Volume 106
Issue 1 *Dickinson Law Review - Volume 106, 2001-2002*

6-1-2001

Consumer Protection in the Global Village: Recent Developments in German and European Union Law

Ulrich Drobnig

Consumer Protection in the Global Village: Recent Developments in German and European Union Law

Norbert Reich* and Axel Halfmeier**

* Professor of Law, University of Bremen. Dr. iur., Johann-Wolfgang-von-Goethe-University Frankfurt/Main, 1966; Dr. iur. h. c., University of Helsinki, 2000. The article is based on a paper presented at the Tenth Meeting of the International Academy of Commercial and Consumer Law at The Dickinson School of Law of the Pennsylvania State University, Carlisle, Pa., August 9-12, 2000.

** Academic Assistant, University of Bremen. LL.M., University of Michigan, 1996; Dr. iur., University of Hamburg, 1999.

I. Preliminary Remarks

The expansion of electronic commerce has continued at a slow but steady pace despite some forecasts to the contrary. This growth continues to be supported by the economic players that have a natural interest in it, namely businesses using modern distribution systems, service providers, telecommunication networks and telemarketing companies. It is, however, not clear whether a similar interest is evident among consumers.

Surely no one can be or should be prevented from electronic contracting, unless unfair or fraudulent marketing practices are being used; a problem with which John Rothchild has extensively and critically dealt.[1] We will not be concerned with that "dark" side of electronic contracting. Our objective is to see how the consumer's freedom of decision-making can be safeguarded under the new technological possibilities of the information society. What consumer model should be used to shape rules governing electronic contracting? What are the requirements of consumer protection as they are spelled out for the European Union in Article 153 of the Amsterdam Treaty? What are the special problems posed by cross-border contracting, which in the past has been a somewhat exotic playground for specialists on conflict of laws, but which may become an everyday problem of consumer contracting?

International rule making, doctrinal writing, proposals for reform, codes of conduct and soft law regulations have exploded in parallel with the expansion of electronic commerce. Andersen informs us about the United Nations Commission on International Trade Law (UNCITRAL) Model Law that is, however, concerned only with commercial transactions, which will not be treated here.[2] Harland gives an overview of the many actors and actions on the international level in his paper.[3] Harland describes a situation in which hard law rarely follows the pronouncement of soft and diffuse proposals—a situation where, in the short run, consumers must seek their confidence elsewhere. On December 9, 1999, the Organization for Economic Cooperation and Development (OECD) issued "Guidelines for Consumer Protection in the

1. John Rothchild, *Protecting the Digital Consumer: The Limits of Cyberspace Utopianism*, 74 IND. L. J. 895 (1999).

2. MATS B. ANDERSEN, ELECTRONIC COMMERCE—A CHALLENGE TO PRIVATE LAW? (Centro di studi e ricerche di diritto comparato e straniero no. 32, Rome, 1998).

3. David Harland, *The Consumer in the Globalised Information Society—The Impact of International Organisations,* 7 COMPETITION & CONSUMER L.J. 1 (2000).

Context of Electronic Commerce,"[4] which sets forth the basic proposition that consumers should enjoy the same protections when entering electronic contracts as they do when contracting is performed by traditional means. The OECD delegations did not reach agreement on more precise issues such as the applicable law and a mandatory right of withdrawal for distance contracts.

On the other hand, national legislation has developed a variety of consumer protection standards that, to some extent, have been triggered by regional (namely European Union) or international rule making. Are national rules adapted to the requirements of electronic commerce and contracting? Can smart traders avoid national consumer protection laws by choosing less protective standards in offshore jurisdictions? Is there danger of a "race to the bottom" made possible by globalization and liberalization of electronic commerce? Will the least protective jurisdiction enjoy an advantage in attracting consumer contracts via electronic commerce?

Although this paper cannot answer all of these questions, this contribution explores, in a wider sense, the European Union (EU) law on electronic contracting by consumers or, to be more precise, the law of the European Community (EC), which is one of the various EU institutions. In our perspective, this will include international law conventions, which may be replaced by EC law under Article 65 of the Amsterdam Treaty. This has already happened with regard to the 1968 Brussels Convention on jurisdiction,[5] and may also happen with regard to the 1980 Rome Convention on the law applicable to contractual obligations.[6] Both contain provisions on cross-border conflicts that are relevant to electronic contracting by consumers.

The EC legislature has also been active in specific areas of consumer protection, most notably by adopting the Distance Selling Directive 97/7/EC of May 20, 1997,[7] which has been implemented by the member states. Germany has implemented the Directive by

4. *See* NORBERT REICH & ANNETTE NORDHAUSEN, VERBRAUCHER UND RECHT IM ELEKTRONISCHEN GESCHÄFTSVERKEHR 156-68 (2000).

5. Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters, consolidated reprint in OFFICIAL JOURNAL OF THE EUROPEAN COMMUNITY 1998 O.J. (C 27) 1. This Convention has been replaced by Council Regulation (EC) 44/2001 of December 22, 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12) 1.

6. Consolidated reprint in 1998 O.J. (C 27) 34.

7. 1997 O.J. (L 144) 19.

adopting the "Fernabsatzgesetz" of June 26, 2000.[8] The "Fernabsatzgesetz" contains specific rules on information obligations, withdrawal and performance regarding contracts concluded at a distance. Although directive 97/7 does not apply to the important area of financial services, the proposed Directive on Distance Marketing of Financial Services (Directive on Financial Services) may close this gap.[9]

Another noteworthy piece of EC legislation, Directive 2000/31/EC on "Certain Legal Aspects of Information Society Services in the Internal Market (Directive on Electronic Commerce),"[10] is not so much concerned with consumer protection. Rather, it addresses internal market aspects, in particular the free access of EU-based providers to e-commerce; provision of information, especially on the identity of the provider; conclusion of electronic contracts; commercial communications; limitation of liability for mere "conduit," "caching," and "hosting;" and dispute settlement, preferably by codes of conduct and out-of-court mechanisms.

The legislative techniques of these three EC instruments are strikingly different. The Distance Selling Directive uses the traditional minimum harmonization principle. In contrast, the proposed Directive on Financial Services contains a maximum harmonization concept. Finally, the Directive on Electronic Commerce proposes a country-of-origin principle, with some specific rules on electronic contracting.

These three instruments also touch upon questions of conflict of laws, and again with different techniques. The Distance Selling Directive is concerned with choice of law clauses relating to non-member countries; such clauses may not deprive the consumer of the protection offered by the Directive. The proposed Directive on Financial Services prescribes objective criteria for its application, disregarding the existing conflict of laws rules. The Directive on Electronic Commerce, however, simply insists on the application of basic international law instruments relating to the EC, namely the 1968 Brussels Convention and the 1980 Rome Convention on the law applicable to contractual obligations, without setting its own standards for cross-border conflicts. The preamble to Section 23 of the Directive on Electronic Commerce reads:

8. 2000 BUNDESGESETZBLATT (Federal Gazette, BGBl.) I 897.

9. Latest proposal: 1998 O.J. (C 385) 10, amended by Commission Proposal of July 23, 1999, COM (99) 385 final, EC document no. 599PC0385.

10. 2000 O.J. (L 178) 1.

> This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

This language is a bureaucratic masterpiece. Although the directive claims not to touch traditional conflicts rules, it will clearly affect their operation, especially through the so-called country-of-origin principle used in the area of commercial communications such as advertising or information services. As lawyers concerned with consumer law, we are thus faced with a complex mix of European legislation whose scope of application has yet to be determined. Before discussing these problems, we deal with the specifics of electronic contracting in cross-border situations with regard to place, persons, and time.

II. Aspects of Indeterminacy in Electronic Contracting

Cross-border contracting, as it is described and regulated in traditional conflict of laws situations, presupposes three firm conceptual pillars: (1) a clear localization of the parties, (2) a precise identification of the parties, namely the supplier and the consumer, and (3) a foreseeable chronological sequence of actions. The clear localization of the parties—in consumer contracts the supplier or his representative on the one side and the consumer on the other—is important in order to know whether we have a cross-border transaction. In an intra-national transaction, the respective member state's consumer protection provisions apply, perhaps with some modifications in regard to the specifics of electronic contracting. We will not be concerned with these aspects. If the parties to the contract reside in different countries, conflict rules become important and the central question will be whether the consumer can expect to have his or her national consumer protection rules applied to the electronic transaction at hand.

The personal sphere of application is equally important since EC law now has a clear definition of "consumer:" a natural person who, in contracts covered by relevant EC legislation, is acting for purposes which are outside of his trade, business, or profession.[11] On the other hand, the concept of the "professional supplier" refers to any natural or legal person who, in contracts covered by a

11. GERAINT HOWELLS & T. WILHELMSSON, EC CONSUMER LAW 2-5 (1997).

directive, is acting for purposes relating to his trade, business or profession, whether publicly owned or privately owned. Of course, there may be difficulties in determining whether a person is a "consumer,"[12] or whether a "professional supplier" acts within his business activity or acts privately. Since European and member states' legislation takes this distinction as a starting point for applying specific consumer law provisions, it presupposes that the parties know each other's role in the marketplace. Otherwise, the contracting parties would not know which rules apply and would be uninformed as to their rights in a specific transaction.

Finally, the time frame of the transaction is important. The existence of withdrawal rights and time limits makes it necessary to know with reasonable certainty when a given transaction has been entered into, when a certain time lapses, and when certain information has been given.

Article 5 of the Rome Convention reflects place, person, and time as the pillars of traditional conflict of laws doctrine. Article 5 is the fundamental conflict rule on consumer protection in cross-border situations for all consumers residing in the EU even with respect to third countries:

> *Article 5. Certain consumer contracts.*
>
> (1) This article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
>
> (2) Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
>
> - if, in that country, the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

12. In its case law, the European Court of Justice (ECJ) has preferred a narrow definition of the concept of the consumer. *Cf.* Case C-361/89, Criminal proceedings against M. di Pinto, 1991 I E.C.R. 1189; Case C-269/95, Benincasa v. Dentalkit, 1997 I E.C.R. 3767.

- if the other party or his agent received the consumer's order in that country or

- if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

(3) Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence, if it is entered into in the circumstances described in paragraph 2 of this Article.

(4) This Article shall not apply to:

- a contract of carriage

- a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

(5) Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

Paragraph 2 of this rule refers to the "habitual residence" of the consumer, since the level of consumer protection in that country is deemed to be adequate for that person's transactions as a consumer. The time frame of a transaction is indirectly mentioned in Paragraph 2, first indent, which states that the conclusion of the contract must be preceded by a "specific invitation" addressed to the consumer or by advertising. It is therefore necessary to clearly determine the chronological sequence of a certain transaction. By using this terminology, private international law distinguishes between the "passive consumer" who was led to enter into a contract by a preceding invitation, offer or advertising, and the "active consumer" who personally initiated the act of contracting.

The consumer protection rules of Article 5 apply in favor of the "passive," not the "active" consumer.[13] The passive consumer is

13. European Consumer Law group (ECLG), *Jurisdiction and Applicable Law in Cross-Border Consumer Complaints*, 1998 J. CONSUMER POL'Y 315.

the beloved child of private international law who needs to be cuddled and protected, while the active consumer—whether an occasional surfer or an Internet addict—opts out of his or her home jurisdiction by choice and, therefore, may be subjected to whatever law the supplier proposes, even offshore jurisdiction.

The above-mentioned basic concepts are not easy to handle with respect to traditional consumer transactions, but they become even more indeterminate when the Internet is used. Domain names, e-mail and web page addresses do not necessarily relate to the place of business of the supplier. The supplier may hide behind the business seat of the provider. To some extent the globe is his business seat. He seems to be everywhere and nowhere, a little bit like *Alice in Wonderland.* A German expert on electronic commerce even talks of "deterritorialization of the Internet,"[14] and Rothchild of "geographic indeterminacy."[15] A fair and reliable supplier will make clear his place of business and may be forced to do so by applicable law. This is exactly the purpose of Article 5(1) of the Directive on Electronic Commerce, which requires the name, the geographic address, the e-mail address, and other particulars of the supplier to be provided. Similar provisions are found in the Distance Selling Directive and in the German Fernabsatzgesetz, but all of these rules cannot be directly enforced against third country providers.

The element of time may also prove problematic with respect to the above-mentioned Article 5(2) of the Rome Convention. What preceded what? Is the consumer in the transaction a passive or an active one? Existing conflict rules force us to decide. If the consumer is passive, he or she will be protected by the mandatory laws of the country of residence in case of a choice of law clause or, in the absence of such a clause, by their home country's legislation. On the other hand, an active consumer is regarded as having completely opted out of the protection offered by the home country's legislation.

As a preliminary result we may say that determining the applicable law in cross-border consumer transactions may be difficult under normal conditions. It will become more difficult as electronic commerce becomes more popular. The expansion of electronic commerce is paralleled by an expansion of indeterminacy

14. T. Hoeren, *Internet und Recht—Neue Paradigmen des Informationsrechts,* 1998 NEUE JURISTISCHE WOCHENSCHRIFT 2849.

15. Rothchild, *supra* note 1; *cf.* Raymond T. Nimmer, *International Information Transactions: An Essay on Law in an Information Society,* 26 BROOK. J. INT'L L. 5, 46 (2000) (stating that electronic commerce means the "death of distance").

and legal uncertainty. How are we going to resolve this dilemma?

III. European Rules on Jurisdiction in E-Commerce Cases

Questions of jurisdiction and enforcement of judgments with respect to civil and commercial matters are well regulated in the European Union by the 1968 Brussels Convention.[16] The Brussels Convention is applicable only to cross-border litigation within the Union, and not with regard to third countries. Articles 13 to 15 contain rules on consumer protection, which to some extent, are similar to the above-mentioned Article 5 of the Rome Convention. The basic idea is that the so-called passive consumer may only be sued in the consumer's country of domicile. If the consumer sues the trader, the consumer may choose either the home courts or the courts in the place of the trader's business seat. On the other hand, the active consumer can sue only according to the general rules of jurisdiction contained in Articles 2 to 6 of the Brussels Convention, which apply to everybody. These general rules follow the *actor sequitur forum rei* principle (plaintiff must use defendant's home forum) with certain exceptions.

Although the Brussels Convention is still in force today, it will be replaced by EC Regulation 44/200, which goes into effect on March 1, 2002.[17] The Brussels Convention will remain important in certain cases, especially since Regulation 44/2001 does not apply to Denmark due to Danish reservations to the Union treaties.

EC Regulation 44/2001 contains some improvements in the jurisdiction provisions and enforcement procedure. With respect to consumer protection, it contains a new provision in Article 15(1), which reads:

> In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 4 and point 5 of Article 5, if:
>
> > (a) it is a contract for the sale of goods on instalment credit terms; or

16. Convention on Jurisdiction, *supra* note 5.
17. *Id.*

> (b) it is a contract for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or
>
> (c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

Regulation 44/2001 then goes on to state the principle known from the Brussels Convention—the consumer may choose where to sue his opponent while the consumer can only be sued at his or her domicile. As is the case under the Brussels Convention, a prior forum selection conflicting with these provisions is impossible. The difference between the new regulation and the Brussels Convention lies in the scope of application for consumer protection. It is not only the passive consumer who enjoys special protection, but also every consumer who is contracting across borders with a supplier who is active in the consumer's state of domicile. Offers of goods or services contained on a web site, which can be downloaded by the consumer on his computer, will suffice under this language. Litigation regarding all consumer contracts entered into via electronic commerce will therefore take place in the consumer's country of residence unless the consumer chooses to litigate abroad. Regulation 44/2001 thus offers the consumer a very high level of protection with regard to jurisdiction.

It must be noted that this protection ends if the European consumer chooses to contract with suppliers from non-member states, say, with a U.S. company which is not acting through a European branch office or subsidiary. In this case, neither the Brussels Convention nor Regulation 44/2001 as its successor applies. The consumer is left to the jurisdictional rules of his home country. Under the German Code of Civil Procedure, for example, there is no provision that would provide for jurisdiction in every such case. Again, the general rule is *actor sequitur forum rei*, so that the consumer who wishes to sue the U.S. supplier in Germany must rely on certain special grounds for jurisdiction. Such grounds may be found under German procedural law if the U. S. defendant holds any assets in Germany,[18] or if the place of performance of the

18. ZIVILPROZESSORDNUNG (ZPO, Code of Civil Procedure) § 23.

obligation that has allegedly been breached is in Germany. The latter may help the consumer in some cases, but not necessarily in the standard case of goods to be shipped to the consumer. Even if German law would govern the sales contract, the German courts would see the place of performance of the seller's obligations at his seat of business.[19]

IV. Global Rules on Jurisdiction?

This example shows that a large number of consumer transactions via electronic commerce do not fall under the scope of regional or international agreements on jurisdiction. This situation is unsatisfactory not only from the consumer protection perspective but also from the perspective of economic players who are engaged in electronic commerce and must, in theory, seek advice on a wide range of legal regimes. Therefore, it is not a coincidence that the activities of the Hague Conference on Private International Law in this area received a lot more attention recently than activities in other areas.

In 1992, the United States initiated the work on a global convention on jurisdiction and enforcement of judgments in civil and commercial matters. The draft of the convention, dating from October 1999,[20] contained the following rule on consumer contracts:

> (1) A plaintiff who concluded a contract for a purpose which is outside its trade or profession, hereafter designated as the consumer, may bring a claim in the courts of the State in which it is habitually resident, if
>
> (a) the conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity, and
>
> (b) the consumer has taken the steps necessary for the conclusion of the contract in that State.

---

19. *See* ZPO § 29; Patzina, *in* MÜNCHENER KOMMENTAR ZUR ZIVILPROZESSORDNUNG § 29 no. 19 (2d ed., 2000).

20. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRELIMINARY DRAFT CONVENTION ON JURISDICTION AND FOREIGN JUDGMENTS IN CIVIL AND COMMERCIAL MATTERS, *available at* http://www.hcch.net/e/conventions/draft 36e.html. For a general discussion of the relation between this draft convention and the U.S. internal law of jurisdiction, *see* Kevin M. Clermont, *Jurisdictional Salvation and the Hague Treaty*, 85 CORNELL L. REV. 89 (1999).

(2) A claim against the consumer may only be brought by a person who entered into the contract in the course of its trade or profession before the courts of the State of the habitual residence of the consumer.

As in EC Regulation 44/2001, a forum selection clause conflicting with these provisions would not be valid (art. 7 (3) of the draft). It seems that among other controversial matters, these provisions on consumer contracts caused conflicts in the Special Commission of the drafters of the Hague Convention.

The U.S. Department of State raised considerable objections to the October, 1999 draft in a formal letter to the Hague conference. The U.S. claimed that the above-cited provision on consumer contracts "raised a storm of controversy in the electronic commerce world."[21]

Why this storm broke out is not exactly clear. If the intention of American e-commerce companies was to force forum selection clauses on consumers through the small print of their business terms, this strategy seems rather outdated and unfair. Although U.S. courts apparently enforce derogation of forum selection clauses, to a certain extent even in consumer contracts, this may be limited to domestic cases. It may be reasonable to expect an American consumer plaintiff to travel from Washington state to Florida in order to sue the supplier,[22] but this reasoning is not necessarily the same in an international setting.[23]

Furthermore, today any American e-commerce supplier already faces the possibility of suits by customers in courts all over the world, depending on local procedural rules. In the same vein, European e-commerce suppliers face the possibility of a suit in the U.S. based on long-arm statutes and the "minimum contacts" doctrine. It is hard to see why a global harmonization of such rules would do any harm to e-commerce companies. Nevertheless, for the moment it must be acknowledged that the Hague project has reached an impasse and that it is uncertain whether or when it will be continued.[24]

---

21. Jeffrey D. Kovar, *Letter of February 22, 2000 to the Hague Conference on Private International Law*, 2000 DAJV (GERMAN-AMERICAN LAWYERS' ASSOCIATION) NEWSLETTER 44, 45.

22. *See* Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991).

23. SCOLES & HAY, CONFLICT OF LAWS 369 (2d ed., 1992).

24. *See* Arthur T. von Mehren, *The Hague Jurisdiction and Enforcement Convention Project Faces an Impasse—A Diagnosis and Guidelines for a Cure*, 2000 PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 465.

V. Conflict of Laws and Consumer Protection

A. General Rules

In the logic of the conflict of laws, rules that are in force throughout the EU by virtue of the Rome Convention on the Law Applicable to Contractual Obligations,[25] the applicable law will either be determined by choice of the parties or by the criteria listed in Article 4 of the Rome Convention, in particular by the concept of the "closest connection." In the absence of a choice of law, Article 4(2) of the Rome Convention stipulates that a transaction will be most closely connected with the home country of the party performing the "characteristic performance" under the contract. This is usually the supplier of goods or services, since the consumer has only to pay, which is not characteristic for any specific type of contract. Therefore, the law of the country of the supplier, not the law of the consumer's residence will normally govern the contract. The exceptions possible under Article 4, for example, if it appears that as a whole the contract is more closely connected to another country, are narrowly interpreted by European courts and are reserved for truly exceptional cases. Under these rules, it is therefore possible for e-commerce suppliers to select a *laissez-faire* offshore jurisdiction as their business seat thereby making that jurisdiction's law applicable to its transactions.

The use of choice of law clauses is another method to select the applicable law in cross-border contracts. Since the Rome Convention gives the parties nearly unlimited freedom in choosing a governing law for their transaction as long as the facts of the case show some connection with a foreign country, parties are not necessarily connected with the country whose law is chosen. In consumer contracts, choice of law clauses usually are not freely negotiated between business partners, but are in fact unilaterally determined by the commercial supplier. We therefore need norms that regulate when and under what conditions such clauses become part of the contract and, therefore, binding on the consumer. Under Article 8(1) of the Rome Convention, the governing law is the law that would be applied if the contract or term were valid. On the other hand, Article 8(2) allows each party to rely on their home country law in order to establish that they did not consent to a choice of law clause, if it appears from the circumstances that it

25. *See* Consolidated reprint, *supra* note 6.

would not be reasonable to determine the effect of the party's conduct according to the law envisaged by the choice of law clause.

The interplay between the two paragraphs of Article 8 of the Rome Convention is particularly difficult to handle in cases where choice of law clauses are contained in general contract terms. Will any reference to a country named by the supplier or service provider suffice, or must certain requirements of the law of the consumer's home country, especially the principle of transparency as it is stipulated in EC Directive 93/13 on Unfair Terms,[26] be respected? What is the content of the specific choice of law provision in Article 6(2) of this directive, which has been implemented differently by Member States? What will be the importance of Article 10(3) of the Directive on Electronic Commerce, which requires that "contract terms and general conditions provided to the consumer must be made available in a way that allows him to store and reproduce them?"

In our opinion, a minimum requirement for choice of law clauses used in electronic commerce is a sufficient degree of transparency. Choice of law clauses should be enforced only in cases where these clauses have been submitted to the consumer in plain and intelligible language before the consumer enters into a contract. In the context of e-commerce this means that the consumer must have easy access to contract terms, via a hyperlink for instance, before the contract is entered into. The supplier must prove that these conditions have been met; otherwise no choice of law can be proven.

The material validity of choice of law clauses must be determined by the law chosen to govern the transaction.[27] This may present certain difficulties, especially when the law of a non-EC country is chosen. New EC directives try to maintain the minimum level of protection that EC law offers to the consumer. The practical effect of the rules contained in the directives on Unfair Terms, Distance Selling and, most recently, Consumer Sales[28] has not yet been tested in litigation.

---

26. 1993 O.J. (L 95) 29. On this issue, *see, e.g.*, 2 DICEY & MORRIS ON THE CONFLICT OF LAWS margin no. 33-106 (13th ed., 2000) (Unfair Terms Directive must be enforced by British courts regardless of choice of law clauses).

27. This has been the opinion of the German Bundesgerichtshof in its judgment of March 19, 1997, 1997 JURISTENZEITUNG 612 with comment by Ralf Michaels & Hans-Georg Kamann at 601.

28. Directive 99/44/EC of the European Parliament and of the Council of May 25, 1999 on certain aspects of the sale of consumer goods and associated guarantees, 1999 O.J. (L 171) 12.

B. Consumer Protection under the Rome Convention

The supplier operates under the general rules of the Rome Convention on the applicability of the law, either by the objective criteria of the closest connection or by choice of law clauses. These general rules may be superseded by the consumer protection rules of the consumer's home country if the requirements of Article 5 of the Rome Convention are met. As mentioned above, the idea of Article 5 is to protect the "passive" but not the "active" consumer. Article 5(2) accomplishes this goal by distinguishing between different forms of solicitation.

The drafting materials of the Rome Convention describe the importance and practical application of Article 5(2):

> The first indent [of Article 5(2)] relates to situations where the trader has taken steps to market his goods or services in the country where the consumer resides. It is intended to cover *inter alia* mail order and doorstep selling. Thus the trader must have done certain acts such as advertising to the press, or on radio or television, or in the cinema or by catalogues aimed specifically at that country, or he must have made business proposals individually through a middleman or by canvassing. If, for example, a German makes a contract in response to an advertisement published by a French company in a German publication, the contract is covered by the special rule. If, on the other hand, the German replies to an advertisement in American publications, even if they are sold in Germany, the rule does not apply unless the advertisement appeared in special editions of the publication intended for European countries. In the latter case the seller will have made a special advertisement intended for the country of the purchaser.[29]

This wording was obviously not addressed to the specifics of electronic commerce. It shows, however, that the trader's intention and the sequence of his actions will be decisive in determining whether the consumer will be protected by the law of his home country.

With regard to electronic commerce, the present discussion has focused mainly on the question of whether an offer contained on the web site of a trader can be regarded as a "specific invitation" addressed to the consumer, or as (specific) "advertising" in the sense of the first indent of Article 5(2) of the Rome Convention. Some German writers argue that a web site containing offers for

29. 1980 O.J. (C 282) 23.

sale or services is usually directed at the entire world and that the possibility of interaction with the consumer makes it a specific invitation or specific advertising in the sense of Article 5(2) of the Rome Convention.[30] These writers conclude that a supplier offering products or services on the Internet must respect all consumer protection legislation of countries in which a potential user may reside. "He who is active on the Internet must know the risks."[31]

This is a clear but not very convincing conclusion. Must the trader or supplier in the European Union really respect the legislation of fifteen states? Even though this result may be favorable to consumers, it has some weak points. Article 5(2) seems to require a specific target group of consumers in a certain country and not simply an offer directed *erga omnes* on the Internet or in a globally circulated magazine. This opinion also disregards the fact that modern consumers may actively "surf the net" to find interesting offers. They may even use search engines or other devices for finding the optimal bargain. It is difficult to say that in these cases the consumer can be regarded as "passive" in the sense of Article 5.

A more traditional approach to defining the applicable law in cases of electronic contracting can be found in a paper by Marc Fallon:

> In the case of Internet use, two possibilities can arise. Either the user locates a site offering a database to consult or goods to acquire during a search; if he then identifies himself to the person in charge of the site, he probably becomes an "active" consumer. On the other hand, if the user discovers a product or service when opening his electronic mailbox and responds to this information, he probably becomes a "passive" consumer, provided that the act necessary to conclude the contract in the country of his residence takes place. This last condition does not appear difficult to fulfill. The only possible identification of the site of this act seems to be through the IP address of the user. It is true that this will not necessarily be transparent for the seller.[32]

---

30. *See* Peter Mankowski, *Das Internet im Internationalen Vertrags-und Deliktsrecht,* 63 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 206 (1999); Andreas Heldrich, *in* PALANDT, BÜRGERLICHES GESETZBUCH, EGBGB art. 29 margin no. 5 (60th ed., 2001); M. Lehmann, *Electronic Commerce and Consumer Protection in Europe,* 17 COMPUTER & HIGH TECH L.J. 101 (2000).

31. Mankowski, *supra* note 30, at 230.

32. Marc Fallon, *La protection internationale de l'acheteur sur l'interréseau*

This opinion is more closely relates to the idea of Article 5 of the Rome Convention,[33] but again contains practical difficulties. Neither the trader nor the consumer may know whether the other is active or passive. The applicable law, especially with regard to consumer protection rules of the country of residence of the consumer, is not clear at the moment the contract is concluded. A certain degree of legal insecurity remains. The underlying problem is that the distinction between active and passive consumers, which is embodied in Article 5(1) of the Rome Convention, "does not really make any sense in the context of a system which may enable the website to be accessed from most parts of the world."[34]

Article 5(2), second indent, of the Rome Convention contains another alternative to guarantee the consumer the protection of the law of his or her country of residence. This will be the case if the other party (namely the trader) or his agent received the consumer's order in the consumer's home country. This rule is particularly important for the current practice of booking a package holiday tour. This booking takes place in a travel office, which usually will be the agent of the tour operator who may have its business seat outside the consumer's country of residence. Under the second indent of Article 5(2), the mandatory rules of consumer protection cannot be waived, especially the consumer protection in case of insolvency of the tour operator, per Directive 90/314 Article 7.[35]

Tour operators may be tempted, however, to offer package holidays via the Internet, thus avoiding the services of a travel agent. The consumer may profit by enjoying increased freedom of choice and by avoiding commissions for the travel agent. On the other hand, the consumer loses the protection offered by Article 5(2), second indent of the Rome Convention. The applicable law, especially in cases of insolvency protection, will be determined by

---

dans le contexte communautaire, *in* LA PROTECTION DES CONSOMMATEURS-ACHETEURS A DISTANCE 241, 270 (B. Stauder ed., 1999).

33. Kurt Siehr, *Telemarketing und Internationales Recht des Verbraucherschutzes*, in 1999 JAHRBUCH DES SCHWEIZER KONSUMENTENRECHTS 169.

34. 2 DICEY & MORRIS, *supra* note 26, at margin no. 33-011. An illustration of the mechanisms of Rome Convention art. 5 in a hypothetical case is provided by Stephanie Francq, *Conflict of Laws, Comparative Law and Civil Law: The Impact of EC Legislation for a Service Provider Established in the United States*, 60 LA. L. REV. 1071, 1074 (2000).

35. *Cf.* Case C-140/97, Walter Rechberger v. Rep. of Austria, 1999 I E.C.R. 3499 (where the European Court extends art. 7 also to tours won by participating in promotion offers by newspapers).

choice of law clauses or by objective criteria. The dilemma in distinguishing between the active and passive consumer is repeated.

The problem is reduced if the tour operator has its business seat in the EU or the law of an EC country is chosen. The minimum protection rule under Directive 90/314 is then applicable. If the law of a non-member country is applicable, this will not be the case, and the consumer may get a "better bargain" but possibly without mandatory protection in case of insolvency. The opportunity to opt out of protective standards set by the EC seems problematic in view of the mandatory character of the directive.

In the future, the problems of Article 5 of the Rome Convention may be reduced when the Convention is amended or even trans-formed into Community law, as was the case with the Brussels Convention on jurisdiction. If such amendments occur, reform of Article 5 and other provisions seems desirable. A group of distinguished scholars has recently recommended that Article 5 should be revised in a fashion similar to its counterpart in the area of jurisdiction, so that it would basically apply to all contracts between consumers and professional suppliers that are concluded across borders, and the distinction between active and passive consumers would fall away.[36]

VI. Specific EC Directives

A. Directive on Distance Selling

The directive on solvency protection in mass tourism is only one example for specific EC regulatory activities that run parallel to conflict of laws rules. For many forms of electronic commerce, the main piece of legislation in this field is the Distance Selling Directive 97/7, since contracting through the World Wide Web or through e-mail falls under its scope.[37] It contains consumer protection rules such as rules on the proper identification of the supplier. If prepayment by a credit card is demanded, the business address of the supplier must be presented. In the case of sales, the consumer also has a right of withdrawal within seven working days after delivery. In the case of services, the consumer has a right of

36. European Group for International Private Law, *Proposals for a Revision of the European Convention on Contractual Obligations*, 2001 PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 64.

37. Norbert Reich, *Die neue RiLi 97/7/EG über den Verbraucherschutz beim Fernabsatz*, 1997 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 581; J. DICKIE, INTERNET AND ELECTRONIC COMMERCE LAW IN THE EU 91-100 (1999).

withdrawal within seven days after the conclusion of the contract and distribution of information about withdrawal rights. This information may be presented electronically. The implementation of Directive 97/7 into member state law might increase the consumer's freedom of decision vis-à-vis electronic commerce, even though this freedom is weakened by numerous exceptions (regarding financial services, sale excursions, certain recreation services and contracts concluded at an auction).[38]

Since many transactions in electronic commerce involve prepayment by the consumer via credit card, several provisions of Directive 97/7 lose much of their practical importance. This is particularly true in case of a withdrawal by the consumer. Unlike Section 75 of the British Consumer Credit Act of 1974, there are no protective rules on the effects of a withdrawal on the consumer's relation to the credit card issuer.[39] There are provisions, as in Article 11(2) of the Consumer Credit Directive 87/102/EC,[40] regarding the effects of the sales contract on the credit card contract.[41]

Under the Directive on Distance Selling, the consumer is explicitly protected against falsifications and fraud, but not against losing the right of withdrawal through prepayment by credit card. A new section 676(h) of the German Civil Code implements the Distance Selling Directive and protects the consumer against any abuse of the credit card transaction by third persons. In our opinion, this includes cases where the seller presents the card number for payment to the card issuer, but where in reality it has no right to do so (e.g., because of effective withdrawal or any other defenses of the consumer against the validity of the transaction or against the claim for payment). Thus, the German legislature has created a limited "charge back system" in favor of credit card holders.[42]

Directive 97/7 on Distance Selling also contains rules limiting choice of law clauses vis-à-vis non-EU countries, but its scope of application is very limited in this field. In the absence of a choice of law clause, the law of the trader's non-EU country of residence will

38. This exception is already subject to heated debate in Germany as far as Internet auctions are concerned, *see* REICH & NORDHAUSEN, *supra* note 4, at no. 66, 131.

39. *See* GERAINT HOWELLS & S. WEATHERILL, CONSUMER PROTECTION LAW 265 (1995).

40. 1987 O.J. (L 42) 48.

41. GERAINT HOWELLS & T. WILHELMSSON, EC CONSUMER LAW 208-210 (1997).

42. REICH & NORDHAUSEN, *supra* note 4, at 94.

usually be applicable according to the principle of the "closest connection" contained in the Rome Convention. In this case, the consumer may lose the protection offered by Directive 97/7, unless the above-mentioned rules of Article 5 of the Rome Convention apply.

B. Proposal on Financial Services

The proposal for an EC directive on distance marketing of financial services would have supplemented Directive 97/7, but differed with regard to information obligations and right of withdrawal. The challenge in this proposal is to simultaneously allow for certain specifics of the trade in financial services while guarding the consumer's freedom of decision. The amended proposal of July 23, 1999[43] puts the information and withdrawal rights of the consumer in distance contracts for financial services somewhat in line with Directive 97/7. However, the Council has not yet adopted a Common Position. It is uncertain whether the proposed directive will ever become law in the EU.

In contrast to the Directive on Distance Selling, the proposed directive on financial services would guarantee the consumer the EU standard of protection, even in cases where the law of a third country is applicable, as long as the transaction has an adequate connection with the EU. Thus, this proposal goes beyond Article 5 of the Rome Convention and similar clauses in other EC directives. As discussed later, the proposal could be a sound basis for increasing and harmonizing the protection of the European consumer in cross-border electronic commerce.

C. The EC Directive on Electronic Commerce

1. Electronic Contracting. The EC member states must implement the Directive 2000/31 on Electronic Commerce[44] by January 17, 2002. As to electronic contracting, the Directive aims to remove requirements regarding written form of contracts by supplementing them with an electronic equivalence. Article 9(1) contains the basic rule:

> Member States shall ensure that their legal systems allow contracts to be concluded by electronic means. Member States shall in particular ensure that the legal requirements applicable to the contractual process neither create obstacles for the use of

43. Proposed Directive on Financial Services, *supra* note 9.
44. Directive on Electronic Commerce, *supra* note 10.

> electronic contracts nor result in such contracts being deprived of legal effectiveness and validity on account of their having been made electronically.

There are many exceptions to this rule. It does not alter existing Community legislation on form requirements for certain consumer contracts, such as consumer credit according to Directive 87/102[45] and life insurance contracts according to Directive 92/96.[46] However, it is not clear whether the exception also includes the minimum harmonization provision of these directives. Member states may exclude contracts that create or transfer rights in real estate (except for rental rights), contracts of suretyship and on collateral securities furnished by persons acting for purposes outside their trade, business, or profession.

Furthermore, the rule cited above applies only to "contracts," which seems to imply the exclusion of negotiable instruments and rights created by company or securities law even if, as under German law, applicable member state law applies a contract theory for the creation of these rights. In the future, the European Court of Justice will have to interpret the concept of "contract" in this context.

With regard to the conclusion of a contract via electronic commerce, Article 11 of the Directive on Electronic Commerce contains the following language on "placement of the order:"

> (1) Member States shall ensure, except when otherwise agreed by parties who are not consumers, that in cases where a recipient of a service places his order through technological means, the following principles apply:
>
> - The service provider has to acknowledge the receipt of the recipient's order without undue delay and by electronic means.
>
> - The order and the acknowledgement of receipt are deemed to be received when the parties to whom they are addressed are able to access them.
>
> (2) Member States shall ensure that, except when otherwise agreed by parties who are not consumers, the service provider makes available to the recipient of the service appropriate, effective and accessible technical means

45. Consumer Credit Directive, *supra* note 40.
46. 1992 O.J. (L 360) 1.

> allowing him to identify and correct input errors, prior to the placing of the order.

Member states must determine the legal effects of the different steps in the placement of the order.

As shown above, the conclusion of the contract in cross-border cases will be governed by the law that would be applied to the contract if it were valid. The applicable law usually depends on choice of law clauses or the objective criteria of the Rome Convention leading to the law of the supplier's business seat. Since an ordinary consumer will rarely understand this complicated legal analysis, doubts may arise as to exactly when the contract is concluded. Such doubts would be reduced if the directive contained its own substantive rules on the conclusion of contracts. Even though the Community's compet-ence may be limited in the field of private law, it certainly has the competence to regulate contract law if such regulation aims at removing obstacles to the free movement of goods and services.[47]

2. Country of Origin Principle. Because of the lack of substantive contract law rules, the impact of the Directive on Electronic Commerce may remain limited in that field. The situation is much different in the field of non-contractual obligat-ions and administrative regulation. In this field, the Directive tries to establish a so-called "country of origin" principle—a principle already applied to cross-border television and financial services.[48] The practical application of this principle is less than clear because of a number of alterations and exceptions. For example, the important fields of data protection and intellectual property rights are excluded from the country of origin principle and remain governed by their own rules.

The so-called country of origin principle is described in Article 3 of the Directive on Electronic Commerce:

> (1) Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

47. Jürgen Basedow, *A Common Contract Law for the Common Market*, 1996 COMMON MKT. L. REV. 1169.

48. *See* NORBERT REICH, BÜRGERRECHTE IN DER EU 263-267 (1999); P.J.G. KAPTEYN ET AL., INTRODUCTION TO THE LAW OF THE EC 579-581 (3rd ed., 1999).

> (2) Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

The "coordinated field" is defined in Article 2(h)(i) broadly as all "requirements regarding the quality or content of the service including those applicable to advertising." This means that claims against businesses located in the EU that are based on certain Internet contents or Internet advertising practices can succeed only if they go no further than the law in the home member state of that business. For example, unfair advertising on the Internet in German language aimed at German consumers would give rise to a cause of action before German courts only if the law of the defendant's home member state so provides.

Although the Directive claims not to affect private international law rules, it does exactly that. Its implementation will lead to a substantial change in results compared to the conflict of laws rules as they are traditionally used in German law. These provide that, in general, the law of the affected marketplace will govern any tort claim or other non-contractual claims based on unfair marketing practices.

However, it is not completely precise to speak of a "country of origin" principle in the Directive in the sense that all claims brought in the receiving state would now be adjudicated according to the originating EU country's law.[49] The existing conflict rules remain formally untouched by the Directive, but their results must comply with the Directive. This means that a restriction on commercial Internet contents can only be ordered by the courts of the receiving country if such a restriction would also apply under the originating country's law. On the other hand, if the receiving country's law allows the content in question, this result of the receiving country's law would be unaffected by the rules in the Directive. Therefore, a more precise description of the Directive's operation would be a "most-favorable-law" principle rather than "country of origin" principle.[50] This is also the approach followed by the German government in its recently presented draft of legislation that is

49. *But see* Nina Dethloff, *Europäisches Kollisionsrecht des unlauteren Wettbewerbs*, 2000 JURISTENZEITUNG 179, 180 (claiming that the Directive on Electronic Commerce establishes a true country of origin principle in this sense).

50. For this distinction regarding EC Treaty law, *see* Jürgen Basedow, *Der kollisionsrechtliche Gehalt der Produktfreiheiten im europäischen Binnenmarkt: favor offerentis*, 59 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 1 (1995).

intended to implement the Directive on Electronic Commerce.[51] It remains to be seen how the courts and other member states' legislatures will cope with the consequences of the Directive before January of 2002.

The wording of the Directive suggests one solution. According to Article 3(4), even if laws in the receiving state are stricter than those in the state of origin, national consumer protection rules may be applied insofar as they are justified by the public interest. The application of stricter national rules on a case-by-case basis can be justified by reliance on the standards of rationality and proportionality that have been developed by the European Court of Justice over the last decades with regard to national limitations on the free movement of goods and services inside the EU.[52]

VII. The European Court of Justice's Solution: European Union Law as the Mandatory Law of the Forum

The main problem of cross-border electronic contracting seems to be that the consumer residing in the European Union cannot be sure that EC consumer protections will apply in all cases. Abrogation of EC protections may be accomplished by the use of choice of law clauses referring to non-EU countries as seen in several recent Directives.[53] This minimum standard of consumer protection will not be applied where the governing law is determined by the objective criteria of Article 4 of the Rome Convention. Article 11(3) of the proposed directive on distance marketing of financial services offers an interesting rule in this context:

> Consumers may not be deprived of the protection granted by this Directive when the law governing the contract is that of a country that does not belong to the European Community, when the consumer is resident on the territory of a Member

51. ENTWURF EINES GESETZES ÜBER RECHTLICHE RAHMENBEDINGUNGEN FÜR DEN ELEKTRONISCHEN GESCHÄFTSVERKEHR, February 15, 2001, *at* http://www.bmwi.de.

52. For a more detailed analysis of the implications of the Directive on Electronic Commerce in the field of tort law *see* Axel Halfmeier, *Vom Cassislikör zur E-Commerce-Richtlinie: Auf dem Weg zu einem europäischen Mediendeliktsrecht*, 2001 ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT (forthcoming). *Cf.* M. Lehmann, *supra* note 30, at 114 (describing Art. 3(4) of the Directiveon Electronic Commerce as an "emergency brake" regarding the effects of the country of origin principle).

53. Directive 93/13 on Unfair Terms, Directive 97/7 on Distance Selling, and Directive 1999/44 on Consumer Sales.

> State of the European Community and when the contract has a close link with the Community.

The cases that are referred to will be those where the trader has his business seat outside the EU and where the marketing activity is directed towards consumers residing in the EU.

This rule could be extended to cover all cases of electronic contracting between consumers and professional suppliers. Such a general extension would guarantee that the consumer residing in, and being solicited in, the EU would expect that the minimum protection rules of EC law will apply to his or her transactions, whatever law is mentioned in the small print and wherever the trader has his business seat. This principle would also avoid distortions of trade that may be possible if traders were allowed to opt out of mandatory community law either by imposing choice of law clauses or by taking their business seat outside the EC.

During the discussion on drafts of the Directive on Electronic Commerce, the following general rule was proposed:

> The consumer contracting electronically may not be deprived of the protection granted by EC directives, when the law governing the contract is that of a country that does not belong to the European Community, when the consumer is resident on the territory of a Member State of the European Community and when the contract has a close link with the Community.[54]

The Community legislature did not follow this suggestion. German law, by implementing Directive 97/7, has created a new EGBGB Article 29(a) supplementing existing conflict rules:

> (1) If a contract is not governed by the law of a Member State of the EU . . . because of choice of law clauses but has a close connection to one of the Member States, the provisions on implementing EC consumer protection directives have to be applied notwithstanding.
>
> (2) A close connection is deemed to exist, if
>
> - the contract is concluded upon a public offer, advertising or similar business activity taking place in a Member State of the EU . . . , and

54. *See* Norbert Reich, *Der Vorschlag der EG-Kommission für eine Richtlinie über bestimmte rechtliche Aspekte des elektronischen Geschäftsverkehrs*, *in* EUROPÄISCHE RECHTSANGLEICHUNG UND NATIONALE PRIVATRECHTE 79, 101 (H. Schulte-Nölke & R. Schulze eds. 1999).

> - to the the other party [the consumer] had its habitual residence in a Member State of the EU while making his declaration leading contract.

This new provision relates only to choice of law clauses, not to the applicability of a third country law by objective criteria. In all cases, however, the mandatory rules provision in Article 7(2) of the Rome Convention can be applied. Article 7(2) reads:

> Nothing in this convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Scholars of private international law are usually quite hostile to this rule, which looks like a relic of legal imperialism. Therefore, a restrictive criterion is used to avoid the application of "mandatory rules of the forum," in particular, the necessity of a "close connection." The restriction to rules with special public policy aims goes beyond the general idea of consumer protection or the exclusivity of the consumer protection rules under Article 5 of the Rome Convention.[55] On the other hand, such a narrow reading of Article 7(2) of the Rome Convention is justified if, and only if, Community law, with its insistence on creating uniform conditions of consumer protection in the internal market, does not determine the basic rules for electronic contracting.

It makes sense that the European Court of Justice has now supported a wider reading of the concept of mandatory rules of the forum. In the *Ingmar* case, the European Court ruled that certain claims of a commercial agent based on EC Directive 86/653 must be applied in favor of a British commercial agent who represented a principal from California. The Court ordered the application of Directive 86/653 notwithstanding the fact that California law governed the agency contract by virtue of a valid choice of law clause. The Court argued that Directive 86/653 aims at uniform conditions of competition in the European Community and that it was therefore important that the parties could not circumvent its provisions through a simple choice of law clause.[56]

While the Court does relate this judgment to the conflict of

55. This approach had been taken by the German Federal Court in its decision of March 19, 1997, *supra* note 27; *cf.* Ulrich Magnus, *in* STAUDINGER, BÜRGERLICHES GESETZBUCH, EGBGB art. 34, margin no. 36-38 (12th ed., 1998).

56. Case C-381/98, Ingmar GB Ltd. v. Eaton Leonard Technologies Inc., [2001] 1 C.M.L.R. 9 (English version); German version in 2001 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 50 with comment by Norbert Reich.

laws rules of the Rome Convention, European Advocate General Léger explicitly points to the French concept of *lois de police.* This concept is always applicable regardless of the law governing the contract and is considered a "mandatory rule of the forum" in the sense Article 7(2) of the Rome Convention.[57]

The importance of the *Ingmar* decision lies in the sweeping argument used by the Court to qualify the Directive on Commercial Agents 86/653 as a European *loi de police.* This directive, among others, aims at creating uniform conditions of competition throughout the European Union. The specific directives on consumer law follow the same goal—they try to set a minimum standard in their respective field in order to create a level playing field for competition in the European Union's internal market. It follows from *Ingmar* that the specific EC directives on consumer law set the minimum standard for transactions with consumers residing in the EU, regardless of the applicable law determined according to the Rome Convention.[58] The applicable law must still be consulted for any problem that goes beyond this minimum European standard.

This solution has the advantage that it is not always necessary to go through complicated conflict of laws mechanisms in order to find the applicable minimum rules for consumer transactions in electronic commerce. The EU consumer can rely on a uniform, minimum level of protection. Suppliers who are active in the EU can use these minimum rules as a guideline for their activities directed towards EU consumers.[59] They are contained in easily accessible EC Directives; no research into national laws is necessary to identify the minimum standard. Since all suppliers must conform to these standards, distortions of competition in the EU market would be reduced. Such a concept could strike a fair balance between freedom of trade and adequate consumer protection by uniform EU law that is not based on national idiosyncrasies.

---

57. *Id.*, margin no. A88.

58. *Cf.* Ludovic Bernardeau, *Droit Communautaire et Lois de Police*, 2001 EUROPE, janvier 2001, 1 at 5. This has already been argued before *Ingmar* for the Unfair Terms Directive, *see* 2 DICEY & MORRIS, *supra* note 26.

59. *Cf.* Maureen A. O'Rourke, *Progressing Towards a Uniform Commercial Code for Electronic Commerce or Racing Towards Nonuniformity?* 14 BERKELEY TECH L.J. 635, 656 (arguing in favor of an international clarification regarding mandatory rules in electronic commerce).

***