

EEC TREATY ARTICLE FIFTY-NINE AND ITS IMPLICATIONS FOR CONFLICTS LAW IN THE FIELD OF INSURANCE CONTRACTS

Dr. Wulf-Henning Roth*

I. INTRODUCTION

The freedom to provide services within the member states of the European Community (EC) represents one of the fundamental freedoms guaranteed by the Treaty Establishing the European Economic Community (EEC Treaty).¹ These freedoms bind both the member states of the EC and the EC legislature. Therefore, conflicts rules established to coordinate divergent legal standards in the member states must be consistent with the freedom to provide services.² The coordination between these two concepts is essential, as the establishment of the common market has had a major impact on the conflicts laws of the member states.

In order to assure the proper functioning of interstate trade a broad-scale harmonization of all trade related conflicts rules has been demanded.³ To this end, three EC member states⁴ initiated, and formally

* Professor of Law, LL.M. (Harvard), Dr.jur. (Munich); Director of the Institute of International Private Law and Comparative Law at the University of Bonn Law School; Member of the Center for European Economic Law, Bonn Law School.

A different version of this article will be published by Kluwer Publications in *INTERNATIONAL INSURANCE LAW WITHIN THE EEC* (Fritz Reichert-Facilides ed., forthcoming 1992).

1. See *TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY* [EEC TREATY] art. 59, which in pertinent part provides:

Within the framework of the provisions set out below, restrictions on freedom to provide services within the Community shall be progressively abolished during the transitional period in respect of nationals of Member States who are established in a State of the Community other than that of the person for whom the services are intended.

Id. This Article governs, *inter alia*, the provision and reception of insurance services and applies to all restrictions that may interfere with this freedom. This concept is discussed in detail *infra* part III.

2. Until now, very little attention has been paid to the degree to which choice-of-law rules, established for the purpose of harmonizing the laws of the member states, could conflict with the EEC TREATY. This lack of attention was due to the early belief that the issue would arise only in the context of the discriminatory application of domestic laws toward subjects of another member state. For a discussion of the interrelationship between Community law and conflicts law, see Wulf-Henning Roth, *Der Einfluß des Europäischen Gemeinschaftsrechts auf das Internationale Privatrecht*, 55 *RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT* [RABELSZ] (forthcoming 1991).

3. See, e.g., René Savatier, *Le Marché Commun au regard du droit international privé*, 48 *REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ* 237 (1959); Konrad Zweigert, *Einige Auswirkungen des Gemeinsamen Marktes auf das Internationale Privatrecht der Mitgliedsstaaten*, in *FESTSCHRIFT FÜR WALTER HALLSTEIN: PROBLEME DES EUROPÄISCHEN RECHTS* 555, 555 (1966).

submitted, a proposal for the negotiation of a unified conflicts code in 1967.⁵ This proposal eventually led to the 1980 Convention on the Law Applicable to Contractual Obligations (Rome Convention), which defines conflicts laws regarding contractual obligations between member and nonmember states.⁶

With regard to the provision of insurance services between member states, the Commission of the European Communities (Commission) quickly realized that choice-of-law rules would influence the degree to which integration of the divergent national insurance markets could be achieved.⁷ The Commission's first attempt to resolve divergent insurance conflicts rules led to the 1971 working paper (Schwartz Report),⁸ wherein the Commission proposed the establishment of a common insurance market.⁹ The Commission later issued the Second Non-Life Directive¹⁰ and the Second Life Directive¹¹ which employ the location of the risk as one of their basic connecting factors¹² for conflicts rules and add mandatory choice-of-law rules to ensure consumer protection.¹³ As will be shown, the use of location of the risk as a basic connecting factor (though divergent in scope) can be interpreted in accordance with the basic tenets of Article 59 of the EEC Treaty. The same, however, cannot be said for all applications of mandatory choice-of-law rules for purposes of consumer protection. In order to facilitate the analysis of the relationship between the EEC Treaty and the two Directives in question, this article first examines the history behind insurance conflicts law in the EC.

4. Belgium, The Netherlands, and Luxembourg.

5. IAN F. FLETCHER, *CONFLICT OF LAWS AND EUROPEAN COMMUNITY LAW* 147 (1982).

6. Convention on the Law Applicable to Contractual Obligations, *opened for signature* June 19, 1980, 1980 O.J. (L 266) 1 [hereinafter Rome Convention].

7. See WULF-HENNING ROTH, *INTERNATIONALES VERSICHERUNGSVERTRAGSRECHT* 678-85 (1985).

8. Errichtung des Gemeinsamen Marktes für Schadensversicherungen (German version), 61 *ZEITSCHRIFT FÜR DIE GESAMTE VERSICHERUNGS-WISSENSCHAFT* 101 (1972) [hereinafter Schwartz Report].

9. *Id.* In many respects this proposal was the forerunner of the harmonization policy embodied in the Commission's 1985 White Paper regarding the completion of the Common Market. *Completing the Internal Market: White Paper from the Commission to the European Council*, COM(85)310 final at 27-29 [hereinafter White Paper].

10. Second Council Directive 88/357 of 22 June 1988 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance Other than Life Assurance and Laying Down Provisions to Facilitate the Effective Exercise of Freedom to Provide Services and Amending Directive 73/239/EEC, 1988 O.J. (L 172) 1 [hereinafter Second Non-Life Directive].

11. Council Directive 90/619 of 8 November 1990 on the Coordination of Laws, Regulations and Administrative Provisions Relating to Direct Life Insurance, Laying Down Provisions to Facilitate the Effective Exercise of Freedom to Provide Services and Amending Directive 79/267/EEC, 1990 O.J. (L 330) 50 [hereinafter Second Life Directive].

12. For example, the connecting point for jurisdictional and choice-of-law purposes. Compare the similar usage of the term "basic connecting factor" in ROBERT A. LEFLAR, *AMERICAN CONFLICTS LAW* § 9 (3d ed. 1977).

13. See Second Non-Life Directive, *supra* note 10, art. 7(2); Second Life Directive, *supra* note 11, pmb1.

II. DEVELOPMENTS LEADING UP TO THE SECOND NON-LIFE DIRECTIVE

A. The Schwartz Report

In the Schwartz Report the Commission proposed the establishment of a common insurance market. This proposal rested upon four basic propositions:

(1) authority to supervise interstate insurance services should be shifted from the state of risk¹⁴ to the exclusive supervision by the state of the insurer;¹⁵

(2) regulations concerning taxation, technical reserves and supervision techniques should be harmonized;

(3) premarket control¹⁶ of policy conditions by supervisory authorities was to be abolished with regard to large risks¹⁷ or transformed into postmarket control;¹⁸ and

(4) important issues of insurance contract law and relevant conflicts rules were to be harmonized.¹⁹

The Schwartz Report based its conflicts rules on party autonomy²⁰ and the principle of characteristic obligation,²¹ but it ignored other important

14. The state of risk is generally considered to be that location where the contingency covered by the insurance policy is located.

15. This is generally known as home country control.

16. Pre-market control refers to the requirement that the authorities pre-approve the policy conditions of the insurance contract.

17. For insurance contracts covering large risks as well as transportation insurance, the Schwartz Report suggested that the parties should be free to choose of whichever member state's that they agreed upon. The report disavowed the necessity of harmonizing insurance contract law with regard to large risks. Schwartz Report, *supra* note 8, at 108.

Insurance contracts covering large risks include coverage for ships, aircraft, railway rolling stock, goods in transit, and liability insurance for ships and aircraft.

18. Postmarket control refers to techniques of controlling policy conditions that apply after the relevant product has been put on the market, i.e., mandatory rules that are applied by the courts in a subsequent controversy.

19. Schwartz Report, *supra* note 8, at 112-14, 118-20, 121-24.

20. Party autonomy signifies the freedom of the parties to choose the law applicable to their contracts.

21. The principle of characteristic obligation refers to a doctrine holding that the law to be applied is that of the state where the party whose performance is characteristic of the type of contract in question has its seat or residence. In the insurance context, this doctrine generally dictates that the law of the state of the insurer applies. This principle is, for example, referred to in Rome Convention Article 4(2) which establishes a presumption that

the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration.

Rome Convention, *supra* note 6, art. 4(2). For an explanation of the principle of characteristic obligation, which is largely of Swiss origin, see FLETCHER, *supra* note 5, at 162. For a radical critique, see ROTH, *supra* note 7, at 316-29.

considerations of conflicts law such as consumer protection.²² These conflicts rules obligate insurers to abide by only the legal system of the state in which they are established. This allows insurers to coordinate their interstate provision of services and to facilitate the development of a common insurance market. The Schwartz Report stated that applying the law of the state in which the risk was located would prolong the existence of traditional national insurance markets and, therefore, was antithetical to the establishment of a common market.²³

The Schwartz Report, despite never discussing how EEC Treaty Article 59 applied to national conflicts rules,²⁴ stressed that the Community would have to foster the basic aims and tenets of the EEC Treaty in its secondary legislation.²⁵ Thus, the Report called on the Community legislature to harmonize insurance services through conflicts-of-law rules.

B. The Second Non-Life Directive

The final version of the Second Non-Life Directive²⁶ does not adopt the recommendations set forth in the Schwartz Report. Instead, it states that the law of the state of risk, rather than that of the state of the insurer's seat, is controlling.²⁷ This general principle is supplemented by complicated sets of rules regarding party autonomy. One set of rules requires member states to allow for restricted party autonomy in certain situations²⁸ and to grant unrestricted party autonomy with respect to insurance contracts concerning large risks.²⁹ Yet, in another set of rules,

22. The Report applied the principle of characteristic obligation with the seat of the insurer as a connecting factor as a subsidiary rule. For a definition of seat, see EEC TREATY art. 58.

23. Schwartz Report, *supra* note 8, at 106-07.

24. *Id.* at 106-10. There is no indication whatsoever that EEC Treaty Article 59 may have any effect on non-discriminatory conflict rules.

25. *Id.* at 110.

26. See *supra* note 10.

27. *Id.* art. 7(1)(a), which provides that "[w]here a policy-holder has his habitual residence or central administration within the territory of the Member State in which the risk is situated, the law applicable to the insurance contract shall be the law of that Member State." *Id.* Numerous proposals for the Second Non-Life Directive were presented subsequent to the Schwartz Report. For a review of these proposals and the degree to which they deviated from the initial concepts developed by the Commission, see ROTH, *supra* note 7, at 684-89.

28. E.g., Second Non-Life Directive, *supra* note 10, art. 7(1)(b). This article provides:

Where a policy-holder does not have his habitual residence or central administration in the Member State in which the risk is situated, the parties to the contract of insurance may choose to apply either the law of the Member State in which the risk is situated or the law of the country in which the policy-holder has his habitual residence or central administration.

Id. See also *id.* arts. 7(1)(c), 7(1)(e).

29. See *id.* arts. 7(1)(f), 5(d)(1) (providing for unrestricted party autonomy with regard to choice-of-law).

member states may opt to grant the parties a certain degree of autonomy, although they are not required to do so.³⁰

C. The Rome Convention

The Rome Convention provides a third application of conflict-of-law rules for insurance contracts covering risks outside the EC.³¹ The Convention allows the relevant parties not only to choose between the law of the state of the insurer and that of the policyholder, but to choose any law that they wish.³² In some cases, the rules also require the application of the consumer protection laws of the state where the policyholder resides.³³

The perpetuation of differing sets of choice-of-law rules for insurance contracts in the Second Non-Life Directive and in the Rome Convention has met with strong criticism.³⁴ Such a divergence seems to be completely inappropriate. However, this dichotomy was established to enhance the insurer's freedom to provide services.³⁵ It is for this reason that the Rome Convention excludes from its ambit, insurance contracts concerning risks located within the Community.³⁶ An interesting question remains regarding whether the application of the conflicts provisions of the Rome Convention is, in actuality, more consistent with the harmonization principles required by Article 59 of the EEC Treaty than the Second Life Directive and Non-Life Directive.

30. See *id.* art. 7(1)(a) (providing that the member state where the risk is located may opt for party autonomy). See also *id.* art. 7(1)(d).

31. Rome Convention, *supra* note 6, art. 1(3). The Rome Convention, however, applies to reinsurance contracts irrespective of the location of the risk. See *id.* art. 1(4).

32. See *id.* art. 3.

33. The Rome Convention provides:

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
- 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 travelled 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.

Id. art. 5(2).

34. See, e.g., D. LASOK & P. A. STONE, *CONFLICT OF LAWS IN THE EUROPEAN COMMUNITY* 355 (1987).

35. Moreover, there is a third group of insurance contracts that is neither covered by the Rome Convention nor by the Second Non-Life Directive. These are contracts concluded by insurers with an establishment outside the EC pertaining to risks located in the EC. The Rome Convention cannot apply to risks situated inside the EC and the Second Non-Life Directive is addressed to insurers with a seat inside the EC. See, e.g., FLETCHER, *supra* note 5, at 154-55.

36. See Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (C 282) 1, 13.

III. EEC TREATY ARTICLE 59: THE FREEDOM TO PROVIDE SERVICES

The requirement that any solution developed by the EC in its secondary legislation must be consistent with primary Community law³⁷ has influenced the discussion concerning the freedom to provide services in the insurance industry. The two most important primary EC law principles relevant to the discussion in this article are undistorted competition³⁸ and nondiscrimination.³⁹ Both principles were relied upon when it was argued that choice-of-law rules, formulated without prior harmonization of substantive insurance contract law, should not competitively disadvantage insurers established in member states that have comprehensive consumer protection.⁴⁰ Insurers located in these member states should not be forced to compete with insurers seated in member states that have lower standards of consumer protection. In its efforts to produce nondiscriminatory standards among insurers regardless of their location, the Second Non-Life Directive uses the location of the risk as the primary objective connecting factor⁴¹ and provides only for a limited role of party autonomy outside the field of large risks.⁴² This solution is not wholly consistent with the freedom to provide services under Article 59.

It is important to note, however, that the scope of Article 59 is different from, but not inconsistent with, the choice-of-law provisions of the Second Non-Life Directive. Article 59 covers the provision of services between nationals of different member states.⁴³ The criteria in the Second Non-Life Directive regarding interstate services apply "where an undertaking, through an establishment situated in a Member State, covers a risk situated . . . in another Member State."⁴⁴ Under the Second Non-Life Directive, the location of the risk need not be in the same member

37. For a more detailed discussion, see ROTH, *supra* note 7, at 697-99, 717-20.

38. See EEC TREATY art. 3(f) ("the activities of the Community shall include, . . . the institution of a system ensuring that competition in the common market is not distorted; . . .").

39. *Id.* art. 7 ("Within the scope of application of this Treaty, and without prejudice to any special provisions contained therein, any discrimination on grounds of nationality shall be prohibited.").

40. See, e.g., ROTH, *supra* note 7, at 718; Martin Herzog, *Die Integration der Versicherungswirtschaft in die EWG*, 23 *VERSICHERUNGSWIRTSCHAFT* 1509, 1512 (1971); Ernst Steindorff, *Dienstleistungsfreiheit und ordre public*, in *DIENSTLEISTUNGSFREIHEIT UND VERSICHERUNGSAUFSICHT IM GEMEINSAMEN MARKT* 79, 112-14 (Maurice Lagrange et al. eds., 1971).

41. An objective connecting factor is a nonconsensual connecting factor, i.e., a connecting factor not requiring the consent of the parties.

42. See Second Non-Life Directive, *supra* note 10, art. 7.

43. Taken literally, a contract concluded between an insurer seated in state A and a policyholder established in the same state, and covering a risk in state B, is not protected by Article 59 of the EEC Treaty.

44. Second Non-Life Directive, *supra* note 10, art. 12.

state as the policyholder.⁴⁵ Thus, the use of different criteria is consistent with Article 59 as the choice-of-law provisions of the Second Non-Life Directive apply to all insurers established in the Community and cover all risks situated within the Community, irrespective of the residence or administration of the policyholder.⁴⁶

A. Application of Article 59 to the Acts of the Community Legislature

The fundamental freedoms of the EEC Treaty are binding on the Community organs as well as the member states.⁴⁷ Accordingly, the Community legislature cannot oblige the individual member states to enact measures that are prohibited by the EEC Treaty.⁴⁸ In *Commission v. Germany*,⁴⁹ for example, the court implicitly took the view that when the wording of secondary Community law is open to more than one interpretation, the preferred construction is the one that renders the provision compatible with the EEC Treaty.⁵⁰ Therefore, the conflicts rules of the Second Non-Life Directive and the Second Life Directive must be compatible with the standards developed under Article 59.

Article 59 states that "restrictions on the free supply of services within the Community shall be progressively abolished."⁵¹ Thus, Article 59 covers all restrictions, that may burden the interstate provision of services, including conflicts laws, and does not merely prohibit those measures that discriminate against a foreign provider of insurance services.

The application of mandatory choice-of-law rules has the potential to influence the contractual obligations of the parties, and therefore the character of the contract. The quality of insurance as a legal product⁵² is

45. *Id.* art. 2(d).

46. *Id.* art. 7.

47. See, e.g., EBERHARD GRABITZ, KOMMENTAR ZUM EWG-VERTRAG, art. 30 (2d ed. 1990); Wulf-Henning Roth, *The European Economic Community's Law on Services: Harmonisation*, 25 COMMON MKT. L. REV. 35, 72-73 (1988). To illustrate, EEC Treaty Article 3(c) requires member states to abolish any obstacles that hinder the free movement of persons and services between them. EEC TREATY art. 3(c). This task must, at least in part, be fulfilled by Community action. Hence, while the Community legislature may take action to promote and facilitate the interstate provision of services, it may not infringe upon this basic freedom to provide services. Cf. *id.* arts. 57(2), 66.

48. This follows from the legal nature of the EEC Treaty as an international treaty whose revision lies in the hands of the member states. See EEC TREATY art. 236. Hence, Community legislation is meant to comply with the basic principles of the EEC Treaty and not to alter them. Furthermore, the Community legislature may not call into question the already achieved unity of the Common Market. Joined Cases 80 & 81/77, *Société des Commissionnaires Réunis S.A.R.L. v. Receveur des Douanes*; *Les fils de Henri Ramel v. Receveur des Douanes*, 1978 E.C.R. 927, 947.

49. Case 205/84, *Commission v. Federal Republic of Germany*, 1986 E.C.R. 3755, 2 C.M.L.R. 69 (1987) [hereinafter *Commission v. Germany*].

50. *Id.* at 3814, 2 C.M.L.R. at 110.

51. EEC TREATY art. 59. For the text of Article 59, see *supra* note 1.

52. A legal product is a product that exists only in the law.

determined by the general and special policy conditions of the insurance contract. Instead of presenting one insurance product for the entire common market, the insurer would be forced to frame its insurance policies according to the relevant national insurance law of the individual member states if the location of risk is used as a connecting factor. This would inhibit the ability of the insurer to allocate its resources efficiently and, thus, is contrary to the idea of a single unified market. While mandatory choice-of-law rules work as a postmarket control, their influence on insurance services is not fundamentally different from traditional schemes of premarket control through national insurance supervision.⁵³

B. Relevant Standards Promulgated by the European Court of Justice Under EEC Treaty Article 59

The European Court of Justice (ECJ) already has addressed supervisory regulations of the state where the service is to be provided (state of destination).⁵⁴ The following analysis will distinguish between regulations concerning the provision of services and regulations regarding the reception of services, since different standards apply to these categories.

1. *Regulations Concerning the Provision of Services by the Insurer.* In *Commission v. Germany* the ECJ held that Article 59:

require[s] the removal not only of all discrimination against a provider of a service on the grounds of his nationality but also all restrictions on his freedom to provide services imposed by reason of the fact that he is established in a Member State other than that in which the service is to be provided.⁵⁵

The Court stated that with regard to regulations restricting the import of services, only "imperative reasons relating to the public interest . . . may justify restrictions on the freedom to provide services."⁵⁶ Such restrictions will be justified only if the state of the service provider's establish-

53. See Norbert Reich, *Die Freiheit des Dienstleistungsverkehrs als Grundfreiheit*, 153 ZEITSCHRIFT FÜR DAS GESAMTE HANDELSRECHT UND WIRTSCHAFTSRECHT [ZHR] 571, 588 (1989). For a brief explanation of the concepts of pre-market control and post-market control, see *supra* notes 16, 18.

54. See, e.g., *Commission v. Germany*, 1986 E.C.R. at 3755, 2 C.M.L.R. at 70; Case 279/80, *Proceedings Against Webb*, 1981 E.C.R. 3305, 1 C.M.L.R. 719 (1982); Case 52/79, *Procureur du Roi v. Debauve*, 1980 E.C.R. 833, 2 C.M.L.R. 362 (1981); Joined Cases 110 & 111/78, *Ministère Public v. van Wesemael*, 1979 E.C.R. 35, 3 C.M.L.R. 87 (1979); Case 33/74, *van Binsbergen v. Bestuur van de Bedrijfsvereniging voor de Metaalnijverheid*, 1974 E.C.R. 1299, 1 C.M.L.R. 298 (1975).

55. *Commission v. Germany*, 1986 E.C.R. at 3802, 2 C.M.L.R. at 101.

56. *Id.* at 3804, 2 C.M.L.R. at 102. The Court refers to public interest and the general good as a justification for any measures of the states that burden the interstate trade of goods or the interstate provision of services. *Id.* at 3803-04, 2 C.M.L.R. at 103. See also *Debauve*, 1980 E.C.R. at 856, 2 C.M.L.R. at 394. The public interest must be of a non-economic and non-protective nature. Whereas the justifications contained in EEC Treaty Articles 36 and 56 may justify even discriminatory measures, the Court held that a justification of measures that burden the interstate trade by public interest is only available for non-discriminatory measures. *Id.*

ment⁵⁷ does not guarantee the necessary level of protection, and if the relevant regulations are not excessive.⁵⁸ Choice-of-law rules that call for the application of the law of the state of destination must be judged by these standards.

In contrast, the ECJ has not yet dealt with regulations of a state where the service provider is established that would burden the export of insurance services to other member states.⁵⁹ The freedom to provide services should also apply to these regulations. This view is supported by the wording of several EEC Treaty articles,⁶⁰ particularly Article 34.⁶¹ Since Article 59 is broad in scope, it can easily be interpreted to encompass a prohibition against discriminatory standards similar to that given by the ECJ to Article 34.⁶² It should be noted, however, that this prohibition is a rather restrictive interpretation of Article 34,⁶³ and the ECJ is likely to interpret Article 59 in the same restrictive fashion.⁶⁴

2. *Regulations Concerning the Reception of Services by the Policyholder.*

There are two subcategories within the category of reception of services: regulations of the state of the policyholder's residence and regulations of the state of the insurer's establishment.

In the first subcategory, which includes cases where the recipient seeks insurance abroad, the freedom to provide services extends to the right to receive services. Thus, member states may not prohibit their residents from traveling to another member state in order to obtain services

57. The state of the service provider's establishment is the state where the insurer has its central administration or its branch or agency that transacts the relevant business. Second Non-Life Directive, *supra* note 10, arts. 2(c), 2(e).

58. *Commission v. Germany*, 1986 E.C.R. at 3804, 2 C.M.L.R. at 102-03. See also Case 154/89, *Commission v. France*, Feb. 26, 1991, not yet reported (addressing the principle of proportionality).

59. But see the Court's remark *en passant* in Case 252/83, *Commission v. Denmark*, 1986 E.C.R. 3713, 3750-51, 2 C.M.L.R. 169, 186 (1987).

60. See EEC TREATY arts. 30-36.

61. Article 34 prohibits all quantitative restrictions regarding the export of goods, as between member States, and all measures having an equivalent effect. *Id.* art. 34.

62. See Case 158/80, Summary Proceedings against Sergius Oebel, 1981 E.C.R. 1993, 2009, 1 C.M.L.R. 390, 405 (1983). It is questionable, however, whether this standard will always lead to an acceptable result. For example, a good argument can be made for allowing the manufacture of a product in state A which contravenes the relevant regulations of state A concerning the composition of the product, if the product is in conformity with regulations of state B, the state to which it is to be exclusively exported and sold.

63. See, e.g., *id.* at 2009-10, 1 C.M.L.R. at 405; Case 15/79, P.B. Groenveld B.V. v. Produktschap voor en Vlees, 1979 E.C.R. 3409, 3415, 1 C.M.L.R. 207, 215 (1981).

64. The differentiation that the Court makes between the restrictive interpretation of EEC Treaty Article 34 and the general approach it takes toward EEC Treaty Articles 30-36 is sensible in the light of Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 3 C.M.L.R. 494 (1979) [hereinafter *Cassis-de-Dijon*], and the development of the state-of-origin principle, discussed *infra* note 68.

there.⁶⁵ This freedom to receive services also encompasses the freedom to choose among the products and services offered throughout the EC.⁶⁶ This freedom should allow consumers to make a purchase in a foreign member state under the same conditions as the citizens of that state.

In *GB-Inno-BM*, for example, the ECJ held that Article 30 of the EEC Treaty guaranteed a consumer's right to travel to a different member state to make a purchase under the same conditions that apply to the citizens of that member state.⁶⁷ Extending this interpretation to EEC Treaty Article 59 is consistent with the concept of a single unified market increasingly dominated by the "state-of-origin principle."⁶⁸ Any regulation of the state of the recipient's residence that interferes with the freedom of the purchaser to receive services in another state should have to meet an exacting standard; in order to justify the application of such regulations there must be an imperative reason based on the public interest.⁶⁹

In the second subcategory, when regulations of the state of the insurer's establishment burden the reception of services by out-of-state recipients, a simple discrimination standard⁷⁰ appears to be adequate.⁷¹ This also seems to be consistent with the relevant decisions of the ECJ.⁷²

65. See *Joined Cases 286/82 & 26/83, Luisi and Carbone v. Ministero del Tesoro*, 1984 E.C.R. 377, 3 C.M.L.R. 57 (1985).

66. See, e.g., THOMAS OPPERMAN, *EUROPARECHT* § 24, at 578 (1991); STEFAN VÖLKER, *PASSIVE DIENSTLEISTUNGSFREIHEIT IM EUROPÄISCHEN GEMEINSCHAFTSRECHT*, reprinted in 21 TÜBINGER SCHRIFTEN ZUM INTERNATIONALEN UND EUROPÄISCHEN RECHT (Thomas Oppermann et al. eds., 1990).

67. See *Case 362/88, GB-Inno-BM v. Confédération du Commerce Luxembourgeois A.S.B.L.*, 1990 E.C.R. 667, 686, 2 C.M.L.R. 801, 816 (1991). Article 30 of the EEC Treaty states that "[q]uantitative restrictions on imports and all measures having equivalent effect shall, without prejudice to the following provisions, be prohibited between Member States." EEC TREATY art. 30.

68. Compare *Cassis-de-Dijon*, 1979 E.C.R. at 649, 3 C.M.L.R. at 494 (state-of-origin principle) with Second Council Directive 89/646 of 15 December 1989 on the Coordination of Laws, Regulation and Administrative Provisions Relating to the Taking Up and Pursuit of the Business of Credit Institutions and Amending Directive 77/780, arts. 4-6, 1989 O.J. (L 386) 1, 4-5 (single-license principle).

According to the "state-of-origin principle", products and services that conform to the standards of production their state of origin may generally be sold everywhere, within the limits required by the general welfare of the state of destination. Since the state of importation must consider the regulations of the state of origin, its authority to regulate is subordinate to the authority of the state of origin. In contrast, the state of origin cannot be obliged to take notice of the potentially differing regulations of states of destination, with the exception of cases covered by *Oebel*, 1981 E.C.R. at 1993, 1 C.M.L.R. at 406.

69. For a discussion of the concept of *public interest*, see *supra* note 56.

70. In this context, a discrimination standard means that a state may not directly or indirectly discriminate against foreign nationals by treating its own nationals more preferably.

71. See discussion *infra* part IV.

72. See *GB-Inno-BM*, 1990 E.C.R. at 686, 2 C.M.L.R. at 816 (holding that a consumer has the right to purchase under the same conditions as the local population). See also *Case 186/87, Cowan v. Trésor Public*, 1989 E.C.R. 195, 220-22, 2 C.M.L.R. 613, 630-32 (1990) (holding EEC Treaty Article 7 applicable to conditions not directly related to the purchased product or service).

These varying standards can be explained by the fact that regulations of the state of the insurer's establishment that burden or restrict the interstate reception of services on a nondiscriminatory basis conform to the state-of-origin principle. It would be unwarranted to apply a stricter standard in favor of service recipients who are residents of other member states. In contrast, when regulations of the policyholder's state of residence burden the out-of-state reception of services they conflict with the state-of-origin principle, which lies at the heart of the single market.

IV. IMPLICATIONS FOR COMMUNITY CONFLICTS LAWS

A. Location of Risk as the Basic Connecting Factor

1. *The Role of Risk Location in the Second Non-Life Directive.* Throughout the Second Non-Life Directive the location of risk is used as the basic connecting factor for jurisdictional and choice-of-law purposes.⁷³ For example, the authority to regulate the interstate provision of services lies with the state of the insurer's establishment and the state in which the risk is located.⁷⁴ Only the state in which the risk is located may impose additional administrative requirements on the provision of interstate services.⁷⁵ Furthermore, the state in which the risk is located also possesses exclusive legislative jurisdiction over taxes on premiums and tax-like charges.⁷⁶

2. *The Second Non-Life Directive's Divergence from EEC Treaty Article 59.* The use of risk location as the basic connecting factor of the Second Non-Life Directive conflicts with Article 59 of the EEC Treaty. Article 59 contains no reference to the location of risk as a connecting factor. Instead, it uses the establishment of the service provider and the establishment or residence of the recipient as the decisive criteria to define its scope.⁷⁷ In *Commission v. Germany*, the ECJ defined the scope of Article 59 by exactly these criteria.⁷⁸

73. The Directive's provisions concerning the freedom to provide services apply only when an enterprise situated in one member state covers a risk located in another member state. See, e.g., Second Non-Life Directive, *supra* note 10, art. 12(1).

74. *Id.* arts. 12, 14-15. Article 15(1) speaks of a "Member State within the territory in which an undertaking intends to provide services." *Id.* art. 15(1). According to Article 2(f), this is the "Member State in which the risk is situated when it is covered by an establishment in another Member State." *Id.* art. 2(f).

75. See *id.* art. 15.

76. *Id.* art. 25. Tax-like charge refers to any financial levy that, though not classified as tax, nevertheless has the same effect, e.g., a lump-sum charge that becomes due at the conclusion of an insurance contract.

77. Note that the terminology used here is the same as that used in the Second Non-Life Directive. See Second Non-Life Directive, *supra* note 10, art. 2.

78. *Commission v. Germany*, 1986 E.C.R. at 3801, 2 C.M.L.R. at 100.

The ECJ also stated that the concept of consumer protection could be used to justify insurance regulation by the policyholder's state of residence where insurance services were provided in the state.⁷⁹ Despite the fact that the notion of services provided in a member state remains unclear, the Court held that this justification applied to consumers residing in the state and to any local business activities that cater to local residents.⁸⁰ While the risk usually will be located in the state where the policyholder resides, the Court recognized that special problems may arise where the risk covered by the insurance contract is not situated in the member state of the policyholder.

The Second Non-Life Directive addressed these special problems. The Directive attributes legislative and enforcement jurisdiction to the state of risk location when it differs from the state of the residence of the policyholder in three specific situations:

- (1) holiday insurance contracts of no more than four months duration;
- (2) insurance contracts covering buildings and their contents; and
- (3) insurance contracts covering registered vehicles, the place of registration being the location of the risk.⁸¹

In the first situation the law of the insurer's establishment will usually apply. In that case there is no conflict with Article 59 since conflicts law does not burden the insurer's activities. In the last two situations, however, the application of the law of the state where the risk is located is in potential conflict with Article 59. For example, if the location of the property or the place of registration of a vehicle do not coincide with the insurer's state of establishment, or the policyholder's state of residence, the Directive clashes with the EEC Treaty.

Regulations of a state where the risk is located that burden the interstate provision of services can hardly be justified by consumer protection in cases where the policyholder is a resident of a different member state. Consumer protection is a matter for the latter state to implement through its national policy. However, a possible justification lies in the protection of third parties. Hence, protection of persons injured by accidents may

79. *Id.* at 3803-07, 2 C.M.L.R. at 102-07. While the Court went into detail regarding the relevant standards for state regulations, it was very brief on the issue of legislative jurisdiction. There are also other justifications, such as third party protection.

80. Comparable questions concerning the legislative jurisdiction of the member states have been touched upon in two decisions in which the Court expressly acknowledged the competence, i.e., legislative jurisdiction, of a member state to regulate minimum wages of the labor force "within" that state. Case 113/89, *Rush Portuguesa Limitida v. Office National d'Immigration*, 1990 E.C.R. 1417, 2 C.M.L.R. 818 (1990); Joined Cases 62 & 63/81, *Seco S.A. and Desquenne & Giral S.A. v. Etablissement d'Assurance*, 1982 E.C.R. 223, 236-37 [1981-83 Transfer Binder] Common Mkt. Rep. (CCH) ¶ 8811 (1982).

81. Second Non-Life Directive, *supra* note 10, art. 2(d).

qualify as a compelling reason for regulation by the state in which the risk is located. Still, to justify burdening the provision of interstate services, member states must do more than merely pay lip service to the concept of third party protection. Third party protection is effective only if insurance coverage for potentially dangerous property is made mandatory.⁸² Thus, in a case where the state of risk location does not mandate coverage of the relevant risk, the assignment to that state of legislative and enforcement jurisdiction could burden the interstate provision of services and therefore run afoul of Article 59.

3. *The Compatibility of the Second Non-Life Directive's Choice-of-Law Rules with EEC Treaty Article 59.* The basic choice-of-law rule embodied in the Second Non-Life Directive is consistent with EEC Treaty Article 59. The Directive mandates applying the law of the state in which the risk is located if that state is also the state of the habitual residence of the policyholder.⁸³ If the policyholder does not reside in that state, the Directive provides for limited party autonomy⁸⁴ by allowing the parties to choose which member state's law will apply.⁸⁵ Parties who select the controlling law cannot complain that this law unjustifiably burdens the interstate trade in services. If the parties have not chosen a particular legal system, the Second Non-Life Directive applies the law of the state with which the contract is most closely connected; the Directive includes a rebuttable presumption in favor of the state in which the risk is located.⁸⁶ This presumption is inconsistent with the reasoning of *Commission v. Germany*, which held that the member state where the policyholder resides may specify an appropriate level of consumer protection.⁸⁷ The fact that the Directive's presumption in favor of the state of risk is rebuttable may, nonetheless, prevent the relevant section from being invalidated by the ECJ as a violation of EEC Treaty Article 59.

B. Nonconsensual Connecting Factors and Their Compatibility with EEC Treaty Article 59

Mandatory choice-of-law provisions that compel the application of the law of the state of the policyholder's residence have the potential to

82. This is because if insurance coverage is not mandatory, third party protection depends on the arbitrary decision of the property owner to take out insurance.

83. Second Non-Life Directive, *supra* note 10, art. 7(1)(a).

84. *Id.* art. 7(1)(b). For a detailed analysis, see Christopher G. J. Morse, *Party Autonomy in International Insurance Contract Law*, in *INTERNATIONAL INSURANCE LAW WITHIN THE EEC* (Fritz Reichert-Facilides ed., forthcoming 1992).

85. If the policyholder resides in a non-member state, this country's law may be chosen as well. Second Non-Life Directive, *supra* note 10, art. 7(1)(b).

86. *Id.* art. 7(1)(h).

87. See *Commission v. Germany*, 1986 E.C.R. at 3755, 2 C.M.L.R. at 69.

burden the interstate provision of insurance services. Such provisions, for example, may force insurers to shape their policy conditions to conform to twelve different legal systems. Nevertheless, both the Second Non-Life Directive and Second Life Directive apply this rule, while providing member states with the discretion to grant party autonomy.⁸⁸

The Second Non-Life Directive allows the member state in which the risk is located, and in which the policyholder resides, to exclude party autonomy altogether.⁸⁹ The conflict-of-law provision in the Second Life Directive is similar; it provides for the application of the law of the state of the policyholder's residence.⁹⁰ The member states are required to grant the parties the right to choose the law of the policyholder's state of nationality when this state and the state of the policyholder's residence are not the same.⁹¹ The member states can, if they choose, grant the parties a greater degree of autonomy—the right to choose the law of the insurer's establishment. However, they are not obligated to do so.⁹² It is doubtful whether this approach can be reconciled with the demands of Article 59 which calls for a greater degree of party autonomy.

1. *Mandatory Choice-of-Law Rules and Consumer Protection.* The concept of consumer protection generally can serve as a justification for mandatory regulations of member states that burden the provision of interstate insurance services.⁹³ Policyholders need at least minimal substantive legal protection against unfair policy conditions. Such protection is necessary irrespective of whether the insurer is domestic or foreign. The consumer should also be protected against the application of an unfamiliar legal system,⁹⁴ the difficulties of obtaining adequate information, and other disadvantages.⁹⁵ As the mandatory application of the law of the policyholder's residence burdens the interstate provision of services, any restriction on the parties' freedom to choose the law of the state of the insurer's establishment must, as EEC Treaty Article 59 mandates, be necessary in order to protect the consumer.

In analyzing whether an exclusion of party autonomy can be reconciled with Article 59, a more specific analysis of three distinct issues is required: whether consumer protection through mandatory provisions in

88. *Id.* art. 7(1)(a); Second Life Directive, *supra* note 11, art. 4(1).

89. See Second Non-Life Directive, *supra* note 10, art. 7(1)(a).

90. See Second Life Directive, *supra* note 11, arts. 4(1), 2(e).

91. See Second Non-Life Directive, *supra* note 10, art. 4(2).

92. See *id.* art. 4(1).

93. This idea has been more extensively developed in ROTH, *supra* note 7, at 160-68.

94. Insurance regulations may impose legal warranties on policyholders of which they are not aware of.

95. Such other disadvantages include the time lag and expense inherent in gathering information and the uncertainties with respect to the interpretation of unfamiliar legal materials.

the contract law of the state of the policyholder's residence justifies the complete exclusion of party autonomy; whether protection against the application of an unfamiliar legal system justifies the exclusion of party autonomy; and whether merely providing adequate information on the content of the chosen law, especially the law of the state of the insurer's establishment, provides sufficient consumer protection.

a) *Consumer Protection as a Justification for the Exclusion of any Choice-of-Law is Potentially Inconsistent with EEC Treaty Article 59.* Conflicts laws that completely exclude party autonomy for the purposes of consumer protection, such as those contained in the Second Non-Life Directive, are difficult to defend. The ECJ, in *Commission v. Germany*, determined that the public interest in consumer protection justifies restrictions on the freedom to provide services by the state of destination only if the rules of the state of origin do not already provide for the same level of protection.⁹⁶ While *Commission v. Germany* dealt with administrative law provisions concerning insurance supervision, this approach should also be applied to mandatory contract law provisions. Therefore, the Second Non-Life Directive's restriction on party autonomy is incompatible with EEC Treaty Article 59 whenever the level of protection in the state of the insurer's establishment equals or surpasses that of the state of destination.

If consumer protection standards are lower in the state of the insurer's establishment, a less restrictive alternative to the total exclusion of the choice of the law of the state of the insurer's establishment should be implemented.⁹⁷ Such an alternative can be found in Rome Convention Article 5(2). This Article combines the goals of party autonomy and consumer protection by supplementing the chosen law with the consumer protection laws of the consumer's residence when the chosen law does not offer the consumer an equivalent level of protection.⁹⁸ This standard is in accord with the demands of Article 59.

The Second Non-Life Directive, and the Second Life Directive, deviate from the principles of Rome Convention Article 5(2) for several reasons.⁹⁹ Contrary to some of its earlier proposals, the Second Non-Life Directive tries to avoid the application of more than one legal system¹⁰⁰ to

96. *Commission v. Germany*, 1986 E.C.R. at 3804, 2 C.M.L.R. at 103. For a discussion of the concept of *public interest*, see *supra* note 56.

97. See *Commission v. Germany*, 1986 E.C.R. at 3803, 2 C.M.L.R. at 102.

98. See Rome Convention, *supra* note 6, art. 5(2).

99. See, e.g., ROTH, *supra* note 7, at 685-88.

100. More than one law is applied if, e.g., the law chosen by the parties and the mandatory contract law of the state of the policyholder's residence apply.

a specific insurance contract.¹⁰¹ The Commission argued that the application of more than one legal system would be both complicated and inadequate for a product defined by legal concepts.¹⁰² These legal systems may also contain different concepts of consumer protection, which may cause problems for the Court when attempting to compare and contrast consumer protection standards of different member states as required by the Rome Convention.¹⁰³

However, these arguments are fallacious. The ECJ has developed the basic standard that rules or measures of the state of destination can be applied only if those of the state of origin are not equivalent.¹⁰⁴ Thus, a comparison between the law of the policyholder's residence and the law of the insurer's establishment, must be made regardless of the complexities. In addition, it is arguably the responsibility of the parties, especially that of the insurer who drafts the policy, to tackle the complex problems that result from choosing a jurisdiction that is different from the jurisdiction of the policyholder's residence.¹⁰⁵ From this perspective, the allowance by Article 5(2) of the Rome Convention of at least some degree of party autonomy would appear to be more consistent with the demands of Article 59 of the EEC Treaty than the exclusion of party autonomy under the Second Non-Life Directive.¹⁰⁶

b) *The Second Non-Life Directive Overly Restricts Party Autonomy.* Although the protection of the consumer against the application of an unfamiliar legal system is an important consideration in conflicts law, the preclusion of party autonomy exceeds the boundaries of what is necessary to afford this protection. Therefore, the preclusion of party autonomy is not the least restrictive alternative. A policyholder may sometimes be more familiar with the legal system of the state of the insurer's establishment than with the legal system of the state of the policyholder's residence.¹⁰⁷ There may also be cases in which the consumer approaches a foreign insurer *sua sponte*¹⁰⁸ because of plans to relocate to the state of the

101. See the Commission's explanation for its revised proposal for the Second Non-Life Directive, submitted to the Council on Feb. 16, 1978, COM(78)63, Supp. I.

102. *Id.*

103. See Rome Convention, *supra* note 6, art. 5(2).

104. See *Commission v. Germany*, 1986 E.C.R. at 3808, 3813, 2 C.M.L.R. at 104-05; Case 279/80, *Proceeding Against Webb*, 1981 E.C.R. 3305, 3325-26, 1 C.M.L.R. 719, 730 (1982).

105. Cf. *ROTH*, *supra* note 7, at 745.

106. See Second Non-Life Directive, *supra* note 10, art. 7(1)(a).

107. As an example, one may think of the case of a migrant worker from the state of the insurer's establishment.

108. The Second Life Directive expressly takes account of situations where a consumer takes the initiative in contracting with a foreign insurer. Second Life Directive Articles 13 and 14 state that the member state of the policyholder's residence may not demand an authorization for doing business where the consumer seeks out a foreign insurer. This is restricted to regulations concerning the

insurer's establishment.¹⁰⁹ The case for protection against the application of an unfamiliar legal system is much weaker in these situations. A policyholder can be sufficiently protected against abusive choice-of-law provisions imposed by a foreign insurer if the validity of these provisions is made contingent upon the fulfillment of certain formal requirements, such as a requirement that any choice-of-law provision be separately signed by both parties¹¹⁰ or even be contained in a separate document.¹¹¹ In any event, member states should not be permitted to exclude party autonomy to the extent provided for in Second Non-Life Directive Article 7(1)(a) and Second Life Directive Article 4(1).

c) *Merely Providing Information on the Content of the Chosen Law is Insufficient to Protect the Consumer.* Arguably, a requirement that the consumer be informed of the specifics of the chosen law,¹¹² the law of the insurer's establishment and the law of the state of risk, is less restrictive than applying the mandatory consumer protection rules of Rome Convention Article 5(2).¹¹³ This argument appears to be supported by *Cassis-de-Dijon*, in which the ECJ held that printing product information was as effective a means of consumer protection as imposing mandatory rules regarding the composition of products.¹¹⁴

supervision of interstate life insurance services. Second Life Directive, *supra* note 11, arts. 13-14. The applicable choice-of-law provision is embodied in Article 4(1), which provides for the application of the law of the policyholder's residence. *Id.* art. 4(1).

It seems doubtful whether anything else can be deduced from Second Life Directive Article 14(5). This provision restrains the member states in their ability to prohibit the policyholder to conclude a contract that is valid under the law of the insurer's seat except to defend the *ordre public* of that state. See *id.* art. 14(5). Viewed from the systematic set-up of the Second Life Directive, Article 14(5) is a provision that refers to administrative law, especially supervisory regulations of the member state where the policyholder resides. It exerts some influence on the application of mandatory administrative law regulations that fall under Article 4(4), restricting their application to cases where the *ordre public* requires such application. However, Second Life Directive Article 14(5) is not meant to influence the conflicts rules for insurance contracts as such. This is the task of Second Life Directive Article 4(1) and 4(2).

109. Other examples include situations in which the consumer opts for a foreign insurer simply because of the insurer's reputation or because the foreign insurer offers coverage not available from domestic insurers.

110. See Preliminary Proposal on the Law Applicable to Insurance Contracts, art. 3(1), EEC Doc. 2229/III/C/67-D rev. 4, 2 (1967) (German version); ROTH, *supra* note 7, at 681, 747.

111. See Fritz Reichert-Facilides, *Zum internationalen Versicherungsvertragsrecht im Rahmen der EWG*, in 1 INSURANCE LAW 465, 478 (1970) (Tribute to Antigono Donati).

112. Cf. STEFAN GRUNDMANN, *DAS EUROPÄISCHE BANKAUFSICHTSRECHT WÄCHST ZUM SYSTEM* 42 (1990).

113. EEC Treaty Article 59 requires that member states have to choose the alternative that least restricts the interstate provision of services. EEC TREATY art. 59. The question remains whether Article 59 demands a degree of party autonomy that exceeds the autonomy provided for by Article 5(2) of the Rome Convention.

114. See Case 120/78, *Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein*, 1979 E.C.R. 649, 664, 3 C.M.L.R. 494, 509-10 (1979). It should be noted, however, that in *Cassis-de-Dijon*

However, it is doubtful whether this rationale can be extended to insurance contracts, for the nature of insurance, as an intangible and complex legal product, is fundamentally different than other products. Often only an insurance expert can understand the complex policy conditions and the consequences of applying different laws to insurance contracts. Furthermore, merely providing information to consumers fails to take into account the generally weaker bargaining position of the policyholder. Such inequality may be more effectively addressed by mandatory provisions of substantive insurance contract law. Thus, the combination of the unique nature of insurance products and the often encountered unequal bargaining power of the parties helps explain why merely providing the policyholder with information about the negative consequences of choosing a foreign legal system does not amount to effective consumer protection.

2. *Connecting Points and the Right of the Consumer to Purchase Insurance Out-of-State.* As stated above, EEC Treaty Article 59 establishes the freedom of both the insurer to provide interstate services and the purchaser to receive such services. Accordingly, purchasers may obtain policies from foreign insurers under the same conditions as residents in the state of the insurer's establishment, subject only to legitimate restrictions justified by reasons of the public interest. EEC Treaty Article 59 thereby limits the ability of the state of the purchaser's habitual residence to apply its own laws.¹¹⁵ However, protection of the public interest does not always justify the application of consumer protection laws on behalf of local residents.

It is questionable whether a purchaser who actively seeks a policy from an out-of-state insurer needs protection. This individual will usually be a well-informed consumer who does not need to be protected against the application of an unfamiliar law or a law that does not offer the same level of protection as that of his residence. The mandatory application of the law of the state of the policyholder's residence may severely burden an insurance company that is not doing business in that state. This might lead this company to deny coverage to out-of-state residents. This burden on the insurer is disproportionate to the aim being pursued. There should be no difference between the importance given to consumer protection in the case of insurance contracts involving parties of non-member states and insurance contracts between parties of member states. The application of the law of the policyholder's residence, as provided by the

the Court interpreted EEC Treaty Article 30 which deals with the prohibition of quantitative restrictions. For a survey of the relevant case law, see GRABITZ, *supra* note 47, art. 30, at 12.

115. Furthermore, less restrictive alternatives may not be available.

Second Non-Life and the Second Life Directives, is inconsistent with the basic principles of Rome Convention Article 5 regarding risks located outside the EC. Rome Convention Article 5 limits the applicability of mandatory consumer protection legislation of the policyholder's state to settings in which the policyholder has purchased the insurance in circumstances where there is a close connection to his state of residence.¹¹⁶ Based on this perspective, neither Second Non-Life Directive Article 7(1)(a) nor Second Life Directive Article 4(1) can be read in accord with the standards established by EEC Treaty Article 59.

The deviation by both insurance Directives from the criteria established in Rome Convention Article 5 cannot be justified by the notion of consumer protection. Article 5 was regarded as unacceptable because its provisions would facilitate the purchase of out-of-state insurance coverage at terms that intrastate insurers, which are bound by the local law, could not offer; this would place national insurance industries at a competitive disadvantage.

The choice-of-law provisions of the Directives were framed on the assumption that any conflicts rule should take into account the principle of undistorted competition.¹¹⁷ However, secondary Community legislation that is meant to effectuate this principle may not infringe upon the freedom to provide and receive services.¹¹⁸ If the Community deems it necessary to prevent a distortion of competition in the insurance market, it should harmonize the relevant substantive laws rather than prescribe choice-of-law rules that run counter to EEC Treaty Article 59.

The only way to reach a result that conforms to the standards of EEC Treaty Article 59 would be to obligate the member states to grant greater party autonomy than the minimal level mandated by the two Directives.¹¹⁹ Parties should enjoy unrestricted freedom to choose the law of the state of the insurer's establishment in those situations where the Rome Convention would not apply the law of the state of the consumer's residence.¹²⁰ Furthermore, restricted party autonomy, as provided for in Rome Convention Article 5(2), is preferable to a total exclusion of party autonomy.

116. Rome Convention, *supra* note 6, art. 5(2).

117. See EEC TREATY art. 3(f); *supra* note 38 and accompanying text. Cf. ROTH, *supra* note 7, at 718 n.117.

118. For a general discussion of supervisory regulations, see Wulf-Henning Roth, *Grundlagen des gemeinsamen europäischen Versicherungsmarktes*, 54 RABELSZ 63, 118-20 (1990).

119. Recall that the two Directives leave it to the member states to determine whether to allow for greater party autonomy than the minimum set by the Directives. See *supra* notes 89-90 and accompanying text.

120. Cf. Rome Convention, *supra* note 6, arts. 4, 5(3).

The conclusion that the choice-of-law provisions of the two Directives conflict with the EEC Treaty appears to have been accepted by the Commission itself. The proposal for a third non-life directive¹²¹ attempts to solve this problem by including the following conflict law provision:

[t]he Member State in which the risk is situated shall not prevent the policy-holder from concluding a contract conforming with the rules of the home Member State, so long as it does not conflict with legal provisions protecting the general good in the Member State in which the risk is situated.¹²²

According to the Commission, proposed Article 25 is intended to serve as a legal bridge between the choice-of-law rules of the Second Non-Life Directive and EEC Treaty Article 59.¹²³ Apparently, the Commission assumes that a member state that enacts the choice-of-law rules set forth in the Second Non-Life Directive may under certain circumstances infringe upon the freedom to provide services.

However, this provision does not fulfill its intended function. If there is a conflict between Article 59 of the EEC Treaty and the choice-of-law rules, as set forth in the Directives, it is the duty of the Commission to propose choice-of-law rules that conform to Article 59 and not merely to restate the conflict and leave it to the member states to rectify the problem.

121. Proposal for a Third Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to Direct Insurance Other than Life Assurance and Amending Directives 73/239/EEC and 88/357/EEC, 1990 O.J. (C 244) 28.

122. *Id.* art. 25. Compare *id.* with Proposal for a Third Council Directive on the Coordination of Laws, Regulations and Administrative Provisions Relating to Direct Life Assurance and Amending Directives 79/267/EEC and 90/619/EEC, art. 24, 1991 O.J. (C 99) 2, 2.

123. Cf. Patrick Pearson, *Opening Address*, in INTERNATIONAL INSURANCE LAW WITHIN THE EEC, *supra* note 84.