law shall be the law of the Member State where the risk is located at the time of conclusion of the contract (Article 7.3 III Rome I).

67. The *location* of the risk is determined by a cross-reference to the corresponding Directives. This solution ensures consistency between the different instruments and does not prejudice the other legal functions that this criterion (the location of the risk) may fulfil (see Article 7.6 Rome I).

68. The Regulation also incorporates a rule for *compulsory* insurance taken from the Directives. According to this rule, if 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. When this Member State does not coincide with the State in which the risk is located, the law of the former prevails. (b) Departing from the abovementioned rules, a Member State may lay down that the insurance contract shall be governed by the Member State that imposes the obligation to take out insurance.

69. Where the contract covers risks located in more than one Member State, the Regulation also retains the regime of the Directive according to which the contract shall be treated as consisting of several contracts each relating to only one Member State (Article 7.5). Recital 33 applies the same approach to situations where there are different risks, some located inside the Community and others outside. In this case, Article 7 only applies to the former.

70. Finally, it is worth recalling that in those countries to which the Regulation does not apply (Denmark and the EEA countries), the conflict-of-laws rules of the Directives remain in force.

VIII. Labour contracts

71. For individual employment contracts, the Regulation retains the same normative model of the Convention, *i.e.,* the principle of most favourable law.[62] The parties can choose the applicable law according to Article 3. However, the application of the chosen law cannot have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law applicable by default, i.e. in the absence of choice. That is, theoretically, the autonomy of the parties only works in favour of the weaker party. The comparison, naturally, is carried out between the content of the law chosen by the parties and the mandatory rules, *i.e.,* the rules that cannot be derogated from by contract, of the law applicable had the parties not made any choice. In principle, the question of whether the comparison is to be made between individual rules, institutions or the two legal systems as a whole must be solved according to the same criteria developed in relation to the Convention. The question of whether the comparison has to be practiced by the judge *ex officio* or by (claim of) the in-

[59] Article 7 applies if the risk is located in Denmark (see, Article 1.4). As regards risks located in a country of the EEA (not a Member State), the corresponding instrument shall apply which –in principle- will prevail over the rules of Article 7.

[60] This rule is taken from the Directive 88/357/EC, but note that it modifies slightly the *status quo* as this instrument foresees the application of the country where the risk is located as a default rule.

[61] See, again, *Max-Plank Institute*, Comments on the Commission's Proposal, cit., p. 50.

[62] For an extensive analysis of the rule of the Commission's Proposal, see *A. Junker*, "Internationales Arbeitsrecht in der geplanten Rom-I Verordnung", *RIW*, 2006, p. 401 *et seq.*

terested party is determined by the *lex fori.*[63]

72. The law applicable by default is the *lex loci laboris,* namely, the law of the country "in which" or, "from which" the employee habitually carries out his work in performance of the contract. The expression "from which" was not contained in the Convention. It has been introduced - following the case-law of the ECJ on Article 19 of the Brussels I Regulation - to cope with those employees who do not carry out their job in the territory of only one country, but where there is a country which constitutes a sort of "base of operations". This is normally the case with employees in aircrafts. In such cases, the law of the country which serves as base for the worker is to be considered as *lex loci laboris.*[64] Furthermore, the new text clarifies that the country where the employee habitually works is not deemed to have changed just because he is temporarily posted to another country or countries. This clarification is also taken from the case-law of the ECJ in the context of the Brussels I Regulation. Recital 36 Rome I points out that the concept of temporarily posted has to be interpreted in a *subjective ex ante* way ("if the employee *is expected* to resume working in the country of origin after carrying out his task abroad") and echoes the idea that the mere conclusion of a new contract with the original employer or with another employer belonging to the same group of companies should not mean that the employee is not temporarily posted to another country.[65] The formula is flexible enough to allow judges to adapt it to different work environments. The expression "is expected to resume" should not be interpreted strictly: it does prevent cases in which an employee initially begins working abroad but is expected to return to the country where he will carry out his work on a habitual basis from being considered a temporary posting.

The possible problems of "social dumping" are solved in combination with the Directive on the posting of workers (Directive 96/71/CE). This instrument requires a compliance with the rules of law of the Member State where the worker has been temporarily posted. Article 8 of the Rome I Regulation proclaims the principle that a temporary posting of the worker does not imply a change of the law applicable to the contract. The Directive overlaps this principle, but states that only certain overriding mandatory rules of the law of the country of destination must be complied with. In principle, the consistency of this Directive with the Regulation should not be problematic, insofar as this Directive only covers "overriding mandatory rules" (for example, rules on minimum wage, maximum work periods, health, safety and hygiene at work). This result could also be reached under Article 9 Rome I[66] (*infra).*

73. If, according to the abovementioned rules, the employee cannot be considered as habitually carrying out his work in a country, the contract shall be governed by the law of the country where the establishment through which he was engaged is situated (Article 8.3 Rome I).[67] The relevant element is not the place where the contract was formally concluded, but the establishment *"through which"* the employee was engaged. Hence, for example, if an employee is "recruited" by an establishment in Spain but is moved to London to sign the contract, the contract shall still be governed by Spanish Law.

74. Finally, the provision concludes with an escape clause: where it appears from the circumstances as a whole that the contract is most closely connected with a country other than that indicated according to the abovementioned rules, the law of that country shall apply. The wording of this clause is more flexible than that of the escape clause contained in Article 4.3 Rome I (*supra* para. 48). In particular, the adverbs "clearly" and "manifestly" are not repeated. The intention was to give more leeway to judges in areas of labour contract, where the interests at stake may be different than in those contracts subject to the general rule of Article 4.

IX. Overriding mandatory provisions

75. The provision dealing with "overriding mandatory rules" (Article 9 Rome I) departs significantly from its parallel in the Convention (Article 7 of this text). Firstly, the new provision incorporates a definition of overriding mandatory rules. The purpose of this definition is to reduce the scope of Article 9 and, therefore, to minimize the risks that judges could invoke this clause to frustrate the general application of the conflict-of-laws rules of the Regulation. In addition, the new provision eliminates the problems raised by the concept of "mandatory rules" in the Convention, where the same term was employed in a very different context (see, for example, Articles 3.3 and 7 of the Convention). Recital 37 of the Regulation explains that *"the concept of overriding mandatory rules should be distinguished from the expression "provisions which cannot be derogated from by agreement" referred to in article 3(4) and should be construed more restrictively"*.

According to the new text, Article 9 Rome I only encom-

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63 On this issue, recently, *F. Jault-Seseke*, "L'office du juge dans l'application de la règle de conflit de lois en matière de contrat de travail", *Rev.crit. DIP,* 2005, p. 253 *et seq.*

64 See, Commission's Proposal, *cit.,* p. 7; *A. Junker*, *loc.cit.,* p. 406; *P. Lagarde*, *loc.cit.,* p. 343. But see also *Max-Planck Institute*, Comments on the Commission's Proposal, *cit.,* pp. 54-55 (pointing out that the difference between the two hypothesis foreseen in Article 8.2 Rome I is not always clear). The case-law of the ECJ in the context on the Brussels I Regulation employs those same terms, see ECJ 13 July 1993 – C-125/92 – *Mulox IBC Ltd v Hendrick Geels* [1993] ECR I-4075; ECJ 9 January 1997 – C-383/95 – *Petrus Wilhelmus Rutten v Cross Medical Ltd.*[1997] ECR I-57; ECJ 28 September 1999 – C-440/97 – *GIE Groupe Concorde and Othes v The Master of the vessel "Suhadiwarno Panjan" and Others* [1999] ECR I-6307; ECJ 27 February 2002 – C-37/00 – *Herbert Weber v Universal Ogden Services Ltd.*[2002] ECR I-2013 = [2005] EuLF I-77; ECJ 10 April 2003 – C-437/00 – *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* [2003] ECR I-3573 = [2003] EuLF (E) 167.

65 See, *A. Junker*, *loc.cit.,* p. 406-407; *P. Lagarde*, *loc.cit.,* p. 343; *P. Mankowski*, *loc.cit.,* p. 107; See also ECJ 10 April 2003 – C-437/00 – *Giulia Pugliese v Finmeccanica SpA, Betriebsteil Alenia Aerospazio* (*supra* note 64).

66 See, Green Paper, *cit.,* p. 36; *GEDIP*, Résponse, *cit.,* p. 12; and with further references to legal literature on this issue, *D. Martiny*, *lo.cit.,* pp. 82-82.

67 Note that the Commission's Proposal contained a reference to the fact that the worker *"…carries out his work in or from a territory subject to no national sovereignty…"*. The reasons for the deletion of this reference are the same as those expressed by *A. Junker*, *loc.cit.,* pp. 407-408; and *Max-Planck Institute*, Comments to the Commission's Proposal, *cit.,* pp. 60-61.

passes "ordo-political rules" or *Eingriffsrechte*, *i.e.* it can only be invoked when "public policy interests" are at stake.[68] Hence, "overriding mandatory rules" are defined as those provisions the respect for which is regarded as crucial by a country in order to safeguard its public interests, such as its political, social or economic organization, 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. This definition is inspired by the Court of Justice's judgment in the Arblade Case.[69] Rules such as those aimed at the protection of a party to the contract (consumers, agents, and so on) are not included in this concept.

In principle, the same definition should apply to Article 16 of the Rome II Regulation.

76. Following the scheme of the Convention, Article 9 of the Regulation differentiates between overriding mandatory rules of the forum and overriding mandatory rules of third countries. As for the former, the rule is the same in both instruments (*"nothing in this Convention/Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum)*. However, as to mandatory rules of the law of third countries (different from the *lex contractus),*[70] the new provision responds to a compromise between (a) those Member States that preferred to exclude any reference to those rules (as in the Rome II Regulation, see Article 16 of this instrument) and (ii) those Member States that preferred to maintian the solution of the Convention.[71] The Regulation foresees the possibility of giving effect to the overriding mandatory provisions of a third country, as a faculty of the judge (*"effects may be given")*. Nevertheless, unlike the Convention, the new text limits the catalogue of mandatory rules that can be considered. *Firstly*, not any rule can be considered, but only those rules of *"the country where the obligations arising out of the contract have to be or have been performed"*; and secondly, only *"insofar as these overriding mandatory provisions render the performance of the contract unlawful".* These two precisions were considered necessary to reduce the uncertainty associated with the formula adopted in the Convention. The material criteria that a judge has to take into account to make a decision on this issue is the same in both texts: *"… regard shall be had to their nature and purpose and to the consequences of their application or non-application"*

X. Scope of the applicable law and special connections

77. The rules dealing with the scope of the applicable law (Article 12 Rome I), the material validity of the contract or of any term of the contract, including the consent (Article 10 Rome I), the formal validity (Article 11 Rome I), and the burden of proof (Article 18 Rome I) have not significantly changed. The only modifications introduced by the Regulation (in particular to Article 11) intend to make the text clearer and easy to read.

XI. Voluntary assignment, subrogation and multiple debtors

78. In relation to voluntary assignment and subrogation, the Regulation departs from the Convention and lays down a scheme of rules partially inspired by the Rome II Regulation. On the one hand, there is a rule on voluntary assignment and *contractual* subrogation (Article 14); on the other hand, there is an autonomous rule on *legal* subrogation (Article 15) and finally, there is a rule clarifying the case of multiple debtors and the right to demand compensation (Article 16).

1. Substitution of creditors: Voluntary assignment and contractual subrogation

79. As for the issue of the substitution of creditors, the Rome Convention contained two rules: one dealing with "voluntary assignment" (Article 12) and the other dealing with "subrogation" (Article 13). According to the Explanatory Report, the former included any assignment of a right based on a contract, while the latter included any assignment of a right "by operation of law".[72] The Regulation intends to make this difference clearer and to avoid any problems of characterization. For this purpose, the new text lays down one provision expressly dealing with both "voluntary assignment and contractual subrogation"; and a different provision dealing only with "legal subrogation".

80. The provision dealing with voluntary assignment and contractual subrogation (Article 14) retains the structure of the Convention. The first paragraph deals with the relationship between the assignor and the assignee. This relationship shall be governed by the law applicable to their contract under the Regulation. Hence, for instance, if the contract of assignment contains a choice-of-law clause, the law designated by the parties will apply to their mutual rights and obligations. The rule is the same as in the Convention (Article 12.1).

81. However, there are two important differences in relation to its scope of application.

(a) *Firstly,* the text does not refer to the *"mutual obligations"* of the assignor and the assignee, but to the *"relationship"* be-

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[68] The legal literature on the concept of *Eingriffsnormen* is very extensive; see, recently and with further references, *P. Mankowski*, "Verbraucherkreditverträge mit Asulandsbezug: Kollisionsrechtliche Dienstleistungsbegriff und sachliche Abgrenzung von Eingriffsrecht", *RIW,* 2006, p. 321 *et seq.,* pp. 325-330; *K. Thorn*, „Eingriffsnormen", in *Ferrari/Leible* (ed.), p. 129 *et seq., passim*.

[69] ECJ Joined Cases 23 November 1999 – C-369/96 and C-374/96 – *Criminal proceedings against Jean-Claude Arblade and Arblade & Fils SARL* and *Bernard Leloup, Serge Leloup and Sofrage SARL* [1999] ECR I-8453.

[70] The problem of whether and under what conditions the overriding mandatory rules of the *lex contratus* are to be applied did not receive any attention, on this issue see, as a mere introduction, *Max-Planck Institute*, Comments to the Commission's Proposal*, cit,* p. 81.

[71] Note that Article 22 of the Convention allowed for a reservation to Article 7.1. For a recent summary of the pro and cons of each position, see *A. Chong*, "The Public Policy and Mandatory Rules of Third Countries in International Contracts", *J.P.I.L.,* 2006, p. 27 *et seq.; A. Dickinson*, "Third-Country Mandatory Rules in the Law Applicable to Contractual Obligations: So Long, *Farewell*, auf Wiedersehen, Adieu?", *J.P.I.L.,* 2007, p. 53 *et seq.*

[72] *Giuliano-Lagarde* Report, *cit.,* commentary to Article 13.

tween them. This new term intends to be wider than the former and to cover all the aspects of the relationship between the parties (assignor and assignee). This is explained by Recital 38. Pursuant to this recital, the term "relationship" includes the *"…property aspects of an assignment as between the assignor and the assignee in legal orders where such aspects are treated separately from the aspects under the law of obligations"*. It would go without saying that it does not cover "any relationship between the assignor and the assignee that might exist", only "*those aspects directly relevant to the voluntary assignment/contractual subrogation in question"*. The *ratio* of this recital is to solve a characterization problem. Some legal orders make a difference between (i) the property effects of an assignment between the assignor and the assignee, (ii) and the property effects *vis-à-vis* third parties (creditors of the assignor, insolvency trustees, and so on). In addition, in those legal systems, the "property effects of an assignment between the parties" are treated separately from the law of contractual obligations. The new wording of Article 14 paragraph 1 - and the accompanying Recital - intends to clarify that in those legal systems (*i.e.* when one of those legal systems is the State forum), the law applicable to the assignment contract also applies to the property effects as between parties (i.e., in and under what conditions the ownership of a claim is transferred as between parties).

However, the claim that there is a discernible difference at the conflict-of-laws level between (i) property aspects as between parties and (ii) property aspects *vis-à-vis* third parties is, to say the least, dubious. Furthermore, this difference may make sense if Article 14 also dealt with the "property effects" *vis-à-vis* third parties, as was the case in a number of stages of the negotiations, but it does not have any sense in relation to the final text, which does not contain any rule dealing with this issue (*infra*)

(b) *Secondly,* the new provision expressly clarifies its application to assignments by way of collateral. According to paragraph 3, the concept of assignment includes not only outright transfers of claims, but also "*transfers of claims by way of security as well as pledges or other security rights over claims"*. This explanation is also helpful to prevent the problem of characterization from arising. Nevertheless, since property effects *vis-à-vis* third parties are excluded from the scope of application of Article 14, this clarification only relates to the contractual obligations (i) between the parties (pledgor and pledgee, for example) (ii) and *vis-à-vis* the debtor whose claim has been pledged (*debitor debitoris).*

82. Paragraph 2 of Article 14 deals with the effectiveness of the assignment in relation to the debtor of the claim. The text is basically the same as in the Convention. The principle underpinning this provision is that the assignment cannot prejudice the legal position of the debtor. Accordingly, the law applicable to the assigned or subrogated claim governs 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. This solution applies irrespective of the nature of the assigned claim, *i.e.* whether it is contractual or not.[73]

83. Unfortunately, the Regulation has not resolved the main problem in this context, namely the determination of the law applicable to the effectiveness *vis-à-vis* third parties of the assignment. As is well know, the silence of the Rome Convention on this issue gave rise to different interpretations between national courts and legal scholars.[74] This legal uncertainty remains under the Regulation. During the negotiations of this instrument, it turned out to be impossible to reach a compromise between "the law-of-the-assignor approach", i.e. those who advocated the application of the law of habitual residence of the assignor (as it was established in the Commission's proposal, following the UNCITRAL Convention approach),[75] and "the law-of-the-claim approach", i.e. those who advocated the application of the law governing the assigned credit (*i.e.,* extending paragraph 2 of Article 14 also to the effectiveness of the assignment against third parties and the priority problems). The loophole has been compensated by the Review Clause, which foresees that the Commission submits a report on this question and, if appropriate, that this report be accompanied by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced (Article 27.2 Rome I).

2. Legal subrogation and multiple debtors

84. The conflict rule on subrogation has remained practically unchanged (Article 15 Rome I), only minor adjustments have been introduced to make it parallel to the text in the Rome II Regulation (see Article 19 of this instrument). Also, following this instrument, the case of multiple debtors has been moved to a separate provision (Article 16). This case was cryptically regulated in the Convention. As in the Rome II Regulation, the new text clarifies the hypothesis in which this provision shall be applied: namely, when a creditor has a claim against several debtors (co-debtors) and the creditor's interest has been discharged by one of them. Despite the joint liability, the law applicable to the different debtors may not coincide. If one of the debtors pays, the question of which law governs the right to demand compensation (i.e., the right to claim recourse) from the other debtors arises. The Regulation points to the law governing the obligation of the debtor who paid. In other words, the debtor who pays determines the law applica-

[73] Note that Article 15 (e) of the Rome II Regulation only refers to the transferability of the right to claim damages, and not to the other issues enumerated in Article 13.2 of the Rome I Regulation. On this issue, see *Max-Planck Institute*, Comments on the Commission's Proposal, *cit.*, p. 88.

[74] See, summarizing the problem and the different solutions, *F. Garcimartín* and *I. Heredia*, "La cesión de créditos: reflexiones sobre los problemas de ley aplicable", Anuario de Derecho Civil, 2003, p. 969 *et seq*. In the context of the revision of the Convention, see, *inter alia, A. Flessner/H. Verhagen*, Assignment in European Private International Law, 2006; *A. Garcella*, "Predebilità contro Flessibilità? La legge applicabile all'opponibilitè delle cessione del credito ai terzi nella proposta di Regolamento Roma I", Banca, Bor., Tit. Di Credito, 2006, p. 635 *et seq.; E.-M. Kieninger/H.C. Sigman*, "The Rome-I Proposed Regulation and the Assignment of Receivables" = [2006] EuLF I-1 *et seq.*

[75] See, Article 13.3 of the Commission's Proposal introducing a new conflict rule based on the 2001 UNCITRAL Convention on the assignment of receivables in international trade.

ble to the right to claim a reimbursement by the other debtors. The Rome I Regulation introduces an additional sentence (which is not in Rome II) aimed at protecting the legitimate expectations of the co-debtors: "*The other debtors can rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor*"; for example, the other debtors may invoke the limitation of the obligation under the law governing their duty as a defence against the right to reimburse.[76] The same rule should apply by analogy to Article 20 Rome II.

XII. Set-off

85. The Convention did not contain any explicit rule on the law applicable to set-off rights. Accordingly, if the set-off was based on a contract (=*contractual set-off*, including netting and similar institutions), the law applicable was determined by the general rules (Articles 3 or 4). On the contrary, "*non-contractual" set-off (ex lege or by declaration),* pursuant to the general view, was implicitly contemplated in Article 10.1 (d) of the Convention as a "way of extinguishing obligations": the same law that governs a contractual obligation, also governs if and under what conditions this obligation can be extinguished by means of a set-off. Naturally, insofar as a set-off implies the extinction -totally or partially- of two different obligations, the application of this provision was not easy if each of the obligations had its own governing law: shall we apply the law governing the main obligation (i.e. against which set-off is invoked), both laws or any of them? In addition, the so-called "procedural set-off" (set-off due to specific procedural situations) raised additional problems.[77]

86. In order to solve this ambiguity, Regulation 1346/2000 (=*The Insolvency Regulation)* introduced a particular rule for insolvency situations (Article 6). Not surprisingly, Rome I generalizes the same rule for non-insolvency scenarios (Article 17). Unless the parties have agreed otherwise, the right to set-off shall be governed by the law applicable to the claim against which the set-off is asserted. An example may be useful to illustrate how the rule works. Let us suppose that A owes B 100 Euros and B owes A 150 Euros. The first debt is governed by German Law while the second is governed by Spanish Law. In this case, if A claims the 150 Euros from B, the questions of whether, under what conditions and when B may offset by invoking his counter-claim for 100 Euros is governed by Spanish Law. In other words, it is the law governing the claim in relation to which the party that does not take the initiative is debtor that determines the applicable law. That explains why the Commission justified the rule arguing that "*The aim of the solution adopted here is to make offsetting easier while respecting the legitimate concerns of the person who did not take the initiative*".[78]

87. The solution eventually adopted has several consequences: (a) it implies that, from a *conflict-of-laws standpoint,* set-off is characterized as a substantive matter, not as a procedural matter;[79] (b) unlike the Commission's proposal, Article 17 does not make any reference to "statutory set-off", but to the fact that the set-off is not based on an agreement by the parties. The reason is to ensure that it covers any set-off, automatic or unilaterally declared. If the set-off is based on an agreement, the general rules apply (Article 3 *et seq.* Rome I); (c) in principle, Article 17, as Article 14.2, applies –directly or by analogy- not only to contractual claims but also to non-contractual monetary claims.[80]

XIII. Final Clauses

88. Finally, the rest of the general clauses, *i.e.* public policy (Article 21), multi-unit States (Article 22) and the exclusion of renvoi (Article 20), have maintained the same content and wording as in the Convention. In the provision on renvoi a sentence has been added to ensure consistency with one of the conflict rules on insurance contracts (Article 7.3 II).

XIV. Conclusion

89. The Rome I Regulation "communitarizes" the 1980 Rome Convention on the law applicable to contractual obligations. Without a doubt, this new text constitutes, together with the Rome II Regulation, a big step forward on the way to building a Code of European Private International Law. In this sense, it has also to be welcomed. However, the result is not so praiseworthy. A good opportunity has been missed out to improve the text of the Convention; in particular, to solve the main problems raised by its practical application and to remove its loopholes. It is really unfortunate that the new instrument has failed on issues such as: (a) laying down a uniform and consistent regime for insurance contracts; (b) solving the problems of interaction between the Rome I Regulation and the unilateral conflict rules contained in some Directives on consumer contracts, or (c) determining the law applicable to the property effects of the assignments of credits.

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[76] See, *P. Lagarde*, *loc.cit.,* pp. 345-346; *Max-Planck Institute*, Comments to the Commission's Proposal, *cit.,* pp. 97.

[77] Summarizing this understanding and with further references, see *Virgos/Garcimartín*, *loc.cit.,* footnote 44, pp. 112-117; also, *H. Magnus*, "Set-off and the Rome I Proposal", *Y.P.I.L,* 2006, p. 113 *et seq.,* pp. 114-155.

[78] Commission's Proposal, *cit.,* Explanatory comment to Article 16. Also welcoming this approach, *P. Lagarde*, *loc.cit.,* p. 346; *H. Magnus*, *loc.cit.,* pp. 118-119.

[79] Even in those legal systems based on an "automatic set-off" (or *ex lege),* there is a procedural scenario where one of the parties brings his claim, and this is to be considered the relevant claim for the purpose of Article 17.

[80] *H. Magnus*, *loc.cit.,* p. 118.