Max Planck Institute for Comparative and International Private Law*

Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)**

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Literature cited in abbreviated form: Bitterich, Kollisionsrechtliche Absicherung gemeinschaftsrechtlicher Standards im Bereich des Verbraucherschutzes, Der Vorschlag für eine Rom I-Verordnung: RIW 2006, 262–270; *Dickinson*, The law applicable to contracts – uncertainty on the horizon?: Butterworths Journal of International Banking and Financial Law 2006, 171; *Mankowski*, Der Vorschlag für die Rom-I Verordnung: IPRax 2006, 101–113 (cited Vorschlag Rom-I-VO); *id.*, Art. 5 des Vorschlags für eine Rom I-Verordnung – Revolution im Internationalen Verbrauchervertragsrecht?: ZvglRWiss. 105 (2006) 121–163 (cited Art. 5 Rom-I-VO); *Reithmann/Martiny*, Internationales Vertragsrecht (2004) (cited *Reithmann/Martiny [-author]*); *Staudinger (-Magnus)*, Kommentar zum BGB[13] EGBGB/IPR (2002).

Materials cited in abbreviated form: Max Planck Institute for Foreign Private and Private International Law, Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization: RabelsZ 68 (2004) 1–118 (cited *Max Planck Institute*, Comments on Green Paper Rome I); Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final of 15. 12. 2005 (cited Rome I-P), Explanatory Memorandum: ibid. pp. 1–10 (cited: Explanatory Memorandum Rome I-P).

** A synopsis of the European Commission's and the Institute's proposals is available at <http://www.mpipriv.de/shared/data/pdf/mpi-synopsis.pdf>.

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Introduction

1. In December 2005, the Commission of the European Communities published the "Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)"[1] (hereinafter "Rome I-P"). The Rome I-P is an important further step towards a homogeneous codification of the private international law of obligations in the Community. It was preceded in January 2003 by the "Green Paper on the

[1] Rome I-P, COM(2005) 650 final of 15. 12. 2005.

conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation",[2] which generated a great number of comments, among others those of the Max Planck Institute for Comparative and International Private Law.[3] The Rome I-P was transmitted to the European Parliament and the Council in December 2005 and is open for public debate. The following observations on the Rome I-P are meant to contribute to this discussion. The topics have essentially been determined by the proposed rules contained in the Rome I-P. However, the Institute has also seen the need to address some additional issues to round off the Commission's proposal.

2. The Institute's comments are the result of intense – although not necessarily comprehensive or complete – discussions held from January to May 2006. We have focused our comments as much as possible on legislative proposals. While the proposals have undergone several discussion rounds and reflect the majority opinion of the group, not all of them have been approved unanimously.

3. The article-by-article commentary is structured as follows: First, a synopsis of the respective article of the Rome I-P and our proposal is given (changes are highlighted in italicised print). Second, a summary at the beginning of each section will inform the reader about the principal reasons of the proposed changes. Third, the proposed changes are explained in more detail.

4. When amending the Rome I-P, it should be kept in mind that Rome I is not the only Regulation "in the making" in the field of European private international law of obligations. In May 2002, the European Commission launched a "Consultation on a preliminary draft proposal for a Council regulation on the law applicable to non-contractual obligations" in which the Hamburg Group for Private International Law participated.[4] In July 2003, it was followed by a "Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II)".[5] Far reaching changes adopted by the European Parliament[6] forced the Commission to overhaul its Proposal. In February 2006, an "Amended Pro-

[2] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final of 14.1. 2003 (cited Green Paper Rome I).

[3] *Max Planck Institute*, Comments on Green Paper Rome I.

[4] *Hamburg Group for Private International Law*, Comments on the European Commission's Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations: RabelsZ 67 (2003) 1–56 (cited: *Hamburg Group for Private International Law*, Comments on Draft Proposal Rome II).

[5] Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), COM(2003) 427 final of 22.7. 2003.

[6] European Parliament legislative resolution on the proposal for a regulation of the European Parliament and of the Council on the law applicable to non-contractual obligations ("Rome II"), A6–0211/2005.

posal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II)" (hereinafter "Rome II-AP") was presented.[7] As a result, the European Parliament has to discuss two different Regulations (Rome I and Rome II) dealing with the European private international law of obligations.

5. The Institute has serious doubts that this bifurcated approach will ensure a coherent set of rules on private international law in the field of obligations. Contractual and non-contractual obligations are closely connected to each other. The dividing line between these two types of obligations is oftentimes difficult to draw. Thus, there is the obvious danger of disparities between the future Rome I and Rome II Regulations. Moreover, many issues are common for both types of obligations and cannot reasonably be subject to different rules. Therefore, it is indispensable that the rules of the future Rome I Regulation be aligned with the rules contained in the future Rome II Regulation. The best solution to assure a coherent body of law would be to merge the Rome I-P and the Rome II-AP into one single Regulation covering the private international law of obligations in general. If this cannot be achieved, the European legislature should keep in mind that amendments to one Regulation will often bear upon the operation of, or will create inconsistencies with, the other. This is recognised in recital 4 Rome I-P which emphasises the "need to achieve the greatest harmony" between the Rome I and the Rome II Regulations. However, the proposal as it stands does not always ensure the necessary consistency. The following observations will, therefore, address the issues – where necessary – against the background of the Rome II-AP.

6. Furthermore, coherence must be attained with jurisdictional issues as addressed in Regulation (EC) 44/2001[8] (hereinafter "Brussels I Regulation") to ensure a certain synchronisation of forum and applicable law.[9]

7. A final remark should be made on translation issues. In preparing these observations, the Institute reviewed the French, English and German versions of the Rome I-P. It was noted that the English version often differed from the two other versions. It seems that the Rome I-P was drafted in French and/or German and was later translated – often not very accurately – into English. The Institute has proposed corrections of the translation errors as far as

[7] Amended Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), COM(2006) 83 final of 21.2.2006 (cited Rome II-AP).

[8] Council Regulation (EC) No. 44/2001 of 22.12.2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. EC 2001 L 12/1.

[9] See for a detailed analysis with respect to convergence and divergence between Brussels I and Rome I: Enforcement of International Contracts in the European Union, ed. by *Meeusen/Pertegás/Straetmans* (2004).

possible. As the English version of a legal text may often be used as basis for a translation into other EU official languages, the Institute urges the European legislature to ensure that the various language versions of the final Rome I Regulation be adjusted.

Recitals

(7) Freedom for the parties to choose the applicable law must be one of the cornerstones of the system of conflict-of-laws rules in matters of contractual obligations.	(7) Freedom for the parties to choose the applicable law must be ~~one of~~ the cornerstone~~s~~ of the system of conflict-of-laws rules in matters of contractual obligations. *This comprises the right to choose as the applicable law principles and rules of substantive law of contract recognised internationally or in the Community. However, such principles and rules must comply with certain minimum standards in order to be eligible. Especially, they have to be created by an independent, impartial, and neutral body; their content has to be balanced and protected against evasion and abuses by certain mandatory rules; and they must regulate the rights and duties in a fairly comprehensive way. These conditions are met, for instance, by the Principles of European Contract Law and the UNIDROIT Principles of International Commercial Contracts. It is understood that such principles, if laid down in an act of the European Communities chosen by the parties shall take precedence over this Regulation in accordance with its Article 22 (1)(b).*
	(13a) The assignment of a claim may include both contractual and non-contractual claims and generally includes the creation of rights in receivables.

Summary

The Institute suggests the following amendments to the recitals:
- Recital 7 should state objective criteria as to what constitutes principles and bodies of rules that can be chosen by the parties as the governing law of the contract under Article 3(2) subpara. 1 Rome I-P (see infra no. 8).
- A minor translation inconsistency in Recital 7 should be eliminated (see infra no. 10).
- An additional recital should clarify the ambit of Article 13 Rome I-P to the effect that it generally encompasses contractual as well as non-contractual claims and that it covers the creation of limited rights in rem in receivables (see infra no. 11).

Comments

Amendments to Recital 7

Stating criteria for internationally recognised principles and rules of substantive law

8. The Institute endorses the European Commission's decision to allow the parties of cross-border contracts to choose internationally recognised principles and rules of substantive law as the applicable law pursuant to Article 3(2) subpara. 1 Rome I-P. The Institute further appreciates the Commission's understanding of this provision as expressed in the Explanatory Memorandum: The parties should only be entitled to choose a qualified body of rules such as the UNIDROIT Principles of International Commercial Contracts (PICC),[10] or the Principles of European Contract Law (PECL)[11] while the so-called lex mercatoria, or private codifications not adequately recognised by the international community such as standard contract forms should not be eligible.[12] Put in other words: A given body of rules which is chosen by the parties will only be recognised as the governing law of the contract if it complies with certain minimum standards.[13] In particular, the respective set of principles has to be created by an independent, impartial, and neutral body; its content has to be balanced and protected against evasion and abuses by cer-

[10] *International Institute for the Unification of Private Law* (UNIDROIT), Principles of International Commercial Contracts, available at <http://www.unidroit.org/english/principles/contracts/main.htm>.

[11] Principles of European Contract Law, ed. by *Lando/Beale* Parts I/II (combined and revised) (2000); Principles of European Contract Law, ed. by *Lando/Clive/Prüm/Zimmermann* Part III (2003).

[12] See Explanatory Memorandum Rome I-P, p. 5.

[13] For a more detailed analysis see *Max Planck Institute*, Comments on Green Paper Rome I, p. 32 seq.

tain mandatory rules; and it must regulate the rights and duties in a fairly comprehensive way. The Institute recommends stating these criteria as well as the exemplary role of the PICC and the PECL explicitly in the recitals of the Regulation. Such an approach is preferable to a mere reference to the PICC and the PECL in the Explanatory Memorandum because the latter will not form part of the future Rome-I instrument whereas the recitals will serve as binding guidelines for the courts. Hence, identifying objective criteria as well as two appropriate examples in the recitals will ensure a uniform interpretation of Article 3 Rome I-P within the Community. Thus, the proposed solution enhances legal certainty and provides guidance to legal counsel when drafting international contracts.

9. In recent years the Commission has initiated scholarly work and stakeholder discussions on the future of substantive contract law in Europe. A Common Frame of Reference is scheduled to be adopted in the near future.[14] To a large extent, it will most likely adapt rules and principles from PECL. Provided that the Common Frame of Reference will be adopted as a Community instrument, its role under the Rome I-P would be unclear. Could it be chosen by the parties under Article 3 Rome I-P, i.e. subject to the exceptions contained in Articles 5 and 6 Rome I-P and to the internationally mandatory rules of national law in accordance with Article 8 Rome I-P? Or would it take priority over the Rome I Regulation under Article 22(1)(b) Rome I-P? The Explanatory Memorandum, by mentioning both possibilities, stirs confusion.[15] It is only the latter solution which would take account of the objective to create common standards of contract law in the EU. Therefore, the latter solution should be clearly preferred in an addition to Recital 7.

Adjustment of the English version

10. The French and German versions read: "La liberté des parties de choisir le droit applicable doit constituer la clé de voûte du système de règles de conflit de lois en matière d'obligations contractuelles" and "Die Kollisionsnormen für vertragliche Schuldverhältnisse müssen auf der freien Rechtswahl der Parteien gründen." Both texts thereby stress the key role of the parties' freedom to choose the applicable law whereas this freedom is only "one of" the cornerstones of conflict of laws in the field of contracts according to the English version. In order to bring the English language version of the Rome I-P in line with the corresponding French and German texts the words "one of" have to be deleted in Recital 7.

[14] See Communication from the Commission to the European Parliament and the Council, A more coherent European contract law – An action plan, COM(2003) 68 final of 12. 2. 2003.

[15] See infra nos. 28 (comment on Article 3) and 183 (comment on Article 22).

Clarifying the ambit of Article 13 Rome I-P by adding a new Recital 13a

11. The wording of the different language versions of Article 13 Rome I-P dealing with voluntary assignment and contractual subrogation is ambiguous in respect of non-contractual claims. At the same time, the proposed Rome II Regulation does not address the assignment of non-contractual claims. The Institute therefore suggests clarifying in the recitals that the ambit of Article 13 Rome I-P will generally include contractual and non-contractual claims.[16]

Moreover, the text of Article 13 Rome I-P does not address the creation of limited rights in rem in receivables.[17] Nevertheless, charges, pledges, gages and comparable rights in receivables can perform economic functions similar to assignments, especially those created for security purposes.[18] Therefore the UN Convention on the Assignment of Receivables in International Trade[19] and also the new Belgian Private International Law[20] explicitly include the creation of real rights within the applicable scope of their conflict rules. Hence, the European legislator should clarify in the recitals that in general, Article 13 Rome I-P also refers to the creation of rights in receivables.

Article 1 – Scope	**Article 1 – *Substantive* scope**
1. This Regulation shall apply, in any situation involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not extend, in particular, to revenue, customs or administrative matters.	1. [no changes]

[16] See for details infra no. 150 (comment on Article 13).

[17] See also the criticism made by *Flessner/Verhagen*, Assignment in European Private International Law (2006) 18; *Kieninger/Sigman*, The Rome-I Proposed Regulation and the Assignment of Receivables: European Legal Forum 2006, 1 (6).

[18] E.g., in the Netherlands a pledge of receivables is frequently used to secure credit, see *Reehuis*, Forderungen als Sicherheit in den Niederlanden, in: Die Forderungsabtretung, insbesondere zur Kreditsicherung, in ausländischen Rechtsordnungen, ed. by *Hadding/Schneider* (1999) 469 (470 seq.).

[19] See Article 2(a) of the UN Convention on the Assignment of Receivables in International Trade (adopted on 12. 12. 2001) which reads as follows: "'Assignment' means the transfer by agreement from one person ('assignor') to another person ('assignee') of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ('receivable') from a third person ('the debtor'). The creation of rights in receivables as security for indebtedness or other obligation is deemed to be a transfer."

[20] See Article 87 §3 Loi portant le Code de droit international privé of 16. 7. 2004, Moniteur belge of 27. 7. 2004: "La constitution de droits réels sur une créance ainsi que les effets de la cession d'une créance sur tels droits sont régis par le droit de l'Etat sur le territoire duquel la partie qui a constitué ces droits ou a cédé la créance avait sa résidence habituelle au moment de la constitution ou de la cession."

2. The Regulation shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 12;

(b) contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has similar effects, including maintenance obligations;

(c) obligations arising out a matrimonial relationship or a property ownership scheme which, under the law applicable to it, has similar effects to a marriage, wills and successions;

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate, the personal liability of officers and members as such for the obligations of the company or body and the question whether a management body of a company or other body corporate or unincorporated

2. The Regulation shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 12;

(b) contractual obligations relating to a family *or similar* relationship ~~a relationship which, in accordance with the law applicable to it, has similar effects, including maintenance obligations~~;

(c) maintenance obligations;

~~(c)~~ *(d)* obligations arising out *of* a matrimonial *or similar* relationship ~~or a property ownership scheme which, under the law applicable to it, has similar effects to a marriage, wills and successions~~;

(e) property and rights arising out of family and similar relationships;

(f) wills and successions;

~~(d)~~ *(g)* obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

~~(e)~~ *(h)* arbitration agreements and agreements on the choice of court;

~~(f)~~ *(i)* questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate, the personal liability of officers and members as such for the obligations of the company or body and the question whether a management body of a company or other body corporate or unincor-

can bind the company or body in relation to third parties;	porated can bind the company or body in relation to third parties;
(g) the constitution of trusts and the relationship between settlers, trustees and beneficiaries;	~~(g)~~ *(j)* the constitution of trusts and the relationship between settlers, trustees and beneficiaries;
(h) evidence and procedure, without prejudice to Article 17;	~~(h)~~ *(k)* evidence and procedure, without prejudice to Article 17;
(i) obligations arising out of a pre-contractual relationship.	~~(i)~~ *(l)* ~~obligations arising out of a pre-contractual relationship.~~ *pre-contractual obligations to the extent that they are governed by the Regulation on the law applicable to non-contractual obligations (Rome II).*
3. In this Regulation, the term "Member State" shall mean Member States with the exception of Denmark [, Ireland and the United Kingdom].	3. [no changes]

Summary

The Institute welcomes the rules on the Rome I-P's scope and their closely mirroring the parallel rules of the Rome Convention. Nevertheless, a few substantive and stylistic changes seem advisable:

– First, the English version's title should conform to the French and the German texts which better reflect the provision's purpose (see infra no. 12).

– Second, Article 1(2)(b) and (c) Rome I-P invites misunderstanding as to the exact questions excluded from the Rome I-P's scope. Non-marital relationships certainly need to be dealt with expressly. The substance of the Commission's proposal, however, is questionable. Also, minor textual changes would enhance its legibility and clarity (see infra nos. 13–16).

– Third, the Institute strongly endorses the idea underlying Article 1(2)(i) Rome I-P, namely, the need to determine expressly whether and to what extent the Regulation covers pre-contractual relationships. However, since such relationships can also be of a contractual nature, they should not be excluded from the Rome I-P altogether. Applying the Rome II Regulation to these cases could result in contradictory, arbitrary and unforeseeable results. The courts, and ultimately the European Court of Justice, are in a better position to delineate the boundaries between the contractual and non-contractual types of this hybrid legal entity. The express reference to the Rome II Regulation as suggested by the Institute would confirm the European legislator's intention to deal with such duties comprehensively in the Rome I and II Regulations without leaving any lacunae (see infra nos. 17–23).

Comments

Headline

12. The insertion of the term "substantive" should avoid the misunderstanding that Article 1 Rome I-P exhaustively enumerates all – for instance, also geographical – conditions of application, instead of defining only the Regulation's subject matter. Furthermore, the French and German versions already contain a pertinent qualification (Champ d'application *matériel, Materieller* Anwendungsbereich). Hence, linguistic coherence warrants the suggested addition.

Non-marital relationships and further issues in Article 1(2)(b) and (c) Rome I-P

13. Due to the enormous pace of national legislation on non-marital – registered or unregistered – relationships[21] the Institute welcomes express rules on the (in-)applicability of the Rome I-P on these novel legal institutions. The Institute shares the view that the Rome I-P does not provide suitable conflict-of-law rules for such relationships because they are mainly rooted in the realm of family law. In particular, the principle of freedom of choice and the focus on the characteristic performance in case of an absence of choice are inappropriate. Nevertheless, the Rome I-P's objective of harmonising the prerogatives of its application requires as much uniformity as possible – including the harmonisation of the concept of family relationships as opposed to typical contractual obligations not involving specific personal and emotional elements.

14. The Commission's proposal, however, unnecessarily complicates the issue. There is no express reference as to which law determines the existence of a "family" or "matrimonial relationship" or whether such an institution is to be characterised from an autonomous viewpoint, i.e. whether it has to meet certain minimum standards in order to be recognised as a legal relationship of the kind mentioned above.[22] In contrast, Article 1(2)(c) Rome I-P requires the comparability of a non-marital relationship with a family or matrimonial relationship according to the applicable national law. The most likely reason for the different treatment of family and matrimonial relationships on the one hand and non-marital relationships on the other hand is the lack of a single cross-border concept of non-marital relationships whereas matrimonial

[21] For a partial overview on some of the legislative solutions see, e.g., *Curry-Sumner*, All's well that ends registered?, The Substantive and Private International Law Aspects of Non-Marital Registered Relationships in Europe (2005).

[22] For an autonomous interpretation of the term "Rights in property arising out of a matrimonial relationship" under Article 1(2) Brussels Convention see, e.g., ECJ 27. 3. 1979 – case 143/78 *(Jacques de Cavel* v. *Luise de Cavel)*, E.C.R. 1979, I-1055, para. 7.

and family relationships comparatively speaking are quite uniformly structured. The legislator can therefore presumably dispense with a similarity test to established notions in cases of family and matrimonial relationships.

For those having to apply the Regulation, however, the relegation to the respective national law is cumbersome. It also endangers legal unity in this area. The Regulation's applicability, and therefore the possible exclusion of a non-marital relationship from its scope, should be easy to determine without requiring lengthy, substantive legal considerations. The Rome I-P, however, compels the parties and lawyers not only to first determine the law applicable to the relationship, but also to research the respective national law and compare the effects attributed to a "family" or "matrimonial" relationship because only in case of comparability to such a relationship would the non-marital relationship be excluded from the Rome I-P. For purposes of this comparison, however, it is not even clear whether national or European standards guide the interpretation of "family". Furthermore, such a comparison has to go beyond the effect relevant in the specific case and extend to a general analysis of two legal institutions. There are possibly hundreds of factors to be considered in civil, criminal and public law. Hence, different courts may reach opposite conclusions as to the Regulation's applicability. This is all the more true because the required degree of similarity between the relevant institutions remains open. The resulting interpretational gaps tend to invite forum shopping and create other unwanted effects intended to be wiped out by uniform conflict-of-law rules.

15. The Institute therefore suggests addressing the comparability test in the Regulation without referring to a national law. This would permit the European Court of Justice (hereinafter "ECJ") to come to the conclusion that there is a minimum of family relationship characteristics on a European level (such as the creation of parental relationships, specific tax treatment, special rights in criminal procedure etc.) which serve as the model with which national regulations will have to be compared (autonomous interpretation of the Rome I Regulation). This would not only reduce legal uncertainty, foster legal unity and thus hinder forum shopping, but would also considerably facilitate the task of determining whether certain national regulatory schemes meet the standards to be excluded from the Rome I Regulation. If the Court considers European standards to be insufficient and the advantages of a reference to national law to outweigh the goal of greater international coherence, it can still consult national laws.

16. The Institute not only recommends changes with respect to the text intended to cover non-marital relationships, but also suggests streamlining the formulation excluding obligations rooted in family law, such as maintenance obligations, and in wills and successions. Maintenance obligations by their very nature are almost always an offspring of family or similar relations. For the sake of clarity, they should be dealt with in a separate provision instead of

attaching them to other provisions related to family or similar relationships. This would also remove the possible misunderstanding resulting from the current wording of Article 1(2)(b) Rome I-P that maintenance obligations are an element of determining whether a relationship has sufficiently similar effects to a family relationship. The Institute also suggests excluding the area of wills and successions from the scope of Rome I-P. The Commission's proposal is confusing at best because Article 1(2)(c) Rome I-P places the term "wills and successions" in the context of a family or similar relationship instead of relating it to "contractual obligations".

Pre-contractual duties

17. The Institute approves a rule on pre-contractual duties. However, the general characterisation of such relationships as non-contractual in Article 1(2)(i) Rome I-P is flawed. In its Explanatory Memorandum, the Commission argues that in accordance with the ECJ's judgments concerning Article 5(1) of the Brussels Convention such obligations should be governed by the future Rome II instrument and therefore excludes them from the scope of application of the Rome I Regulation altogether.[23]

Brussels I distinction no suitable model

18. The close analogy to the Brussels I Regulation is questionable because jurisdictional and conflict-of-law instruments serve distinct objectives. Not surprisingly, the criteria employed in Article 5(1) and (3) Brussels I Regulation to determine jurisdiction are not identical with the criteria used to determine the applicable law under the Rome I and the Rome II instruments and, thus, by no means necessarily point to the same jurisdiction/legal system in each individual case. Article 5(1) Brussels Convention considers "the place of performance of the obligation in question" to be relevant and thereby obviously concentrates on the procedural aspect of performance particularly relevant for the determination of jurisdiction.[24] Article 4 Rome I-P, however, generally declares the law of the country to be applicable in which the party that owes the obligation characterising the contract has its habitual residence. This reflects the desire to foster legal certainty.[25] If the characteristic obligation has to be fulfilled in a country other than that of the debtor's habitual residence, jurisdiction vested in accordance with Article 5(1) Brussels I Regulation and the law applicable under Article 4(1) Rome I-P will not

[23] Explanatory Memorandum Rome I-P, p. 5.

[24] ECJ 28. 9. 1999 – case C-440/97 *(Groupe Concorde and Others* v. *The Master of the vessel "Suhadiwarno Panjan" and Others)*, E.C.R. 1999, I-6307, para. 29: "[…] with a view to efficient organisation of procedure".

[25] Explanatory Memorandum Rome I-P, p. 5.

coincide. Since the provisions obviously pursue at least partially different objectives and point in different directions, the attempt to streamline jurisdictional and conflict-of-law instruments seems misguided. That is all the more true since the Brussels I Regulation may lead to the competence of the courts of several countries whereas the Rome I-P and Rome II-AP must always point to only one legal system. The completely parallel system of jurisdiction and applicable law that the Commission may have in mind thus cannot be achieved as a matter of principle.

General application of a future Rome II Regulation to pre-contractual obligations not in line with ECJ case law

19. Even if the Brussels I Regulation contained appropriate criteria, the proposal does not truly incorporate them. The ECJ does not automatically consider all pre-contractual duties as a matter of tort law. To the contrary, the Court generally favours a broad interpretation of Article 5(1) Brussels Convention:[26] It is sufficient – even in the absence of the conclusion of a contract – that in the relevant situation one party has freely assumed an obligation towards another and that the claim underlying the dispute is based on this obligation.[27] The wording of Article 1(2)(i) Rome I-P therefore does not properly reflect the distinction drawn by the ECJ judgments concerning Article 5(1) and (3) Brussels I Convention between "contract" and "tort" cases.

Applicability of a future Rome II Regulation substantively inappropriate

20. Admittedly, the Member States lack a uniform standard on the contract or tort characterisation of pre-contractual duties. Some pre-contractual duties perceived as contractual in nature in one Member State are treated as cases of tort liability in another or maybe most Member States. An independent characterisation of pre-contractual obligations is therefore desirable and even necessary to avoid forum shopping and the resulting possibility of manipulating applicable law. That, however, neither justifies nor warrants the total exclusion of pre-contractual obligations from the scope of the proposed Rome I Regulation.

21. Relegating all pre-contractual obligations to the proposed Rome II Regulation would create severe dysfunctions. *Duties of disclosure*, for instance

[26] See, e. g., ECJ 20.1. 2005 – case C-27/02 *(Petra Engler* v. *Janus Versand GmbH)*, E.C.R. 2005, I-481, para. 48: "[…] the concept of 'matters relating to contract' referred to in Article 5(1) of the Brussels Convention is not interpreted narrowly by the Court."

[27] ECJ 20.1. 2005 (preceding note) para. 50 and expressly para. 51: "[…] the application of the rule of special jurisdiction provided for matters relating to a contract in Article 5(1) presupposes the establishment of a legal obligation freely consented to by one person towards another and on which the claimant's action is based."

the seller's duty to inform the buyer about certain features of the goods sold, are a prime example of "contractual" pre-contractual obligations. The close connection between the conditions for their existence, i.e. the making of the contract and the legal remedies available in case of breach, justify this classification. This assumption also underlies the Principles of European Contract Law[28] which deal with duties of disclosure in 4:107 PECL. If Articles 3(6) and 9(1) Rome I-P determine the law applicable to the making of the contract (which may be PECL according to Article 3(2) Rome I-P) and if the proposed Rome II Regulation leads to a different system regarding duties of disclosure, almost insolvable problems of adapting the rules of two legal systems to each other may be caused. Suppose that non-compliance with a duty of disclosure flowing from the law of State A, applicable in accordance with the proposed Rome II Regulation, is sanctioned by damages under that law. Yet, the non-compliance might lead to invalidity of the contract or ipso facto avoidance under the law of State B, applicable as the proper law of the contract under Articles 3(6) and 9(1) Rome I-P. Duties and the sanctions for their violation should always result from one and the same legal order. The proposed provision does not accord with this principle and threatens to subject functionally close-connected questions to two different legal systems. Furthermore, it severely undermines the fundamental principle of free choice of law because the parties, despite their choice-of-law clause, could not be sure which legal system (regardless whether they have chosen PECL or a national body of law) would apply to the question of duties of disclosure.

22. Under the rules of the Rome I-P the law applicable to the *breaking-off of negotiations* would also have to be determined according to the rules of the proposed Rome II Regulation. That would be true even in a case where the parties have already agreed upon the law applicable to their intended contract before the break-off occurs. In this case, the choice of law might be ineffective under the law applicable according to the proposed Rome II Regulation even though the parties have expressed their intention clearly in a contractual manner which would be recognised under Article 3 Rome I-P. The proposed rule is also in conflict with the contractual rules of PECL Article 2:301(2) and (3) on the breaking-off of negotiations. Assuming that the parties have chosen PECL as applicable law according to Article 3(1) of the Rome I-P before the breaking-off occurs, it is unclear whether such a choice should be honoured under Rome I-P, whether its validity should be determined under the Rome I-P or whether the law applicable under the Rome I-P and Rome II-AP should be cumulatively applied. In such a case, however, any unnecessary barriers to recognizing the parties' intention should be avoided. The only way to do so safely is to recognise the choice-of-law clause according to the Rome I-P.

[28] Principles on European Contract Law (supra n. 11).

Superiority of a case law approach

23. The desirable autonomous interpretation of the distinction between contract and tort pre-contractual obligations should, therefore, rather be achieved by leaving the allocation of pre-contractual duties between the Rome I-P or Rome II-AP to the courts (and thereby ultimately to the ECJ). The Commission's formal, yet substantively inappropriate, criterion might simplify the determination of applicable law but would create a quagmire of substantive law rules. The criteria for the suitable distinction developped under Article 5(1) Brussels I Convention should not be neglected. However, the independence and different purpose of conflict-of-law rules from jurisdictional issues needs to be respected. These goals can best be achieved by reminding national judges that a tort classification of pre-contractual duties is possible without sacrificing the objective of creating a comprehensive system of conflict-of-law rules for such obligations under either the Rome I-P or Rome II-AP. This is the purpose of the Institute's proposal which makes it clear that every issue in this area would be covered either by Rome I or Rome II and that it is up to the courts to decide on the proper allocation.

Article 2 – Application of law of non-Member States

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

Summary / Comments

24. The Institutes recommends only one minor, stylistic change. As the Convention has been transformed to a Community instrument, the term "Convention" must be replaced by the term "Regulation".

Article 3 – Freedom of choice

1. Without prejudice to Articles 5, 6 and 7, a contract shall be governed by the law chosen by the parties.	1. Without prejudice to Articles 5, 6 and 7, a contract shall be governed by the law chosen by the parties.
The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract behaviour of the parties or the circumstances of the case.	The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract, *the* behaviour of the parties, or the circumstances of the case.

If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.

However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.

3. The parties may at any time agree to subject the contract to a law other than the law that previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 10 or adversely affect the rights of third parties.

4. The fact that the parties have chosen a foreign law in accordance with paragraphs 1 or 2, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are

If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a ~~Member~~ State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that ~~Member~~ State. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may also choose as the applicable law the principles and *body of* rules of the substantive law of contract recognised internationally or in the Community.

However, questions relating to matters governed by such principles or *body of* rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.

3. [no changes]

4. The fact that the parties have chosen a ~~foreign~~ law in accordance with paragraphs 1 or 2, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are

connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

5. Where the parties choose the law of a non-Member State, that choice shall be without prejudice to the application of such mandatory rules of Community law as are applicable to the case.

6. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 9, 10 and 12.

connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

5. ~~Where the parties choose the law of a non-Member State, that choice shall be without prejudice to the application of such mandatory rules of Community law as are applicable to the case.~~ *The fact that the parties have chosen a law other than that of any Member State, whether or not accompanied by the choice of a tribunal situated in a non-Member State, shall, where all the other elements relevant to the contract at the time of the choice are connected with one or more of the Member States, neither prejudice the application of the mandatory rules contained in European regulations nor the application of Member State rules which implement mandatory European directives. In the latter case, the provisions of the relevant directive apply as implemented in the domestic law of the Member State that would govern the contract in the absence of a choice-of-law clause.*

6. [no changes]

Summary

The Institute welcomes the proposed Article 3 Rome I-P as far as paragraphs 1 to 4 are concerned. Especially, the parties' option to choose principles and rules recognised internationally or in the Community as their governing law is endorsed by the Institute. Nevertheless, the Institute regards the following modifications as necessary:

– As to those first four paragraphs of Article 3 Rome I-P, only minor changes of wording are proposed (see infra nos. 25–30).

– However, the Institute strongly advocates a different solution for Article 3(5) Rome I-P. This paragraph aims to protect mandatory provisions of Community law against the parties' choice of a third state law. Article 3(5) Rome I-P as it stands now is ambiguous in its wording and none of the possible interpretations is convincing. The Institute recommends the approach taken by the Commission in the parallel provision of the Rome II-AP: The technique of Article 3(4) Rome I-P, which deals with the application of mandatory rules in purely domestic cases, should be extended to intra-Community cases. Hence, the fact that the parties have chosen the law of a non-Member State does not, where all the other elements relevant to the contract are connected with one or more Member States, prejudice the application of mandatory rules contained in European regulations or the application of mandatory Member State rules insofar as they implement European directives (see infra nos. 31–41).

Comments

Article 3(1) Rome I-P: Implied choice of law

25. The Institute welcomes the Commission's solution laid down in Article 3(1) subpara. 3 Rome I-P whereby in case of a jurisdiction clause it is presumed that the contracting parties have chosen the lex fori of the designated court. This synchronisation of forum and ius saves time and transaction costs. However, the presumption of Article 3(1) subpara. 3 Rome I-P should not only apply to cases where the parties have chosen a tribunal of a Member State but also to cases where the parties have agreed to confer jurisdiction on a court of a Non-Member State. The underlying rationale of Article 3(1) subpara. 3 Rome I-P applies to the latter situation as well. It is true that litigation arising from such contracts will usually not take place in the courts of Member States and that the chosen court of a third state will not apply a future Rome I Regulation. But a Member State court could be confronted, in an annex lawsuit relating to guarantee contracts or security interests, with the issue of the law applicable to the main contract. Moreover, the parties could confer jurisdiction on a Member State court by way of submission.[29] In such a case the court should consider the fact that the parties originally have chosen a court of a third state when establishing the law governing the contract. The mere fact that the parties have entered appearance before a non-competent court does not always imply a choice of law in favour of the lex fori. Furthermore, when determining the law applicable to a non-contractual obligation, a

[29] See Article 24 Brussels I Regulation.

Member State court will have to account for a pre-existing relationship between the parties according to Article 5(3) Rome II-AP. Consequently, the law applicable to a pre-existing contract might also govern potential non-contractual obligations relating to it. If, for example, a Member State court is seized with a dispute concerning a tort, the judge might have to consider the law applicable to a contractual obligation even if the court had no jurisdiction to adjudicate on the contract itself due to the choice of a non-Member State forum. In those cases, a universal wording of the presumption contained in Article 3(1) subpara. 3 Rome I-P could be useful and would be appropriate.

A final remark concerns only the English language version of Article 3(1) subpara. 2 Rome I-P: In order to bring the text in line with the corresponding French and German versions ("des dispositions du contrat, du comportement des parties ou des circonstances de la cause"; "aus den Bestimmungen des Vertrages, dem Verhalten der Parteien oder aus den Umständen des Falles") the provision must read: "The choice must be […] demonstrated […] by the terms of the contract, the behaviour of the parties, or the circumstances of the case".

Article 3(2) Rome I-P: Possibility to choose internationally recognised principles

26. The Institute endorses the European Commission's proposal to allow the parties of cross-border contracts to choose internationally recognised principles and rules as the applicable law. However, these principles have to comply with certain requirements. The respective set of principles has to be created by an independent, impartial, and neutral body; its content has to be balanced and protected against evasion and abuses by certain mandatory rules; and it must regulate the rights and duties in a fairly comprehensive way. The Institute recommends stating these criteria explicitly in the recitals of the Regulation.[30] The Institute welcomes the Commission's view that the so-called lex mercatoria does not qualify as an eligible set of rules.[31] For the sake of clarification it should also appear from the text of Article 3(2) Rome I-P itself that only a sufficiently comprehensive set of rules can be chosen as the governing law.[32] Therefore, the Institute suggests inserting the words "body of" before the term "rules".

27. The notion of internationally recognised "rules" of substantive law in Article 3(2) Rome I-P also encompasses provisions laid down in international conventions provided that they comply with the aforementioned general requirements. Given the practical need for the possibility to choose international conventions especially in the field of transport law, e.g., the Hague

[30] See supra no. 8 (comment on Recitals).
[31] Cf. Explanatory Memorandum Rome I-P, p. 5.
[32] See supra no. 8 (comment on Recitals).

Visby Rules, the Institute appreciates the Commission's decision in this respect.

28. According to the Explanatory Memorandum, the wording of Article 3(2) Rome I-P authorises the parties not only to opt for generally recognised principles of substantive law such as the Principles of European Contract Law[33] but also offers the possibility to choose a possible future optional Community instrument,[34] i.e. the Common Frame of Reference.[35] However, pursuant to the comments on Article 22(b) Rome I-P, it is this latter provision that is in fact designed to address the relationship between Rome I and a possible instrument in the Context of a European Contract Law project.[36] Hence, two different rules are supposed to deal with the same problem which, as a matter of principle, appears to be inconsistent. This is all the more true, given the fact that the two provisions entail different and irreconcilable results:

If the choice of the optional Community instrument was based on Article 3(2) Rome I-P, party autonomy would be subject to the restrictions embedded in Articles 5, 6 and 8 Rome I-P, i.e. national law could override the harmonised European rules. By contrast, if Article 22(b) Rome I-P was to be construed to the effect that only this provision addressed the election of a future Community instrument, the optional body of rules would prevail over national law irrespective of the envisioned Regulation whereby a truly uniform law would be achieved. It appears that only the latter solution would be in line with the objective pursued by the adoption of an optional Community instrument. Therefore, the relationship between Article 3(2) and Article 22(b) Rome I-P as to a future optional instrument, far from being clear, needs to be established. The Explanatory Memorandum in its current wording is contradictory in this respect. In order to avoid problems of interpretation, it should be clarified in a recital of the Regulation that only Article 22(b) Rome I-P applies to the choice of such an instrument.[37]

Article 3(4) Rome I-P: Mandatory provisions in purely domestic cases

Terminology: Internally and internationally mandatory rules

29. The Institute recommends using a different terminology for the provisions dealt with in Articles 3(4), 3(5) and 6 Rome I-P on the one hand and in Article 8 Rome I-P on the other hand. All these conflict rules speak in their English version of "mandatory rules" but have different concepts in mind.[38]

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[33] Principles on European Contract Law (supra n. 11).
[34] Cf. Explanatory Memorandum Rome I-P, p. 5.
[35] See supra no. 9 (comment on Recitals) with n. 14.
[36] Cf. Explanatory Memorandum Rome I-P, p. 9.
[37] See supra no. 9 (comment on Recitals).
[38] For details see *Max Planck Institute*, Comments on Green Paper Rome I, pp. 53 seq.

Mandatory provisions as defined by Articles 3(4), 3(5) and 6 Rome I-P are *internally* mandatory only and cannot be derogated from by contract, but can normally be set aside by choice of law if the parties conclude a contract which, in addition to a choice of law, carries sufficient international elements. By contrast, Article 8 Rome I-P deals exclusively with the application of so-called *internationally* mandatory provisions. Due to their crucial importance for the political, social or economic organisation of a state, those internationally mandatory provisions apply, from the viewpoint of the enacting state, irrespective of the law governing the contract.

The important distinction between nationally and internationally mandatory rules has been honoured by the Commission in the French and German version of its proposal. The same has to be done in the English wording. A viable solution would be to retain the references in Articles 3(4), 3(5) and 6 Rome I-P to "mandatory rules" but to change the terminology of Article 8 Rome I-P by replacing "mandatory rules" by "internationally mandatory rules".[39]

Reference to the chosen law

30. Additionally, the Institute suggests, that Article 3(4) Rome I-P should refer to the law chosen by the parties rather than the *foreign* law chosen by them. Article 3(2) Rome I-P enables the parties to elect as their governing law the principles and rules of the substantive law of contract recognised internationally or in the Community. Those principles and rules, e. g., the UNIDROIT Principles of International Commercial Contracts,[40] are not part of the law of a state and thus not foreign to the state whose law the parties want to derogate from. As a consequence, Article 3(4) Rome I-P in its current wording might be interpreted in such a way as to allow the parties to a contract having only connections to France to evade internally mandatory provisions of French law by choosing the UNIDROIT Principles. Hence, by removing "foreign", it should be clarified that Article 3(4) Rome I-P applies regardless of the parties choosing a state law according to Article 3(1) Rome I-P or a non-state law according to Article 3(2) Rome I-P.

Article 3(5) Rome I-P: Internally mandatory provisions in intra-Community cases

Underlying rationale

31. Article 3(5) Rome I-P aims to serve the same purpose as Article 4(4) Rome II-AP.[41] It purports to foreclose an evasion of mandatory provisions

[39] See infra no. 141 (comment on Article 8).

[40] Principles of International Commercial Contracts (supra n. 10).

[41] Explanatory Memorandum, Rome II-AP (supra n. 7) p. 14: "The parties' choice of

contained in Community instruments if the contract has significant links to one or more of the Member States.[42] The harmonisation of private law has proceeded and has created, in some areas, a common minimum standard within the Community. Community law provides, for instance, for the post-contractual compensation of commercial agents[43] or for interest rates that are due in case of late payment of certain debts.[44] Hence, situations similar to those provided for by Article 3(4) Rome I-P for purely domestic cases may occur if the parties choose the law of a third state, although all other factors relevant to the contract are linked with the Community.

The Institute shares these concerns:[45] The parties should not be able to evade any internally mandatory minimum standards of Community law if their contract has only connections to Member States. Article 3(4) Rome I-P does not suffice to restrain the parties from evading internally mandatory Community law if there are links to *different* Member States. Even if all elements relevant to the contract are located in the Community, Article 3(4) Rome I-P, just like Article 3(3) Rome Convention, does not limit the parties' freedom to choose the law of a third state as the governing law insofar as the circumstances point to more than one Member State. This gap for cross-border intra-Community cases could be closed by applying Article 3(4) Rome Convention by analogy, as some propose.[46] Yet, a clear-cut provision is desirable,[47] since not everyone seems to be convinced by an analogous application

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the applicable law shall not debar the application of provisions of Community law where the other elements of the situation were located in one of the Member States of the European Community at the time when the loss was sustained."

[42] Explanatory Memorandum Rome I-P, p. 5; Green Paper Rome I (supra n. 2) pp. 18 seq.

[43] Council Directive 86/653/EEC of 18. 12. 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, O.J. EC 1986 L 382/17.

[44] Directive 2000/35/EC of the European Parliament and of the Council of 29. 6. 2000 on combating late payment in commercial transactions, O.J. EC 2000 L 200/35.

[45] See *Max Planck Institute*, Comments on Green Paper Rome I, pp. 16 seq.; see also *Groupe européen de droit international privé* (GEDIP), Réponse au Livre vert de la Commission sur la transformation de la Convention de Rome en instrument communautaire ainsi que sur sa modernisation (2003), available at <www.drt.ucl.ac.be/gedip/>; Reply of the *Dutch government* to the Commission's Green Paper, p. 3; Reply of the *Nordic Group for Private International Law*, p. 23; Reply of *Rauscher*, p. 5; critically, however, the replies of the *Norwegian Ministry of Justice* of 9. 9. 2003, p. 2; of the *German Federal Ministry of Justice* of 6. 10. 2003, p. 4, of the *Government of the United Kingdom*, para. 7, of the *Ministry of Justice of the Czech Republic*, p. 2, all replies available at <http://ec.europa.eu/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm>; reply of *Magnus/Mankowski*, The Green Paper on a Future Rome I Regulation – on the Road to a Renewed European Private International Law of Contracts: ZVglRWiss. 103 (2004) 131 (143 seq.).

[46] *Lando*, The EEC Convention on the law applicable to contractual obligations: C.M.L. Rev. 24 (1987) 159 (181 seq.); *Michaels/Kamann*, Europäisches Verbraucherschutzrecht und IPR: JZ 1997, 601 (604).

[47] *Basedow*, Materielle Rechtsangleichung und Kollisionsrecht, in: Internationales Verbraucherschutzrecht, ed. by *Schnyder/Heiss/Rudisch* (1995) 11 (34).

of Article 3(4) Rome Convention in cross-border intra-Community cases.[48] Additionally, Articles 5 and 6 Rome I-P do not sufficiently protect Community law from evasion by the choice of the law of a non-Member State, either. Those provisions only safeguard the application of certain internally mandatory Community provisions within their substantive scope,[49] but do not tackle the evasion of Community law generally.

Ambiguous wording of Article 3(5) Rome I-P

32. However, Article 3(5) Rome I-P, as it stands now, does not provide a suitable solution for the evasion problem in cross-border intra-Community cases. Notably, it is not clear what is meant by limiting the party autonomy with regard to mandatory rules of Community law "as are applicable to the case".[50] This ambiguous wording can be understood in very different ways, as the first academic reactions to the Commission's proposal already show:

Article 3(5) Rome I-P could, on the one hand, be interpreted to the effect that the parties cannot derogate from mandatory Community law via Article 3(1) and (2) Rome I-P if the case falls within the *substantive* scope of the Community law provision in question and the law of a Member State would be applicable pursuant to Article 4 Rome I-P.[51] On the other hand, one could infer from the clause "as are applicable to the case" that the national judge in applying Article 3(5) Rome I-P is required to assess whether the specific mandatory Community law provision is by its own virtue *internationally* applicable, irrespective of the law governing the contract according to Rome I.[52]

Yet, neither of these possible interpretations of Article 3(5) Rome I-P is satisfactory with regard to the Commission's aim to protect internally mandatory Community law provisions in pure intra-Community cases.

One possible meaning of "as are applicable to the case": Turning all internally mandatory Community law provisions into internationally mandatory rules

33. If Article 3(5) Rome I-P is understood as covering all mandatory rules of Community law which are applicable to the case rationae materiae and would be applicable according to Article 4 Rome I-P in the absence of a choice of law, the scope of Article 3(5) Rome I-P would be far too wide. Un-

[48] See for further details Münchener Kommentar zum BGB[4] *(-Martiny)* X (2006) Art. 27 EGBGB, no. 92 seq. (cited Münch. Komm. BGB *[-Martiny]*).

[49] Green Paper Rome I (supra n. 2) pp. 18 seq.; *Max Planck Institute*, Comments on Green Paper Rome I, p. 17.

[50] *Mankowski*, Vorschlag Rom-I-VO 102.

[51] Cf. *Bitterich* 267.

[52] Cf. *Mankowski*, Vorschlag Rom-I-VO 102; *Dickinson* 172.

like Article 4(4) Rome II-AP[53], Article 3(5) Rome I-P in its current wording is not restricted to intra-Community cases. Rather, Article 3(5) Rome I-P applies regardless of any additional link to the Community. Hence, it would be merely sufficient for ousting a choice of law with regard to internally mandatory provisions of Community law if Article 4 Rome I-P points to the law of a Member State. Thus, within the substantive scope of any Community instrument, the parties could not derogate from that instrument by electing the law of a non-Member State as their governing law, even if there are no additional links to the Community.[54] Within the ambit of internally mandatory Community law, party autonomy would cease to exist.[55] One could hardly regard the freedom of the parties to choose the applicable law as "one of the cornerstones" of the Regulation anymore, as the Commission still maintains in its proposed Recital 7.[56] Unlike mandatory provisions of national origin, every internally mandatory rule of Community law would be turned into a "loi de police" by Article 3(5) Rome I-P.

34. Such an extensive meaning of Article 3(5) Rome I-P is not justified. It would grant internally mandatory Community law a much stronger protection than internally mandatory provisions of national law. This would, notably, be contrary to the jurisprudence of the ECJ. In *Maxicar*, a Brussels Convention case, the Court has held that, with regard to the public policy exception, provisions of national law and Community law are, in principle, to be treated equally;[57] the same has to apply to the international scope of internally mandatory rules. Furthermore, Article 3(5) Rome I-P would even go beyond the *Ingmar* decision of the ECJ,[58] to which the Commission referred in its Green Paper as a possible example for a future Article 3(5). In *Ingmar* the Court had to decide whether Articles 17 and 18 of the Commercial Agents Directive[59] guaranteeing a post-contractual indemnity to commercial agents must be applied where the commercial agent carried out its activity in a Member State, even though the principal is established in a non-Member State and the parties have chosen the law of that latter state. The ECJ ruled that those provisions will apply which are at least internally mandatory provisions of Community law because Article 19 of the Commercial Agents Directive forbids any contractual derogation to the detriment of the agent.

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[53] See wording supra n. 41.

[54] *Dickinson* 172 with n. 7.

[55] See also *Max Planck Institute*, Comments on Green Paper Rome I, p. 68.

[56] For the wording of Recital 7 in the English version see supra no. 10 (comment on Recitals).

[57] ECJ 11. 5. 2000 – case C-38/98 *(Régie nationale des usines Renault SA* v. *Maxicar SpA und Orazio Formento)*, E.C.R. 2000, I-2973, paras. 32 seq.

[58] ECJ 9. 11. 2000 – case C-381/98 *(Ingmar GB Ltd.* v. *Eaton Leonard Technologies)*, E.C.R. 2000, I-9305.

[59] Council Directive 86/653/EEC (supra n. 43).

However, the ECJ stressed that Articles 17 and 18 of the Commercial Agents Directive were not only internally mandatory, but that their application was "essential for the Community legal order" – a condition which is missing in the current wording of Article 3(5) Rome I-P. The Advocate General *Léger* also regarded Article 19 of the Commercial Agents Directive as an internationally mandatory provision (as opposed to an internally mandatory provision in the sense of Article 3(4) Rome I-P), which is applicable to an international situation according to its intention to be applied, regardless of its designation by a conflicts rule.[60] Furthermore, in *Ingmar* – unlike in Article 3(4) Rome I-P – there was a sufficient connection to the Community justifying the application of a mandatory provision of Community law in spite of the choice by the parties of a non-Member State law.[61]

Another possible meaning of "as are applicable to the case": hinting at internationally mandatory provisions of Community law

35. It is therefore more likely that the reference to the applicability of the mandatory rules of Community law in Article 3(5) Rome I-P ("as are applicable to the case") is to be understood in the second sense: Only provisions of Community law should be applied which are internationally applicable irrespective of the law governing the contract.[62] However, many Community instruments do not contain explicit provisions on their international scope. Thus, under Article 3(5) Rome I-P the national judge would be supposed, as was the ECJ in *Ingmar*, to interpret the Community instrument in question and to decide whether it is intended to cover the case at hand internationally although the parties have chosen the law of a non-Member State.

36. If the wording of Article 3(5) Rome I-P is understood in that way, however, it is equally unconvincing: First, if the *Ingmar* test is meant to be the true function of the annex "as are applicable to the case", there would be no practical need for Article 3(5) Rome I-P. A provision of Community law which claims international application irrespective of a choice of law by the parties is arguably applicable by its own virtue, by virtue of Article 8(2) Rome I-P as an internationally mandatory rule,[63] or as a prevailing Community act under Article 22 Rome I-P. If *Ingmar* is to be codified for reasons of clarification, it should, at the most, be accommodated within Article 8 Rome I-P where issues of internationally mandatory rules are specifically addressed.[64]

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[60] Advocate General *Léger* 11.5. 2000, in ECJ 9.11. 2000 (supra n. 58) para. 89.

[61] ECJ 9.11. 2000 (supra n. 58) para. 25.

[62] This interpretation is supported by reference to the *Ingmar* decision (supra n. 58) in the Green Paper Rome I (supra n. 2) p. 19.

[63] *Dickinson* 172.

[64] Reply of *Rauscher* (supra n. 45) pp. 5 seq.; Reply of the *Nordic Group for Private Interna-*

37. Secondly, the *Ingmar* problem would only be solved in part. The application of internationally mandatory rules of Community law would merely be safeguarded by Article 3(5) Rome I-P if the parties have chosen a governing law (Article 3 Rome I-P), but not in the absence of such a choice (Article 4 Rome I-P).[65] By contrast, internationally mandatory provisions of national law would under Article 8 Rome I-P prevail over the law designated by both Articles 3 and 4 Rome I-P. One may conceive a case, where a Community law provision should be applicable because the provision is essential for the Community legal order and the case has some strong links to the Community, but Article 4 Rome I-P would lead nonetheless to the application of the law of a third state. Hence, the Commission's proposal, if understood in the second sense, would lead to the odd result, that a given provision of Community law would be applied internationally irrespective of the parties' choice of law, but not irrespective of the law applicable to the contract in the absence of a choice of law. There is no reason for such a distinction. This observation clearly demonstrates that the priority of internationally mandatory rules of the Community law has to be established in the systematic context of Article 8 Rome I-P and not in Article 3 Rome I-P.

38. Finally, if Article 3(5) Rome I-P has to be conceived as a mere declaratory provision hinting at the unconditional enforcement of internationally mandatory provisions of Community law, the Commission's proposal would make no material change to the status quo:[66] Under the current regime, an internationally mandatory provision of Community law is applicable by its own virtue, by virtue of Article 7(2) Rome Convention or as a prevailing Community act under Article 20 Rome Convention. The question whether the parties should be able to avoid the *internally* mandatory rules of Community law in pure intra-Community contracts by electing the law of a third state – an issue which the Commission raised in the Green Paper[67] – would still be left open. Article 4(4) Rome II-AP[68] would find no counterpart in the Rome I-P.

Incompleteness as to Directives

39. Apart from its ambiguity of wording, the possible interpretations of Article 3(5) Rome I-P do not explicitly address the question which law is to be applied instead of the law of the non-Member State chosen by the parties. This causes no problems if the parties derogate from a Community regulation because this regulation would be enforced directly. Yet, the situation is differ-

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tional Law (supra n. 45) p. 23; *Dickinson* 172; in the same direction Reply of the *Ministry of Justice of the Czech Republic* (supra n. 45) p. 2.

[65] *Bitterich* 267; see also *Magnus/Mankowski* (supra n. 45) 143 seq.

[66] *Mankowski*, Vorschlag Rom-I-VO 102.

[67] Green Paper Rome I (supra n. 2).

[68] See wording supra n. 41.

ent if the parties deviate from a directive; then the question arises whose Member State's implementation is to be applied.

Proposed solution: Extension of Article 3(4) Rome I-P to intra-Community cases

40. The Institute suggests that the Commission's legitimate concerns are to be addressed by extending Article 3(4) and Article 8(2) Rome I-P to provisions of Community law: As proposed by the Institute in its 2004 comments, the Commission's aim would best be served by applying mutatis mutandis the technique of Article 3(4) Rome I-P to intra-Community cases.[69] Accordingly, similarly to Article 4(4) Rome II-AP,[70] Article 3(5) of the Rome I Regulation should state that the fact that the parties have chosen the law of a non-Member State does not, where all the other elements relevant to the contract are connected with one or more of the Member States, prejudice the application of mandatory rules contained in European regulations or the application of Member State rules insofar as they implement mandatory European directives. In the latter case, the provisions of the relevant directive shall apply as implemented in the domestic law of the Member State that would govern the contract in the absence of a choice-of-law clause pursuant to Article 4 Rome I-P.[71]

Extension of Article 8(2) Rome I-P to internationally mandatory provisions of Community law

41. The concern addressed in Article 3(5) Rome I-P has to be distinguished from the *Ingmar* issue. Article 3(5) Rome I-P is confined to cases which have no relevant connection with non-Member States. It is a different question whether certain provisions of Community law, which are essential for the Community legal order, deserve additional protection and are to be applied irrespective of the law applicable to the contract under Rome I, even if not all elements relevant to the contract point to the Community. The parties might not be allowed to circumvent such provisions, neither directly by a choice of law pursuant to Article 3 Rome I-P in favour of a non-Member State law nor indirectly by changing connecting factors relevant under Article 4 Rome I-P in order to make a non-Member State law applicable. But *Ingmar* cannot be codified within Article 3 Rome I-P because, as seen above, this ar-

[69] *Max Planck Institute*, Comments on Green Paper Rome I, pp. 16 seq.

[70] See wording supra n. 41.

[71] See GEDIP proposal of 2003 (supra n. 45); Reply of the *German Federal Ministry of Justice* (supra n. 45), p. 4; Reply of *Rauscher* (supra n. 45) 6; Reply of the *Nordic Group for Private International Law* (supra n. 45) p. 15; *Stoll*, Fragen der Selbstbeschränkung des gemeinschaftlichen Rechts der internationalen Schuldverträge in Europa, Eine Skizze, in: Festschrift (FS) für Erik Jayme I (2004) 905 (910).

ticle deals only with the parties' choice of law, whereas the *Ingmar* rationale concerns the outer limits of all conflict rules – not only those laid down in Article 3 Rome I-P, but also those contained in Articles 4 to 7, 9 and 10 Rome I-P. The application of internationally mandatory rules of Community law should therefore, as with the application of internationally mandatory rules of the lex fori in general, be addressed within Article 8 Rome I-P.[72]

Article 4 – Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law determined as follows:	1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law ~~determined as follows:~~ *of the country with which it is most closely connected.*
	2. It shall be presumed that the contract is most closely connected with the country in which the party who is to effect the performance which is characteristic of the contract has his habitual residence at the time of conclusion of the contract.
	3. In particular, a contract shall be presumed to be most closely connected as follows:
(a) a contract of sale shall be governed by the law of the country in which the seller has his habitual residence;	(a) a contract of sale ~~shall be governed by the law of~~ *shall be presumed to be most closely connected with the country* in which the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country in which the service provider has his habitual residence;	(b) a contract for the provision of services ~~shall be governed by the law of~~ *shall be presumed to be most closely connected with the country* in which the service provider has his habitual residence;
(c) a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;	(c) a contract of carriage ~~shall be governed by the law of~~ *shall be presumed to be most closely connected with the country* in which the carrier has his habitual residence;

[72] See infra nos. 142–144 (comment on Article 8).

(d) a contract relating to a right in rem or right of user in immovable property shall be governed by the law of the country in which the property is situated;

(d) a contract relating ~~to a right in rem or right of user in immovable property~~ *to a right in rem in immovable property or a right to use immovable property* ~~shall be governed by the law of~~ *shall be presumed to be most closely connected with the country* in which the property is situated;

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be governed by the law of the country in which the owner has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months ~~shall be governed by the law of the country~~ *shall be presumed to be most closely connected with the country* in which the ~~owner~~ *landlord* has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;

(f) [Primary proposal: delete Article 4(1) (f)] ~~a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;~~

[Alternative proposal (see infra no. 54)]

a contract relating to intellectual or industrial property rights shall be presumed to be most closely connected with the law of the country in which the person who transfers or licenses the rights has his habitual residence, unless the transferee or licensee has accepted a duty to exploit the rights;

(g) a franchise contract shall be governed by the law of the country in which the franchised person has his habitual residence;

(g) *notwithstanding point (f)*, a franchise contract ~~shall be governed by the law of~~ *shall be presumed to be most closely connected with the country* in which the ~~franchised person~~ *franchisee* has his habitual residence;

(h) a distribution contract shall be governed by the law of the country in which the distributor has his habitual residence.

2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.

(h) *notwithstanding point (f)*, a distribution contract ~~shall be governed by the law of~~ *shall be presumed to be most closely connected with the country* in which the distributor has his habitual residence.

[see supra paragraph 2]

4. The presumptions of paragraphs 2 and 3 may exceptionally be disregarded if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country.

S u m m a r y

Article 4 Rome I-P constitutes one of the most significant departures from the law as it now stands under the Rome Convention. The Commission proposes to enhance certainty by adopting a list of fixed connection points for certain contracts enumerated in Article 4(1) Rome I-P. Contracts not specified in the list of Article 4(1) Rome I-P shall be governed by the law of the country in which the party required to perform the service characterising the contract has his habitual residence (Article 4(2) 1st sentence Rome I-P). The flexible criterion of the closest connection is only retained in the exceptional case where no contract on the list of Article 4(1) Rome I-P is concerned and the service characterising the contract cannot be identified (Article 4(2) 2nd sentence Rome I-P). The Commission thus proposes to convert the presumptions of Article 4(2), (3) and (4) Rome Convention into fixed rules which will replace the flexible system of closest connection and presumption of Article 4(1)-(4) Rome Convention. An exception to the application of the law of the place of habitual residence of the party effecting the characteristic performance which is possible under present law due to the rebuttable nature of the presumptions and the exception clause of Article 4(5) Rome Convention will no longer be admissible. This departure from the flexible approach

of the Rome Convention to a system of strict rules will lead to the mandatory application of the law specified in Article 4(1) and Article 4(2) 1st sentence Rome I-P with no discretion left to the courts.

Even though the Institute welcomes some points of the Commission's proposal (in particular the introduction of a general definition of habitual residence in Article 18 Rome I-P and the deletion of the special rule for carriage contracts in Article 4(4) Rome Convention), it believes that the general approach to (almost) completely abandon flexibility in Article 4 Rome I-P is not desirable. Article 4 Rome I-P in its present wording does not only seem to be in contradiction with the general objective of balancing certainty and flexibility as expressed by the European Parliament and the Commission in the neighbouring field of non-contractual obligations (see infra nos. 45–46). The strict rules of Article 4(1) Rome I-P would also overrule case law of different Member States' courts which have relied on the flexibility of Article 4 Rome Convention to adequately cope with the needs of commercial practice (see infra nos. 47–56). From a comparative point of view, the Commission's proposal would disturb international concordance which currently exists with important trading partners of the EU (see infra no. 57). The Institute thus regards four modifications as necessary:

– The test of closest connection should be retained as a general rule in Article 4(1).

– This test should be supplemented with a presumption in favour of the law of the party effecting the characteristic performance in Article 4(2).

– A clarifying list of presumptions for specific contracts should be included after the general presumption as special presumptions in Article 4(3).

– A more narrowly drafted escape clause should constitute the final paragraph of Article 4(4) which makes it clear that the exception clause is to be invoked in exceptional circumstances only.

Comments

Overview of the proposal

42. Article 4 Rome I-P constitutes one of the most significant departures from the law as it now stands under the Rome Convention. Probably motivated by a divergence of the national courts' practice relating to the relationship between Article 4(2) and Article 4(5) Rome Convention, the Commission proposes to enhance certainty by adopting a list of fixed connection points for certain contracts enumerated in Article 4(1) Rome I-P. Contracts not specified in the list of Article 4(1) Rome I-P shall be governed by the law of the country in which the party required to perform the service characterising the contract has his habitual residence (Article 4(2) 1st sentence Rome I-P). The flexible criterion of the closest connection is only retained in the ex-

ceptional case where no contract on the list of Article 4(1) Rome I-P is concerned and the service characterising the contract cannot be identified (Article 4(2) 2nd sentence Rome I-P). The Commission thus proposes to convert the presumptions of Article 4(2), (3) and (4) Rome Convention into fixed rules which replace the flexible system of closest connection and presumptions of Article 4(1)-(4) Rome Convention. An exception to the application of the law of the place of habitual residence of the party effecting the characteristic performance which is possible under present law due to the rebuttable nature of the presumptions and the exception clause of Article 4(5) Rome Convention will no longer be admissible.

On a more technical level, the Commission proposes to introduce a general definition of habitual residence for companies and contracts concluded in the course of operation of a subsidiary, a branch or other establishment in Article 18 Rome I-P which absorbs the present Article 4(2) 2nd sentence Rome Convention. Finally, the Commission proposes to abolish the special rule for carriage contracts in Article 4(4) Rome Convention and instead integrate such contracts into the general system (Article 4(1)(c) Rome I-P).

Consequence: No discretion left to the courts in the vast majority of cases

43. These changes, in particular the change from the flexible system of the Rome Convention to the strict rules of Article 4(1) and (2) 1st sentence Rome I-P, will lead to the mandatory application of the law specified in Article 4(1) Rome I-P for the named categories of contracts or, respectively, to the mandatory application of the law of the country in which the party who is required to perform the service characterising the contract has its habitual residence (Article 4(2) 1st sentence Rome I-P). The courts will thus be obliged always to apply the law of the habitual residence of the seller, service provider, carrier, transferor or assignor of intellectual property rights, franchisee or distributor unless the parties have chosen the law applicable to their contract. An exception which is possible under present law due to the rebuttable nature of the presumptions and the escape clause of Article 4(5) Rome Convention will no longer be admissible. Only in the exceptional case of no contract of the list of Article 4(1) Rome I-P being concerned and the service characterising the contract not possible to be identified, the flexible criterion of the closest connection may be applied (Article 4(2) 2nd sentence Rome I-P).

The Institute's opinion: Compromise between certainty and flexibility

44. Even though the Institute welcomes some points of the Commission's proposal – in particular the introduction of a general definition of habitual

residence in Article 18 Rome I-P[73] and the deletion of the special rule for carriage contracts in Article 4(4) Rome Convention[74] – it believes that the general approach to (almost) completely abandon flexibility in the determination of the law applicable to a contract in the absence of a parties' choice is not desirable. Even though such strictness is obviously favourable to promote legal certainty and the uniform application of a future Community instrument, it leaves judges hardly any space to balance commercial interests and adapt the rule to the needs of commerce. This marks a considerable departure from the practice of most European countries prior to the enactment of the Rome Convention.[75] The Institute believes that in the field of obligations a common policy must prevail which allows for exceptional deviations from the basic conflict rule both in contractual and non-contractual matters. The loss of foreseeability generated by the exception clause of Article 4(5) Rome Convention should also be viewed in the context of procedural devices. Exception clauses lend themselves to deviating interpretations by national courts as long as no common and authoritative interpretation exists. Until 2004 the Protocols on the interpretation of the Rome Convention had not entered into force, and to date the ECJ has not handed down a single judgment on the Rome Convention. A future Rome I Regulation will be subject, under Article 68 EC, to interpretation by the ECJ from the onset forward. It will be up to the ECJ to identify fact situations which allow a deviation from the basic conflict rules, and the ECJ will certainly prevent former national conflict rules from being perpetuated under the cover of an exception clause.

The Institute thus proposes to retain the flexible principle of closest connection, supplemented with a system of presumptions, and draft only the exception clause more narrowly, thereby finding a compromise between enhanced certainty of application and retained judicial flexibility in individual cases. If a clarifying list of presumptions for specific contracts is favoured by the European legislator, such a list could be included as special presumptions – thus achieving the compromise solution of a closest connection criterion test supplemented with presumptions and an exception clause featuring three narrowing elements: (1) The presumption of the closest connection may be disregarded only "exceptionally". (2) The closer connection to another country must not only "appear" from the circumstances, it must be "clear". (3) A closer connection as such does not matter, it must be "manifestly" closer.

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[73] See infra nos. 171 seq. (comment on Article 18).

[74] See infra no. 50.

[75] *Giuliano/Lagarde*, Report on the Convention on the law applicable to contractual obligations: O.J. EC 1980 C 282/1 (20).

The Commission's and Parliament's opinion in the neighbouring field of non-contractual obligations

45. A compromise between legal certainty and judicial flexibility appears to match the position of both the Commission and the European Parliament in the neighbouring field of non-contractual obligations. Both in the original[76] and in the amended[77] proposal for a regulation on the law applicable to non-contractual obligations (Rome II), the Commission has proposed the introduction of an exception clause to the general rule for the law applicable to non-contractual obligations arising out of a tort or delict[78] "which aims to bring a degree of flexibility, enabling the court to adapt the rigid rule to an individual case so as to apply the law that reflects the centre of gravity of the situation".[79] The European Parliament has gone even further and pointed out in a newly drafted Recital 8 to the proposed Rome II Regulation that "the need for legal certainty must always be subordinate to the overriding need to do justice in individual cases and consequently the courts must be able to exercise discretion".[80]

Contradiction between Article 4 Rome I-P and Recital 8 Rome I-P

46. The fixed rules of Article 4 Rome I-P also seem to contradict the general objective of the instrument as stated in Recital 8. Recital 8 states that "to contribute to the general objective of the instrument – certainty as to the law in the European judicial area – the conflict rules must be highly foreseeable." However, it is also acknowledged that "the courts must retain a degree of discretion to determine the law that is most closely connected to the situation in a limited number of hypothetical cases." It is difficult to see in which "limited number of hypothetical cases" this "degree of discretion" is maintained. It should be remembered that for all contracts specified in Article 4(1) and Article 4(2) 1st sentence Rome I-P, i.e. all contracts of sale, provision of services, carriage, relating to a right in rem or a right to use immovable property, relating to intellectual or industrial property, franchising and distribution and all other contracts where the characteristic performance can be identified, the rules of Article 4(1) and 4(2) Rome I-P leave no discretion at all. Only in the very exceptional case of other contracts (Article 4(2) 2nd sentence Rome I-P) is a certain discretion kept, but this is not a result of a compromise between certainty and individual justice, but rather a consequence of

[76] COM(2003) 427 final (supra n. 5).

[77] Rome II-AP (supra n. 7).

[78] Article 3(3) of the original proposal and Article 5(3) of the amended proposal (Rome II-AP).

[79] COM(2003) 427 final (supra n. 5).

[80] European Parliament (supra n. 6) A6–0211/2005, p. 3.

the fact that, in the case described by Article 4(2) 2nd sentence Rome I-P, it is hard to think of a criterion which would make a strict rule possible.

Practical inappropriateness of strict rules for individual contracts

47. Most importantly, the proposed fixed rules of Article 4(1) Rome I-P would overrule jurisprudence in different Member States which has relied on the flexibility of Article 4 Rome Convention to adequately cope with the needs of commerce. This shall be demonstrated by use of examples of national jurisprudence for the different contracts specified in Article 4(1) Rome I-P.

Article 4(1)(a) Rome I-P: Contracts of sale

48. Concerning the fixed rule for contracts of sale, Article 4(1)(a) Rome I-P referring to the law of the seller will normally indicate the law which is best suited for the contract. However, the inappropriateness of a fixed rule is demonstrated by a case decided by the German Bundesgerichtshof (BGH) in 2004.[81] In this case the BGH had to decide about the law applicable to a contract for the purchase of a claim, governed by German law but secured by a mortgage over property situated in France and thus governed by French law. After pointing out that the contract did not have a right in immovable property as its subject matter because it was concerned with the purchase of the secured claim and not the mortgage which was accessory to the claim, the BGH nevertheless used the escape clause of Article 4(5) Rome Convention[82] to apply French law to the contract of sale because the mortgage related to property in France, the contract of sale had been certified by a French notary, the contract was written in French, the lawyers on both sides were French, the sales price was in French francs and the aim of the parties was essentially to buy the mortgage and not the claim secured by it. Even if the synchronisation of the laws applicable to several contracts is only one argument when it comes to the application of the escape clause of Article 4(5) Rome Convention, an accessory choice of law might under certain circumstances be appropriate from a practical point of view, in particular in contracts relating to claims secured by rights in immovable property as these come very close to the presumption in Article 4(3) Rome Convention. It should not in general be prohibited as it would under the strict character of Article 4(1)(a) Rome I-P.[83]

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[81] BGH 26.7. 2004, IPRax 2005, 342 (345 seq.).

[82] The corresponding Article 28(5) EGBGB.

[83] *Dickinson* 172; the accessory determination of the applicable law can also be found in other national case law, see Cour d'appel Versailles 6.2. 1991 *(Bloch* c. *Société Lima)*, Rev. crit. d.i.p. 80 (1991) 745 (746 seq.) with note *Lagarde*; *Bank of Baroda* v. *Vysja Bank Ltd.*,

Article 4(1) (b) Rome I-P: Contracts for the provision of services

49. Contracts for the provision of services may also be more closely connected with another country than the country where the service provider is habitually resident. Hard cases where the law of the service provider had only a remote connection with the contract and where the application of the escape clause was at least conceivable can be found in UK case law.[84] A particularly striking example for the inappropriateness of the law designated by Article 4(1)(b) Rome I-P is a case decided by the Austrian Oberster Gerichtshof (OGH) in 1998.[85] The OGH had to decide which law applies to a contract with an arbitrator. Such a contract[86] may well be understood as a contract "for the provision of services" and would thus fall under Article 4(1)(b) Rome I-P. Alternatively, one would consider the arbitrator to perform the service characteristic of the contract, thus leading to the application of Article 4(2) 1st sentence Rome I-P. In both cases the law of the country where the arbitrator is habitually resident would have to be applied with no exception possible. As a consequence, in an arbitration tribunal with arbitrators from different countries, the contractual liability of the arbitrators might be subject to different laws which do not necessarily coincide with the law applicable to the arbitration proceedings. The OGH understandably considered this result as inappropriate and decided to subject all contracts with arbitrators to the law which governs the arbitration proceedings.[87] Such a solution would no longer be possible under Article 4(1)(b) Rome I-P.

[1994] 2 Lloyd's L.Rep. 87 (93); OLG Hamm 13. 11. 1995, NJW-RR 1996, 1144 (1145); OLG Düsseldorf 20. 6. 1997, RIW 1997, 780 (780 seq.).

[84] *Definitely Maybe (Touring) Ltd.* v. *Marek Lieberberg Konzertagentur GmbH*, [2001] 1 W.L.R. 1745 (1749); *Ennstone Building Products Ltd.* v. *Stanger Ltd.*, [2002] 2 All E.R. (Comm.) 479 (489); *Kenburn Waste Management Ltd.* v. *H. Bergmann*, [2002] International Litigation Procedure 588 (594); *Caledonia Subsea Ltd.* v. *Microperi Srl*, [2002] Scots Law Times 1022 (1029).

[85] OGH 28. 4. 1998 ZRvgl. 39 (1998) 259. In this case the Rome Convention was not yet applicable. The Austrian national law at that time was, however, similar to Article 4 Rome Convention.

[86] Such a contract does not fall under the exclusion clause of Article 1(2)(e) Rome I-P because it does not concern the "arbitration agreement" submitting the dispute to arbitration but rather the contract with the arbitrator to conduct the arbitration proceedings. The *Giuliano/Lagarde* report (supra n. 75) 12, only states that "[t]he exclusion of arbitration agreements does not relate solely to the procedural aspects, but also to the formation, validity and effects of such agreements. Where the arbitration clause forms an integral part of a contract, the exclusion relates only to the clause itself and not to the contract as a whole." It seems, thus, only concerned with the arbitration agreement itself, not with the contract with the arbitrators.

[87] OGH 28. 4. 1998 (supra n. 85) 261.

Article 4(1)(c) Rome I-P: Contracts for carriage

50. The same can be true for contracts of carriage. Even though the Institute welcomes the abolition of Article 4(4) Rome Convention,[88] this does not mean that the considerations underlying this provision were wholly unfounded from the outset. It may well be that the habitual residence of the carrier points to the law of a country of a flag of convenience wholly unconnected with the operation of the ship and the execution of the contract. In appropriate exceptional circumstances it should be possible for the courts to derogate from the law of the carrier's habitual residence which would not be the case under Article 4(1)(c) Rome I-P, but which would be possible under a system of presumptions supplemented by a narrowly drafted exception clause.[89]

Article 4(1)(d) Rome I-P: Contracts relating to a right in rem in immovable property or a right to use immovable property

51. The English text of Article 4(1)(d) Rome I-P ("a contract relating to a right in rem or a right of user of immovable property") seems to have suffered from a translation error as both the German ("dingliches Recht an einem Grundstück oder ein Recht zur Nutzung eines Grundstücks") and the French text ("un droit réel immobilier ou un droit d'utilisation d'un immeuble") indicate that a different wording was intended. The Institute thus proposes to bring the English wording in line with the German and French texts of the Rome I-P ("right in rem in immovable property or a right to use immovable property"). In substance, the Institute proposes to change the strict rule of Article 4(1)(d) Rome I-P into a more flexible presumption which would make it possible for the national courts in appropriate circumstances to submit contracts relating to immovable property between parties which have their habitual residence in the same country to the law of that country.[90] In cases which fall outside the rule on exclusive jurisdiction in Article 22 No. 1 Brussels I Regulation and which will thus most likely be dealt with by the courts of both parties' habitual residence, such a change would make it possible to apply the lex fori and thus save both time and money in judicial proceedings.

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[88] For a detailed opinon see *Max Planck Institute*, Comments on Green Paper Rome I, pp. 44 seq.; see also *Mankowski*, Vorschlag Rom-I-VO 103.

[89] For an example for the application of Article 4(5) Rome Convention on transport contracts Cour de cassation 4. 5. 2003, Rev. crit. d.i.p. 92 (2003) 285 (286) with note *Lagarde*.

[90] For an example OLG Köln 12. 9. 2000, IPRspr. 2000, no. 26, p. 60 (61). A similar solution is adopted in the field of non-contractual obligations, see Article 5(2) Rome II-AP, (supra n. 7).

Article 4(1)(e) Rome I-P: Leases for the temporary use of immovable property

52. Article 4(1)(e) Rome I-P provides for an exception to the general rule on rights in immovable property or rights to use immovable property in Article 4(1)(d) Rome I-P. The very existence of such an exception demonstrates that there is a need for flexibility in determining the law applicable to contracts in the absence of choice and that a system of strict rules is unsuited in a world of increasingly complex contracts. It is by no means certain that today's legislator is able to foresee all situations in which an exception to the general rules is justified. It should be remembered that the situation described in Article 4(1)(e) Rome I-P – which nowadays seems to be widely accepted as an exception to the general rule of Article 4(1)(d) Rome I-P – evolved as a result of the national courts' application of the exception clause.[91] Like all other provisions of Article 4(1) Rome I-P, Article 4(1)(e) Rome I-P should also be changed into a presumption.

In the wording of Article 4(1)(e) Rome I-P, it is not understandable why the habitual residence of the owner should be decisive for the applicable law as the owner of the property is not necessarily the same person as the landlord of the tenancy agreement.[92] Thus the Institute proposes to replace the word "owner" by the word "landlord". Even though an extension of Article 4(1)(e) Rome I-P to non-personal use and non-natural persons as tenants might be thinkable,[93] such an extension would not be in line with the wording of the exclusive jurisdiction rule of Article 22 No. 1 Brussels I Regulation. The applicable law for the contract would thus diverge from the law of the courts having exclusive jurisdiction under Article 22 No. 1 Brussels I Regulation, a divergence which would increase both costs and length of judicial proceedings and is not advisable.

Article 4(1)(f) Rome I-P: Contracts relating to intellectual or industrial property rights

53. The strict rule in Article 4(1)(f) Rome I-P is particularly unsuited to the needs of commercial and judicial practice in the field of intellectual property related contracts. This is due to the wide variety of contracts in this field. Some of these contracts might have as their main object a franchise, research cooperation or joint venture agreement and deal with the transfer or license of intellectual property rights only in ancillary provisions. As the wording of Article 4(1)(f) Rome I-P does not specify what is meant by "contracts relating to

[91] For references see *Max Planck Institute*, Comments on Green Paper Rome I, p. 46 with n. 122–123.

[92] Article 22 No. 1 Brussels I Regulation, which was (probably) the model for Article 4(1)(e) Rome I-P, also uses the word "landlord" and not the word "owner".

[93] *Mankowski*, Vorschlag Rom-I-VO 104.

intellectual or industrial property rights", it is quite unclear whether in the situation described above (franchise, distribution or joint venture contract with ancillary license of intellectual property rights) the strict rule of Article 4(1)(f) Rome I-P would submit the whole franchise, research cooperation or joint venture agreement to the law of the transferor or assignor of the intellectual property rights or whether Article 4(1)(f) Rome I-P would apply only to the part of the contract dealing with intellectual property transfers or licenses (thus resulting in a dépeçage which may raise serious problems of coordination) or whether contracts which include transfers or licenses of intellectual property rights only as ancillary provisions would be excluded from the scope of Article 4(1)(f) Rome I-P altogether. This is a particular problem in franchising contracts which according to Article 4(1)(g) Rome I-P would be governed by the law of the country where the franchisee is habitually resident whereas Article 4(1)(f) Rome I-P would call for the application of the law of the franchisor as licensor of the intellectual property rights.[94] The Institute thus proposes to clarify the ambit of Article 4(1)(f) Rome I-P. This could be done by including a "notwithstanding point (f)" in those provisions which might conflict with Article 4(1)(f) Rome I-P, in particular Article 4(1)(g) and (h) Rome I-P. Another solution would be to narrow the wording of Article 4(1)(f) Rome I-P from "a contract relating to intellectual or industrial property rights" to "a contract having as its main subject matter the transfer or license of an intellectual or industrial property right".

54. The wide variety of contracts relating to intellectual property rights also calls for a differentiated solution instead of a strict, clear-cut rule.[95] Even though the application of the law of the assignor or transferor of the intellectual property right might be appropriate in simple contracts which resemble an outright sale – such as an assignment or license for consideration in the form of a lump sum payment –, this does not hold true as a general rule. More complex intellectual property transactions often include an explicit or implicit[96] duty of the licensee to exploit the intellectual property right, sometimes supplemented by clauses indicating quantities of production or modalities of use, while the licensor does not accept any commitment beyond the toleration of use of his rights. This casts doubt on the proposition that it is

[94] It may even be the case that license of intellectual property rights is the most important part of the franchise contract, see Austrian OGH 5.5. 1987, GRUR Int. 1988, 72 (73) ("Stefanel").

[95] For the different approaches see, e.g., *Fawcett/Torremans*, Intellectual Property and Private International Law (1998) 558 seq.; *Metzger*, Transfer of Rights, License Agreements, and Conflict of Laws: Remarks on the Rome Convention of 1980 and the Current ALI Draft, in: Intellectual Property in the Conflict of Laws, ed. by *Basedow/Drexl/Kur/Metzger* (2005) 61 (63 seq., 69 seq.)

[96] This is, e.g., the case if the licensee's or assignee's consideration is a payment of royalties rather than a payment of a lump sum.

the licensor who effects the performance characteristic of the contract (as it is the licensee who accepts the commercial risks linked to the exploitation). It may also be the case that the intellectual property rights licensed or assigned are mainly exercised in the country of the licensee's or transferee's habitual residence or principal place of business. Another example of an intellectual property contract where the performances of both parties are essential and characteristic is a contract to publish and distribute a book. For these reasons it is not surprising that many national courts have refused to always regard the assignment or license of an intellectual property right as the performance characteristic of the contract and instead stressed the importance of an individual assessment of the license or transfer contract.[97] The Institute thus proposes to delete Article 4(1)(f) Rome I-P altogether and instead submit contracts relating to intellectual property rights to the general rule of characteristic performance in order to make it clear that it is left to the judges' appraisal of the circumstances of the case whether there is a characteristic performance and which party has promised it. If the legislator nevertheless prefers a special rule for contracts relating to intellectual property rights, the Institute proposes to change Article 4(1)(f) Rome I-P into a presumption in favour of the law of the transferor or licensor which, however, excludes contracts in which the transferee or licensee has accepted an explicit or implicit duty to exploit the rights. The wording should be amended in order to reflect that not only transfers, but also licenses of intellectual property rights are covered.[98]

Article 4(1)(h) Rome I-P: Distribution contracts

55. A final example for the inappropriateness of a fixed rule without any flexibility can be drawn from the provision on distribution contracts (Article 4(1)(h) Rome I-P). This provision seems not to be fully harmonised with Article 7(1) Rome I-P. Under the strict rule of Article 4(1)(h) Rome I-P, a distribution contract will always be governed by the law of the country in which the distributor has his habitual residence. It may, however, be that the distributor also acts as an agent with the consequence that Article 7 Rome I-P would apply. Article 7(1) Rome I-P subjects the relationship between principal and agent (which concerns inter alia the distribution contract) to the law of the country in which the agent has his habitual residence, thus arriving in most cases at the same result as Article 4(1)(h) Rome I-P. However, if the

[97] OLG Hamburg 23. 10. 1997, GRUR Int. 1998, 431 (432) ("Feliksas Bajoras") regards not the transfer, but rather the exploitation of the copyright as the characteristic performance; LG Düsseldorf 10. 1. 1999, GRUR Int. 1999, 772 (773 seq.) ("Virusinaktiviertes Blutplasma") stresses the importance of an individual assessment of license contracts and applies in the given case the law of the place of habitual residence of the licensee who accepted a duty to exploit the rights.

[98] For doubts under the present wording *Dickinson* 172.

agent exercises or is to exercise his main activity in the country where the principal has his habitual residence, the law of that country shall apply (Article 7(1) in fine Rome I-P). In this situation, it is unclear whether Article 4(1)(h) Rome I-P or Article 7(1) Rome I-P shall prevail. This clearly demonstrates that a fixed rule for all distribution contracts is not appropriate and ought to be replaced by a more flexible presumption which makes it possible in some cases to apply a different law. A redrafting of Article 7(1) Rome I-P is also required in order to bring this provision in line with Articles 3, 4, 5 and 6.[99]

Conclusion

56. Obviously the examples cited above do not lead to the conclusion that the rules of Article 4(1) Rome I-P are not useful indications of the law which should regularly be applied to the named contracts. However, the existence of the exceptional cases described above evidences that the fixed rules should be turned into presumptions, indicating the most appropriate law to be applied in general but leaving open the possibility to depart in extraordinary cases. If the courts are deprived of this flexibility it will be quite likely that they will tend to characterise contracts in hard cases as falling outside the rules of Article 4(1) and (2) 1st sentence Rome I-P in order to regain flexibility under Article 4(2) 2nd sentence Rome I-P. Given the fact that a uniform interpretation of a future Community instrument would be ensured by the ECJ and a very high degree of legal certainty can already be achieved by the parties' choice of law under Article 3 Rome I-P, it seems advisable to keep the flexible closest connection test and a system of rebuttable presumptions as the general rule and draft only the exception clause more narrowly, thereby finding a compromise between judicial flexibility and enhanced uniformity of application.

International concordance

57. A final argument against the adoption of Article 4 Rome I-P as proposed by the Commission is international practice outside the EU. The conflict rules of many countries outside the EU and in particular most of the more modern codifications of Private International Law opt for a flexible approach to the law applicable to contractual obligations if the parties have not made a choice of law. The flexible criterion of closest connection can be found in the laws of Switzerland (Article 117(1) IPRG of 1987),[100] Russia (Article 1211(1) of the Russian Civil Code part 3 of 2001),[101] the Republic of

[99] See infra nos. 118–119 (comment on Article 7).

[100] Bundesgesetz über das Internationale Privatrecht vom 18. 12. 1987, BBl. 1988 I 5 = AS 1988, 1776.

[101] Sobranie zakonodatel'stva Rossijskoj Federacii 2001, no. 49, pos. 4552, translated into German in RabelsZ 67 (2003) 341 (347).

Korea (Article 26(1) Conflict of Laws Act of 2001),[102] Québec (Articles 3112 seq. of the Code Civil québecois of 1991),[103] the People's Republic of China (Article 126 of the Chinese contract law of 1999)[104] and in the Inter-American Convention on the Law Applicable to International Contracts of 1994 (Article 9).[105] Most of these legal systems supplement the general test of closest connection with presumptions, be it a general presumption in favour of the law of the party effecting the characteristic performance or special presumptions for specific types of contracts[106] or a combination of both.[107] These examples are clear evidence of the fact that international practice outside the EU seems to converge at a test of closest connection quite often linked with a system of presumptions. The introduction of the strict regime of Article 4 Rome I-P would sacrifice international convergence which is undesirable from the point of view of world-wide harmonisation of conflict rules.

Article 5 – Consumer contracts

1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.	1. *Subject to the provisions in paragraphs 2 and 3* consumer contracts ~~within the meaning and in the conditions provided for by paragraph 2~~ shall be governed by the law of the ~~Member State~~ *country* in which the consumer has his habitual residence.
2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.	2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, ~~who has his habitual residence in a Member State~~ for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.

[102] Law no. 6465, translated into English in Yearbook of Private International Law (YB. Priv.Int.L.) 5: 2003 (2004) 315 (322) with comments by *Kwang Hyun Suk* at p. 99; translated into German in RabelsZ 70 (2006) 342 (347) with comments by *Pissler* at p. 279.

[103] Code civil du 18. 12. 1991, L.Q. 1991, ch. 64 = RabelsZ 60 (1996) 327 (332 seq.).

[104] Contract law of the People's Republic of China 1999, available at <http://english.mofcom.gov.cn/article/topic/lawsdata/chineselaw/ 200211/20021100053894.html>.

[105] Available at <http://www.oas.org/juridico/english/Treaties/b-56.html>.

[106] As in Article 26 of the Korean Conflict of Laws Act.

[107] As in Article 117 of the Swiss IPRG, Article 1211 of the Russian Civil Code Part 3 and Articles 3112 seq. of the Code civil québecois.

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence 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, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.

3. Paragraph 1 shall not apply to:

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

(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;

(c) contracts relating to a right in rem or right of use in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.

It shall apply on condition that the ~~contract has been concluded with a person~~ *professional* ~~who~~ pursues a trade or profession in the ~~Member State~~ *country* in which the consumer has his habitual residence or, by any means, directs such activities to that ~~Member State~~ *country* or to several ~~Member States~~ *countries* including that ~~Member State~~ *country*, and the contract falls within the scope of such activities~~, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence~~.

3. Paragraph 1 shall not apply to:

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

~~(b)~~ (a) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;

~~(c)~~ (b) contracts relating to a right in rem or right of use in immovable property other than contracts relating to a right of use~~r~~ on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.

Summary

The Institute generally welcomes the Commission's proposal for Article 5 Rome I-P. It provides for a clear conflicts rule for consumer contracts and accounts for both the problems experienced with Article 5 Rome Convention as well as the replies to the questions in the Commission's Green Paper. Nonetheless, the Institute regards four modifications as necessary:

The scope of application of Article 5(1) and (2) Rome I-P should not be limited to consumers who are habitually resident in a Member State. Instead,

it should apply to all consumers within the meaning of the proposed Regulation irrespective of their place of habitual residence (see infra nos. 62 and 65).

– The language of Article 5(2) 2nd sentence Rome I-P should account for the definition of "professional" established in Article 5(2) 1st sentence Rome I-P (see infra no. 65).

– The exception in Article 5(2) 2nd sentence Rome I-P relating to the professional's non-negligent ignorance of the consumer's place of habitual residence should be deleted (see infra nos. 66–71).

– The list of excluded contracts in Article 5(3) Rome I-P should not cover contracts 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 (see infra no. 73).

Comments

Overview of the proposal

58. The Commission's proposal for consumer contracts takes centre stage in the envisioned Regulation.[108] It departs from the Rome Convention in several respects: First, it mainly provides for the application of the law of the Member State in which the consumer has his habitual residence and thereby abandons the principle of free choice of law applied under the Convention. Second, it defines consumer contracts with exclusive reference to the persons involved and thus does not follow the Convention's approach of defining consumer contracts with additional reference to the object of the contract. Third, it restricts application of the consumer's law with the help of the targeted activity criterion and thus replaces the long and complex, yet incomplete list of conditions applied under the Convention to limit the principle of free party choice of law.

General rule: Application of the law of the consumer's habitual residence

59. The general conflicts rule for consumer contracts codified in Article 5(1) Rome I-P provides for application of the law at the consumer's place of habitual residence and thus abandons the Convention's complex interplay of free party choice of law and mandatory rules. The Institute embraces this change even though it did not endorse systematic application of the consumer's law in its previous comment.[109] However, the provision as submitted by the Commission has some significant advantages:[110] First, it renounces the

[108] See for first appraisals of Article 5(1) Rome I-P *Mankowski*, Vorschlag Rom-I-VO 105–107; *id.*, Art. 5 Rom I-VO 121.

[109] *Max Planck Institute*, Comments on Green Paper Rome I, pp. 51–52.

[110] See also *Mankowski*, Vorschlag Rom-I-VO 106; *id.*, Art. 5 Rom-I-VO 151–154.

rather vague concept of mandatory rules and thus avoids the parallel application of different laws entailed in the current version of Article 5 Rome Convention. This in turn leads to more legal certainty which helps to reduce both compliance and litigation costs. Second, due to Article 16 Brussels I Regulation, the proposed provision avoids a split of jurisdiction and applicable law. This is particularly desirable in consumer transactions given that the claims involved are usually small.[111] Third, it protects the consumer's expectation in having his law applied without significantly weakening the professionals' position. Even though the latter must adjust their general conditions of contract to the laws of potentially 25 different legal systems the professionals are not worse off than under the Rome Convention:[112] They must abide with the mandatory rules of the consumer's law but they are free to depart from the default rules as long as they comply with the requirements of the Directive on unfair terms in consumer contracts.[113] It must finally be borne in mind that there is no evidence that a choice-of-law clause in a consumer contract has ever been acknowledged by a European court.[114] All in all, Article 5(1) Rome I-P therefore manages to strike a fair balance between the interests of consumers on the one hand and the interests of professionals on the other.[115]

Scope of application: Consumer contracts and targeted activity criterion

60. Article 5(2) Rome I-P defines the scope of Article 5(1) Rome I-P. It provides that the law of the consumer's habitual residence shall govern a contract under three conditions: First, the contract must be a contract concluded by a consumer and a professional. Second, the professional must direct business activities to the consumer's habitual place of residence. Third, the contract must fall within the scope of such activities.

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[111] See for a more detailed discussion *Max Planck Institute*, Comments on Green Paper Rome I, pp. 52 seq.

[112] *Bitterich* 268; but see *Dickinson* 173.

[113] Council Directive (EC) No. 13/1993 of 5. 4. 1993 relating to unfair terms in consumer contracts, O.J. EC 1993 L 95/29.

[114] See the case report and the conclusions drawn therefrom by *Basedow*, Consumer contracts and insurance contracts in a future Rome I Regulation, in: Enforcement of International Contracts in the EU (supra n. 9) 269 (279 seq.); *id.*, Internationales Verbrauchervertragsrecht – Erfahrungen, Prinzipien und europäische Reform, in: FS Jayme (supra n. 71) 3 (16 seq.).

[115] *Bitterich* 268; *Mankowski*, Art. 5 Rom-I-VO 150–160. This is also due to the targeted activity criterion which is embedded in Article 5(2) Rome I-P and discussed in more detail infra nos. 63–65.

Consumer contracts: Contracts between a consumer and a professional

61. Article 5(2) Rome I-P defines a consumer contract as a contract concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession. The Institute welcomes this definition.[116] It significantly extends the substantive scope of Article 5 Rome I-P because it defines consumer contracts solely with reference to the persons involved and refrains from setting up additional requirements relating to the object of the contract. More specifically, it extends the scope of Article 5 Rome I-P to areas which are not covered by Article 5 Rome Convention although European and national laws provide for mandatory consumer protection rules in these areas. In contrast to the definition applied by the Rome Convention, the Commission's definition covers, for example, loans and credits not linked to the supply of goods or services, timeshare agreements on immovable property as well as tenancy agreements for holiday homes situated abroad but marketed in the country of the consumer's habitual residence. By the same token, it covers the growing number of contracts relating to intangible goods that cannot be classified as consumer contracts under the Rome Convention because they concern the supply of neither goods nor services.[117] In addition to extending the substantive scope of Article 5 Rome Convention, the proposed definition also clarifies its personal scope: It stipulates expressly that only natural persons can be consumers and thus ends a long-lasting dispute about whether legal persons can benefit from the protection afforded by Article 5 Rome Convention.[118] Since it does so by implementing definitions contained in other Community acts[119] as well as the case law of the ECJ,[120] it aligns Article 5 Rome I-P with other areas of European consumer protection law.

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[116] It corresponds to the Institute's previous proposal, see *Max Planck Institute*, Comments on Green Paper Rome I, pp. 104 seq.; see also *Mankowski*, Vorschlag Rom-I-VO 105 seq.; *id*., Art. 5 Rom-I-VO 122–123 and 141–142.

[117] See for a more detailed account *Max Planck Institute*, Comments on Green Paper Rome I, pp. 48 seq.; *Mankowski*, Art. 5 Rom-I-VO 122–123.

[118] See for the discussion in Germany for example *Reithmann/Martiny (-Martiny)* no. 803; *Staudinger (-Magnus)* Art. 29 EGBGB, no. 44.

[119] Article 2(b) of Council Directive (EC) No. 13/1993 (supra n. 113).

[120] See for example ECJ 22. 11. 2001 – case C-541/99 *(Cape Snc* v. *Idealservice Srl)*, E.C.R. 2001, I-9049, para. 17 (regarding the notion of consumer in the Council Directive [EC] No. 13/1993 [supra n. 113]); ECJ 19. 1. 1993 – case C-89/91 *(Shearson Lehmann Hutton Inc.* v. *TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH)*, E.C.R. 1993, I-139, para. 22 (regarding the notion of consumer in Article 13 of the Brussels Convention); ECJ 3. 7. 1997 – case C-269/95 *(Francesco Benincasa* v. *Dentalkit Srl.)*, E.C.R. 1997, I-3767, para. 17 (regarding the notion of consumer in Article 13 of the Brussels Convention).

62. Against this background, the Institute recommends adoption of the definition as proposed by the Commission. One modification, however, seems appropriate: In its current version the definition limits the personal scope of Article 5 Rome I-P to consumers that have their habitual place of residence in a Member State. Thus, it excludes consumers habitually resident outside the European Union. This reduction of the article's personal scope of application is astonishing: First, limiting the protection afforded by Article 5 Rome I-P to consumers residing in the European Union has never been a point of discussion under the Rome Convention. Second, none of the replies[121] to the Commission's Rome I Green Paper argued for exclusion of consumers not resident within the European Union. Third, the Explanatory Memorandum does not even mention it. Therefore, it seems that the exclusion of consumers residing outside the European Union was not intended. More important, however, is that it is not desirable. There is no reason to deprive consumers from outside the European Union of the protection afforded to them under their own laws. There is no reason to establish two different consumer protection schemes under the envisioned Rome I Regulation, one for consumers residing within the European Union and one for consumers residing outside. To the contrary: Any such distinction would be discriminatory in nature and, therefore, should not be incorporated in the envisioned Regulation.[122]

Targeted activity criterion: Direction and scope of professional activities

63. The second and third conditions for application of Article 5(1) Rome I-P implement the targeted activity criterion already present in Article 15(1) (c) of the Brussels I Regulation. It is meant to replace Article 5(2) Rome Convention which has caused numerous disputes about the appropriate scope of Article 5 Rome Convention. As the Institute has pointed out in its previous comment, the long and complex list of conditions for the application of the law of the consumer's habitual place of residence has proven too wide in some cases and too narrow in others.[123] It covers some consumers which do not deserve the protection afforded by the law of their habitual residence – such as the consumer who receives a special invitation in the meaning of Article 5(2) Rome Convention after first business contacts in the professional's country. On the other hand it does not cover cases – such as the infamous *Grand Canary* cases – in which protection of mobile consumers by the mandatory rules of their laws of habitual residence would have been desirable. The targeted activity criterion embedded in Article 5(2) 2nd sentence Rome

[121] Supra n. 45.

[122] See also *Bitterich* 268; *Mankowski*, Vorschlag Rom-I-VO 106; *id.*, Art. 5 Rom-I-VO 160–162.

[123] See for a more detailed account *Max Planck Institute*, Comments on Green Paper Rome I, pp. 50 seq.

I-P effectively avoids problems of over- and under-inclusiveness by providing for a flexible standard.

64. At the same time it entails two further advantages: First, it strikes a fair balance between the high standard of consumer protection envisioned by the EC Treaty and the needs of the internal market in consumer transactions. It guarantees application of the protective provisions of the law of the consumer's habitual place of residence where the consumer expects these provisions to apply. On the other hand it allows professionals to escape the consumer protection laws of certain states by limiting their offers to consumers from other states. In this way, the targeted activity criterion also accommodates the needs of electronic commerce and other modern techniques of long distance contracting. Second, the targeted activity criterion leads to the desired synchronisation of jurisdiction and applicable law.[124] Since Articles 15(1)(c) and 16 Brussels I Regulation provide for jurisdiction at the consumer's place of habitual residence if the professional has directed his business activities to that country it is guaranteed that the court will apply its own law in consumer cases. This is particularly desirable given the small stakes in consumer cases which render the costly assessment of foreign law an inefficient endeavour.

65. Against this background, the Institute welcomes the proposed revision of Article 5(2) Rome I-P. However, two changes are recommended: First, for the reasons pointed out earlier, Article 5 (2) Rome I-P should not be limited to consumers who are habitually resident in a Member State.[125] Second, Article 5(2) 2nd sentence Rome I-P should be couched in more concise terms by applying the definition of "professional" provided for in Article 5(2) 1st sentence Rome I-P. More specifically, it should simply require that the "professional" pursues a trade or profession at the consumer's habitual residence instead of referring to a contract that has been concluded with a "person" who pursues a trade or profession in that country.

Exception: Non-negligent ignorance of consumer's habitual residence

66. In addition to defining the scope of application in a positive way, Article 5(2) provides for one exception that excludes application of the law of the consumer's place of habitual residence: According to Article 5(2) 2nd sentence Rome I-P, the consumer's law does not apply if the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence. The provision raises difficulties for the following reasons: First of all, it leads to an unfortunate – and unintended – mix

[124] See *Max Planck Institute*, Comments on Green Paper Rome I, pp. 52 seq.; see also *Mankowski*, Vorschlag Rom-I-VO 106; *id.*, Art. 5 Rom-I-VO 128–129 and 130–131.

[125] See supra no. 62.

of the proposals submitted by the Institute and the Group Europeén du Droit International Privé (GEDIP).[126] This is because it adopts a variant of the GEDIP awareness criterion according to which the professional can escape the application of the consumers' law if he establishes that due to the consumer's conduct he was not aware of the country in which the consumer had his habitual residence. This criterion, however, was never meant to be introduced next to the targeted activity criterion as proposed by the Institute and as implemented in the Commission's proposal in Article 5(2) 2nd sentence Rome I-P. More specifically, it was never meant to serve as an exception to the targeted activity criterion. Rather, it was meant to define the situations in which the consumer should – or should not – enjoy the protection afforded to him by the law of his habitual residence. The introduction of a variant of the GEDIP criterion in Article 5(2) 2nd sentence Rome I-P, therefore, contradicts its original purpose.

67. More important, however, is that the GEDIP criterion as implemented in the Commission's proposal does not bear any practical meaning: It is hard to imagine a case where the supplier has directed his business activities towards the country where the consumer has his habitual residence and where the supplier is not negligent in ignoring that the consumer is habitually resident in that specific country. In fact, it seems that all cases are sufficiently covered by the targeted activity criterion embedded in Article 5(2) 1st sentence Rome I-P.

68. To illustrate this finding three scenarios must be distinguished: In the first scenario the professional is located in state A and directs his business activity (exclusively) to country B where a consumer habitually residing in B accepts his offer to enter into a contract. In this scenario, Article 5(1) Rome I-P is clearly applicable: The professional has directed business activities within the meaning of Article 5(2) 2nd sentence Rome I-P to the consumer's country and there is no way that he could claim that he was not negligent in not knowing that the consumer was habitually resident in that country.

69. In the second scenario the professional, again, is located in state A and directs his business activity (exclusively) towards country B. This time, however a consumer from country C accepts his offer. Here, the professional indeed might be non-negligent in not knowing that the consumer was from C with the result that the adjusted GEDIP criterion could exclude application of Article 5(1) Rome I-P. However, non-application of the law at the place of the consumer's habitual residence already follows from the targeted activity criterion embedded in Article 5(2) 2nd sentence Rome I-P: The professional did not direct his business activity to C. Therefore, he did not direct his business activity to the country in which the consumer was habitually resident – as required by the targeted activity criterion.

[126] Supra n. 45.

70. In the third scenario, the professional, again, is located in state A, but directs his trade to country B *and* C. In this case Article 5(1) Rome I-P is clearly applicable if the professional indiscriminately directs his activities to B and C, i.e. if he does not distinguish between consumers habitually resident in B and those habitually resident in C. As in the first scenario, there is no way that the professional can claim that he was not negligent in not knowing the consumer's place of habitual residence. If, however, the professional distinguishes between his business activities directed towards B and C and if a consumer from C accepts his offer directed to consumers in state B, the professional might indeed invoke non-negligent ignorance of the consumer's place of habitual residence. And in contrast to the second scenario, he has also directed his business activity to the country in which the consumer with whom he has entered the contract was habitually resident. However, as in the second scenario, non-application of the consumer's law already follows from the targeted activity criterion. This is because it requires that the contract eventually concluded falls within the scope of the activities he has directed to country C. If, however, the contract was concluded as a result of business activities directed to B it cannot be said that it falls within the scope of the activities the professional directed to the consumer's country C.

71. Against this background, the GEDIP criterion does not take on any importance. Where the application of the consumer's law seems inappropriate, the targeted activity criterion adequately limits the scope of Article 5(1) Rome I-P.[127] It should be noted, however, that as a result of the targeted activity criterion consumer transactions not covered by Article 5 Rome I-P will be subject to the general provisions of Articles 3 and 4 Rome I-P.

Exclusion of certain contracts

72. Article 5 (3)(a)-(c) Rome I-P provides for three exceptions to the wide scope of application defined by Article 5(2) Rome I-P. While two of them correspond to the Institute's prior proposal and should be retained, the exception relating to contracts where the services are to be supplied exclusively in a foreign country should be deleted.[128]

Contracts for the supply of services in a foreign country

73. Article 5(3)(a) Rome I-P excludes the application of Article 5(1) Rome I-P in regards to contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that of

[127] *Bitterich* 268. See for a detailed account *Rühl*, Das neue europäische Kollisionsrecht für Verbraucherverträge: Zur geplanten Kombination von Ausrichtungskriterium und subjektiver Schutzklausel: GPR 2006, 196–202.

[128] See infra no. 73.

his habitual residence. It equals Article 5(4)(b) Rome Convention and rests on the idea that a consumer does not need the protection of his own laws where he has agreed to the supply of goods or services in a foreign country. However, in light of the targeted activity criterion employed in Article 5(2) Rome I-P, the exception cannot be justified anymore. To the contrary: If the professional has directed his business activities towards the consumer's place of habitual residence – as required by Article 5(2) 2nd sentence Rome I-P – the consumer should enjoy the protection afforded to him by his own law no matter where the services are to be supplied. Therefore, the exception should be deleted.[129]

Contracts of carriage and package travel

74. Article 5(3)(b) Rome I-P excludes contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990.[130] This exception equals Article 5(4)(a) Rome Convention. It is justified on two grounds: First, contracts of carriage for both persons and goods are usually subject to uniform law and, therefore, do not require the protection established by Article 5(1) and (2) Rome I-P.[131] Second, they cannot adequately be dealt with by application of the law at the consumer's habitual place of residence: Cross-border carriage, especially for the conveyance of passengers, usually involves a large number of consumers from different countries. Therefore, application of the consumer's law would require the carrier to comply with different protective laws at the same time. It is evident that this is neither feasible nor desirable.[132] It is, therefore, to be welcomed that contracts of carriage – except for those relating to package travel – are not governed by Article 5(1) Rome I-P but by the general rules of Articles 3 and 4 Rome I-P.

Contracts relating to a right in rem or right of use in immovable property

75. Article 5(3)(c) Rome I-P excludes contracts relating to a right in rem or a right of use in immovable property – other than a right of use on a time-share basis within the meaning of Directive 94/47/EC of 26 October 1994[133]

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[129] See also *Mankowski*, Art. 5 Rom-I-VO 125–127.

[130] Council Directive (EEC) No. 314/1990 of 13. 6. 1990 on package travel, package holidays and package tours, O.J. EC 1990 L 158/59.

[131] See for example *Staudinger (-Magnus)* Art. 29 EGBGB, no. 59. See also *Morris*, The Conflict of Laws (2005) no. 4–043 (regarding jurisdiction).

[132] See for example *Audit*, Droit international privé (1997) no. 808; *Reithmann/Martiny (-Martiny)* no. 819; *Staudinger (-Magnus)* Art. 29 EGBGB, no. 59. See also *Giuliano/Lagarde* (supra n. 75) 57. But see *Mankowski*, Art. 5 Rom-I-VO 124–125.

[133] Council Directive (EC) No. 47/1994 of 26. 10. 1994 on the protection of purchasers

– from the article's scope of application. The exclusion is new insofar as Article 5 Rome Convention does not contain an *express* exception for any such contracts. Instead, it excludes contracts relating to a right in rem or a right of use in immoveable property by limiting the scope of application to contracts that relate to the supply of goods and services. Under the Commission's proposal, in contrast, the article's scope of application is significantly broader in that it relates to all contracts between a consumer and a professional irrespective of the object of the contract.[134] Therefore, an *express* exception for contracts relating to a right in rem or a right of use in immovable property is necessary.[135] It is justified on the basis that real property transactions – other than timesharing agreements – are closely linked to the land register of the situs, the forms employed and the practice of the land registrar and its administrative personnel.

Article 5a – Insurance contracts

1. The law applicable to the insurance contract shall be the law of the country in which the policyholder has his habitual residence or central administration at the time of the conclusion of the contract.

2. The parties to the contract of insurance may choose

(a) the law of the country in which the risk or part of it is situated in accordance with the internal law of the forum;

(b) in case of an insurance contract limited to events occurring in a given State, the law of that State;

(c) in life insurance contracts, the law of a country of which the policyholder is a national;

(d) in travel or holiday insurance of a duration of six months or less, the law of the country where the policyholder took out the policy.

3. The law applicable to a compulsory insurance contract is the law of the country which imposes the obligation to take out insurance.

in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis, O.J. EC 1994 L 280/83.

[134] See supra no. 61.

[135] But see *Mankowski*, Art. 5 Rom-I-VO 127–128.

4. The rules set out in paragraphs 1 and 2 of this Article do not apply to reinsurance and to the insurance of large risks as defined in Council Directive 73/239/EEC as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended.

Summary

The Institute regrets the Commission's proposal to perpetuate the excessively complicated choice-of-law rules implemented by the Insurance Directives of the second generation. It repeats its recommendation to consolidate the existing conflict rules into one provision thereby simplifying the rules without causing any major substantive change.

Comments

Overview of the proposal

76. The Commission's proposal essentially carries on the regime of insurance contracts established by the Insurance Directives and the Rome Convention. Under Article 22(a) Rome I-P and Annex 1, the conflict rules contained in Articles 7 and 8 of the second Non-life Insurance Directive 88/357/EEC and in Article 32 of the Consolidated Directive 2002/83/EC on Life Assurance still prevail over the general conflict rules as set forth in the draft regulation. Since both directives have been adopted with an eye towards the implementation of the internal insurance market, they only deal with transborder insurance contracts concluded by insurance companies established in a Member State and cover risks situated in other Member States. As far as risks located in third states are concerned the general conflict rules of the Rome I Regulation will apply; this has also been the case under the Rome Convention. A slight change is brought about by the proposed Regulation for a third group of cases: At present, if a risk located in a Member State is covered by an insurer established in a third state, neither the Rome Convention nor the Insurance Directives apply; consequently, the matter is left to national conflict rules. Under the draft regulation these cases will also be subject to the general conflict rules of Articles 3–5 Rome I-P. This is due to the fact that the coordination of the general conflict rules with the Directives will no longer be effected by a general exclusion of risks located in Member States as stated in Article 1(3) Rome Convention. Instead Article 22(a) Rome I-P ensures that the general conflict rules will only be superseded if the special conflict rules of the Directives actually apply.

Technical error

77. The list of Directives in Annex 1 of the Rome I-P that contain special conflict rules which prevail over the general conflict rules of the Rome I-P correctly refers to the second Non-life Insurance Directive 357/1988/EEC and its conflict rules in Articles 7 and 8. With regard to life assurance the list specifies Directive 619/1990/EEC as amended as the relevant instrument for the determination of the applicable law. It must be recalled that this Directive has been derogated by the "consolidated" Directive 2002/83/EC, see its Article 72 and Annex V A. The relevant conflict rules are now contained in Article 32 of Directive 2002/83; Annex 1 of the draft regulation should be amended accordingly.[136]

Inconsistencies of the two conflicts regimes

78. The Max Institute has pointed out the inconsistencies of the different conflict regimes in its comments on the Green Paper.[137] As has been explained, a British insurer may choose the applicable law in a hull insurance policy sold to the owner of a sailboat registered in Denmark under the conflict rules of Directive 88/357/EEC relating to large risks, which include marine hull insurance.[138] If the boat were registered in Croatia, the case would concern a risk situated outside the Community[139] and therefore would fall outside the scope of the conflict rules of the Directives; it would be covered by the Rome I Regulation which does not distinguish small and large risks, but would protect the boat owner under the special conflicts rule for consumer contracts contained in Article 5 Rome I-P. It is difficult to see why a consumer domiciled in a third state should be afforded better protection than a consumer domiciled within the Union.

Another inconsistency relates to the demarcation of the area where free choice of law is allowed. If a professional or small trader who is established in a Member State is protected under Directive 88/357/EEC against the choice of the insurer's law in an intra-Community case, why should it make a difference for that insurance policy if the policyholder moves the business to Switzerland? Under the present complex regime, the applicable conflict rules would in fact change and would allow free choice. Such examples clearly show that the current situation is untenable. Historical development led to

[136] See also infra no. 182 (comment on Article 22).

[137] *Max Planck Institute*, Comments on Green Paper Rome I, pp. 26 seq.

[138] See the Danish Højesteret 31.3. 1998, Ugeskrift for retsvæsen (UfR) 1998, 723, where the choice-of-law clause was proposed by the English insurer only after the conclusion of the contract and therefore held to be invalid.

[139] See Article 2(d) 2nd indent on the situation of the risk in case of insurance relating to vehicles.

the adoption of the Insurance Directives by the Community and of the Rome Convention by the Member States,[140] but it would be outright contradictory and arbitrary if they were continued after the Community has acquired competence and responsibility for the various conflicts regimes. Therefore, the opportunity of the conversion of the Rome Convention into a Community instrument must be seized to restore both consistency and transparency to the respective conflict rules.

A special conflict rule for insurance contracts

79. One possibility for bringing the conflict rules for insurance contracts in line with the general conflict rules would be to extend the general rules of the future Rome I Regulation to insurance contracts. If references to the Insurance Directives in the third and fourth indents of Annex 1 to the proposal are deleted,[141] all transnational insurance contracts would be subject either to Article 3, 4 or 5 Rome I-P. This solution would result in a very basic change in Community policy. The law of the policyholder would only remain applicable in the case of insurance contracts concluded by consumers. In all other cases the insurer would most likely choose its own law as being applicable to the contract. Thus, the scope of the freedom to choose the applicable law would be broadened considerably and in particular for insurance purchased by professionals and small traders.

It would also be broadened to all insurance contracts which grant cover for both private and professional purposes. As the ECJ has recently pointed out in respect of jurisdiction, the concept of consumer has to be interpreted in a narrow way and does not include persons who contract for both private and professional purposes.[142] Thus, fire insurance purchased by a farmer for the farmhouse which serves as his home and for farming would not be considered to be a consumer insurance contract. It appears that the demarcation of the scope of free choice of law under the insurance directives is more appropriate even if arbitrary to a certain extent. The distinction between large risks and small risks enshrined in the insurance directives has served as a model for the admission of choice of court agreements in Article 14 Brussels I Regulation. It should also be adopted for choice of law. Consequently, a future Rome I Regulation should not simply extend the general rules relating to contracts of all kinds, but should contain a specific conflict rule on insurance contracts.

80. The proposal of the Institute essentially consolidates the present conflict rules contained in the insurance directives. Its basic principles are as follows:

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[140] *Max Planck Institute*, Comments on Green Paper Rome I, p. 26.

[141] See also infra no. 182 (comment on Article 22).

[142] ECJ 20. 1. 2005 – case 464/01 *(Gruber* v. *BayWa)*, E.C.R. 2005, I-439, para. 38–45.

– Application of the general conflict rules in respect of large risks, i.e. primarily free choice of law, see para. 4;

– Compulsory insurance is subject to the law of the country which imposes the duty to insure, see para. 3;

– The non-compulsory insurance of small and medium risks is basically subject to the law of the country where the policyholder has his habitual residence, see para. 1;

– Para. 2 lists a number of cases where the parties may chose the law applicable to small and medium risks in non-compulsory insurance contracts; these cases summarise the existing law of the Directives.

No indirect choice of law

81. The Institute has not adopted the indirect choice of law permitted by the Directives. Under the present regime the parties may choose the applicable law if the private international law of the Member State where the policyholder is habitually resident so allows; in such a case, the choice of law would be binding on courts in the whole Community, i.e. also in Member States which do not permit a free choice of law in insurance contracts. Thus, an insurer established in Germany or France where choice of law is strictly confined could choose the applicable law in a contract with a British applicant since the free choice of law is permitted under the conflict rules of the common law in the United Kingdom and the insurance directives refer to British law as the applicable law. The experience of more than 15 years shows, however, that this is a pure hypothesis. The risk that some of the numerous mandatory provisions contained in national insurance contract law will be enforced against a choice of law is considered very high by insurers, and they consequently refrain from making a choice of law.[143] In order to make national conflict rules in the Member States compatible as mandated by Article 65 EC, the Institute therefore favours an exclusion of the free choice of law in respect of small and medium risks unless specifically provided in para. 2; the perpetuation of the present state of law as proposed by the Commission does not appear to be reconcilable with Article 65 EC.

Article 6 – Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protec-	1. [no changes]

[143] For further details see *Max Planck Institute*, Comments on Green Paper Rome I, pp. 25 seq.

tion afforded him by the mandatory rules of the law which would be applicable under this Article in the absence of choice.

2. A contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in or from which the employee habitually carries out his work in performance of the contract. The place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. The conclusion of a new contract of employment with the original employer or an employer belonging to the same group of companies as the original employer does not preclude the employee from being regarded as carrying out his work in another country temporarily;

(b) if the employee does not habitually carry out his work in or from any one country, or he habitually carries out his work in or from a territory subject to no national sovereignty, by the law of the country in which the place of business through which he was engaged is situated.

2. A contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in ~~or from~~ which the employee habitually carries out his work in performance of the contract. ~~The place of performance shall not be deemed to have changed if he is temporarily employed in another country.~~ *The country where the work is habitually carried out shall not be regarded as having changed if the employee is posted to work in another country for a limited period.* ~~Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.~~ The conclusion of a new contract of employment*, e.g. with the* original employer or an employer belonging to the same group of companies as the original employer ~~does not preclude the employee from being regarded as carrying out his work in another country temporarily~~ *shall not exclude a finding that such a posting has taken place*;

(b) if the employee does not habitually carry out his work in ~~or from~~ any one country, ~~or he habitually carries out his work in or from a territory subject to no national sovereignty,~~ *e.g., personnel on international flights*, by the law of the country in which the place of business through which he was engaged is situated*; or*

	(c) in case of seamen by the law of the country whose flag the ship flies.
3. The law designated by paragraph 2 may be excluded where it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.	3. The law ~~designated by~~ *determined in accordance* with paragraph 2 ~~may be excluded~~ *may exceptionally not be applied* where it ~~appears~~ *is clear* from the circumstances as a whole that the contract is *manifestly* more closely connected with another country, in which case the contract shall be governed by the law of that country.

Summary

The Institute basically welcomes the Commission's proposal for Article 6 Rome I-P. It leaves its approved structure intact and aims at clarifying certain disputes experienced with Article 6 Rome Convention. Nevertheless, the Institute regards the following modifications as necessary:

– The words "or from" should be deleted in Article 6(2)(a) Rome I-P. Instead, a clear-cut rule for employment contracts of international flight personnel should be inserted into the regulation, preferably in Article 6(2)(b) Rome I-P (see infra nos. 84–87 and 88–91).

– With regard to the Commission's attempt to clarify the concept of temporary employment, two substantial changes are recommended: First, Article 6(2)(a) 2nd sentence Rome I-P should be reformulated such as to provide for a flexible definition of temporary employment, and the overly rigid definition provided for in Article 6(2)(a) 3rd sentence Rome I-P should be deleted (see infra nos. 93–94). Second, Article 6(2)(a) 4th sentence Rome I-P should be rephrased. It should clarify that the conclusion of a new contract does not militate against the finding that a posting was temporary and that this result is not limited to the two major cases (new contract with the same employer or with an employer belonging to the same group of companies as the original employer) as currently laid down in Article 6(2)(a) Rome I-P (see infra nos. 95–100).

– The amendment in Article 6(2)(b) Rome I-P relating to employment contracts "habitually carried out in or from a territory subject to no national sovereignty" should be deleted and replaced by a suitable conflict-of-law rule for maritime employment contracts, preferably in Article 6(2)(c) Rome I-P (see infra nos. 101–115).

– The "escape clause" in Article 6(3) Rome I-P should be reformulated to emphasise that the rules set forth in Article 6(2)(a) and (b) Rome I-P are to be disregarded in exceptional cases only. Further, some minor stylistic changes

are recommended without altering the content of Article 6(3) Rome I-P (see infra no. 116).

Comments

Overview of the proposal

82. The Commission's proposal maintains the general structure of Article 6 Rome Convention. The Institute embraces this decision. As Article 6 Rome Convention was generally regarded as well drafted, it should essentially remain unchanged.[144] Article 6(1) Rome Convention allows for a choice of the applicable law but sets forth that the choice of law cannot deprive the employee of the protection afforded to him by the mandatory rules of the law which would be applicable in the absence of choice. This rule ensures that the employee will always benefit from a certain minimum standard which cannot be derogated from to his detriment by a choice of law. It further ensures that employees will generally enjoy the protection of the law of their workplace. Under the Rome Convention, the law to be applied in the absence of choice (the so-called objectively applicable law) is determined by two basic rules set forth in Article 6(2) Rome Convention: If the employee habitually carries out his work in one country, the law of the country in which he carries out his work in performance of the contract governs his employment contract, even if he is temporarily employed in another country (Article 6(2)(a) Rome Convention). If the employee does not habitually carry out his work in any one country, Article 6 (2) (b) Rome Convention provides for the application of the law of the country in which the place of business through which the employee was engaged is situated. Finally, Article 6 (2) in fine Rome Convention allows the application of the law of a country having a closer connection to the contract than the law otherwise determined in accordance with the two basic rules (the so-called "escape clause").

83. The changes proposed by the Commission concern the following details: First, the basic rule in Article 6(2)(a) Rome I-P shall not only apply to cases in which an employee habitually carries out his work "in" one country but also to cases in which an employee habitually carries out his work "from" one country. Second, the proposal rephrases Article 6(2)(a) Rome Convention, adds a definition of temporary employment and sets forth that the conclusion of a new contract with the original employer or an employer belonging to the same group of companies as the original employer does not preclude regarding a posting abroad as temporary. Third, the Commission's proposal provides for the application of the rule in Article 6(2)(b) Rome I-P in

[144] See *Max Planck Institute*, Comments on Green Paper Rome I, p. 60; *Magnus/Mankowski* (supra n. 45) 170.

cases where the employee habitually carries out his work "in or from a territory subject to no national sovereignty". Fourth, it reformulates the escape clause and relocates it to paragraph 3.

Working "in or from a country"

84. The proposal amplifies the basic rule in Article 6(2)(a) Rome I-P to take account of the law as stated by the ECJ with regard to Article 19 Brussels I Regulation. According to the Commission, the proposed changes will make it possible to apply the rule to personnel working on board of aircraft if there is "a fixed base from which the work is organised and where the personnel perform other obligations in relation to the employer".[145] However, the proposed amendment is superfluous as Article 6(2)(a) Rome I-P already refers to the concept of temporary employment. Further, the Commission is mistaken in believing that the proposed amendment provides for a clear-cut rule concerning employment contracts of personnel on international flights.

Codifying the ECJ case law is superfluous

85. The ECJ has interpreted the notion of "the place where an employee habitually carries out his work in performance of the contract" when ruling on jurisdictional issues under Article 19 No. 2 (a) of the Brussels I Regulation (or under its predecessor Article 5 No. 1 Brussels I Convention). Pursuant to this provision, an employer domiciled in a Member State may be sued "in the courts for the place where the employee habitually carries out his work or in the courts for the last place where he did so". Unlike Article 6(2) (a) Rome I-P, Article 19 Brussels I Regulation does not expressly mention that the place where the employee habitually carries out his work remains unchanged when he temporarily works abroad. Nonetheless, there can be no doubt that the courts at the place where the employee habitually works remain competent even though the employee is temporarily posted to another country.[146]

86. Although not directly referring to the concept of temporary employment, the ECJ effectively reads this concept into the Brussels I Regulation by stating that the habitual place of work refers to the place where the "employee has established the effective centre of his working activities and where, *or from*

[145] See Explanatory Memorandum Rome I-P, p. 7.

[146] See only *Franzen*, Arbeitskollisionsrecht und sekundäres Gemeinschaftsrecht, Die EG-Entsende-Richtlinie: Zeitschrift für Europäisches Privatrecht 1997, 1055 (1057); *Palao Moreno*, Multinational Groups of Companies and Individual Employment Contracts in Spanish and European Private International Law: YB. Priv. Int. L. 4: 2002 (2003) 303 (327); *Rauscher (-Mankowski)*, Europäisches Zivilprozeßrecht – Kommentar (2003) Art. 19 Brüssel I-VO, no. 7; *Junker*, Gewöhnlicher Arbeitsort und vorübergehende Entsendung im Internationalen Privatrecht, in: FS Andreas Heldrich (2005) 719 (725).

which, he in fact performs the essential part of his duties vis-à-vis his employer".[147] Thus, even in cases where an employee carries out some parts of his contractual obligations in different states, one can conclude that the habitual work place is located in only one country. For example, in *Rutten/Medical Cross* the ECJ made clear that the habitual work place of an international sales representative is located in the country where he spends most of his working time (in the case at hand, two thirds of his overall time), in which he has an office from where he organises most of the work for his employer, and to which he returns after each business trip abroad.[148] In other words, the ECJ regarded the business trips to foreign countries as a form of temporary posting abroad which cannot alter the conclusion that the work was habitually carried out in the employee's country of origin. Given that Article 6(2)(a) 2nd sentence Rome I-P already refers to temporary postings, the codification of the ECJ case law with essentially the same scope is superfluous.

87. The Institute therefore recommends eliminating this amendment as it creates more confusion than clarity.

Introducing a clear-cut rule for contracts of personnel on international flights

88. The Institute welcomes the Commission's attempt to tackle the disputed issue of which law shall apply to employment contracts of airline flight personnel. However, the Institute regards the current proposal as insufficient and strongly recommends the adoption of a conflicts rule for these employment contracts in Article 6(2)(b) Rome I-P.

89. It should be noted that the dispute concerns only airline personnel routinely employed on international flights. Flight attendants or pilots servicing national routes maintain a habitual place of work in the respective country. If these employees occasionally fly on international routes, their habitual place of work is not altered; rather, they are *temporarily* employed abroad. Regarding employment contracts of flight personnel on international flights, three connecting factor analyses can be found in academic opinion and case law: (1) First, it is argued that flight personnel habitually work *on* an aircraft.[149] As the aircraft must be attributed to the state in which it is registered, an employment contract is governed by the law of this state, if the employee serves only

[147] See ECJ 9.1. 1997 – case C-383/95 *(Petrus Wilhelmus Rutten* v. *Cross Medical Ltd.)*, E.C.R. 1997, I-57, para. 23 (emphasis added).

[148] ECJ 9.1. 1997 (previous note) para. 27.

[149] See *Mankowski*, Arbeitsverträge von Seeleuten im deutschen Internationalen Privatrecht, Ein Beitrag zur Auslegung des Art. 30 II EGBGB und zum sog. Zweitregistergesetz: RabelsZ 53 (1989) 487 (508); *Junker*, Internationales Arbeitsrecht im Konzern (1992) 188; *Franzen*, Der Betriebsinhaberwechsel nach §613a BGB im internationalen Arbeitsrecht (1994) 96 seq.; see also *Coursier*, Le conflit de lois en matière de contrat de travail (1993) 109.

on planes registered in this state. Conversely, if he is attached to aircraft registered in multiple states, there is no habitual place of work in one single country and Article 6(2)(b) Rome I-P applies accordingly. (2) Other commentators point out that pilots or flight attendants working on international flights do not usually have a habitual place of work in one country as they perform a substantial part of their work at airports located in different states.[150] Consequently, the law of the country applies where the business is seated through which the employee was engaged. (3) This interpretation is generally supported by a third view which, however, argues that the business engaging the employee is not necessarily located where the employment contract is signed. Rather, one must apply the law of the country where the employee is "integrated" into the business ("the base"). Flying personnel are normally integrated in the airbase from which they usually start and where they return to.[151]

90. The proposed clarification regarding work "from a country" does not provide for clear guidance in cases concerning employment contracts of personnel working on board of aircraft. On first review, the Commission seems to favour an application of the law of the base. But as pointed out above,[152] the application of the law of the base is generally regarded as falling under Article 6(2)(b) Rome I-P and not, as the Commission seems to suggest, under Article 6(2)(a) Rome I-P. In addition, the Explanatory Memorandum points out that the law of the base only applies where the personnel perform "other obligations in relation to the employer (registration, safety checks)".[153] This argument does not support the law of the base as a connecting factor since flight personnel usually carry out these activities not only at their base but at all airports where the aircraft starts from.

91. Against this background, the Institute proposes to choose the seat of the engaging business as the relevant connecting factor. First, it is difficult to argue that flying personnel have a habitual work place in one country. Unlike seamen, the members of the crew of an aircraft also have considerable work to do on the ground, such as security checks on the plane, assisting with passenger check-in, cooperation with catering services, or doing paper work. Furthermore, some airlines man their aircraft by using employment agencies that send temporary personnel on a short-notice basis to work for different

[150] BAG 12. 12. 2001, BAGE 100, 130 (137); *Lagarde*, Sur le contrat de travail international: analyse rétrospective d'une évolution mal maîtrisé, in: Les transformations du droit du travail, Études offertes à Gerard Lyon-Caen (1989) 83 (92); *Staudinger (-Magnus)* Art. 30 EGBGB, no. 162; Münch. Komm. BGB *(-Martiny)* (supra n. 48) Art. 30 EGBGB, no. 52.

[151] *Gamillscheg*, Ein Gesetz über das internationale Arbeitsrecht: Zeitschrift für Arbeitsrecht 1983, 307 (334); *Däubler*, Das neue Internationale Arbeitsrecht: RIW 1987, 249 (251).

[152] See supra no. 89.

[153] Explanatory Memorandum Rome I-P, p. 7.

airlines. Thus, on the very same day such personnel may conceivably work on aircraft registered in different countries. To link such employment contracts to the registration would lead to arbitrary results. In contrast, the seat of the engaging business ensures the necessary flexibility. For clarification, we propose that international flight personnel be explicitly mentioned as an example in Article 6(2)(b) Rome I-P. It should be left to the courts to decide which circumstances justify applying the law of the base.

Clarifying the concept of temporary employment

92. The Institute embraces the Commission's efforts to clarify the notion "temporarily employed" by introducing guidelines in Article 6(2)(a) 2nd to 4th sentence Rome I-P. The Commission was right in rejecting calls for the introduction of upper limits or presumptions beyond which a posting shall be deemed to be permanent.[154] Any given period will be arbitrary and could prove too rigid to cover the various situations of modern employment contracts.[155] Notwithstanding this general approval, we strongly recommend overhauling the proposed clarifications as both the proposed definition of temporary employment and the guidelines concerning postings within the same group are too rigid.

Article 6(2)(a) 2nd and 3rd sentence Rome I-P: Avoiding a too rigid definition of temporary employment

93. First, the general statement contained in Article 6(2) 2nd sentence Rome I-P should be replaced. The proposal states that the "place of performance" shall not be deemed to have changed if the employee is temporarily employed in another country. The reference to the place of performance is imprecise since the crucial question is whether a temporary employment changes the "habitual place of work". Further, Article 6(2) 2nd sentence Rome I-P should circumscribe temporary employment as "posting to work in another country for a limited period".[156] A further legal definition of the term "posting limited in time" should be avoided in order to ensure flexible

[154] See, e.g., *Heilmann*, Das Arbeitsvertragsstatut (1991) 144 (arguing that an employment may not be regarded as temporary after the employee worked two years abroad); *Bamberger/H. Roth (-Spickhoff)*, Kommentar zum Bürgerlichen Gesetzbuch (2003) Art. 30 EGBGB, no. 20 (assuming the same after three years); *v. Hoffmann/Thorn*, Internationales Privatrecht[8] (2004) 460 (assuming the same after one or two years).

[155] *Max Planck Institute*, Comments on Green Paper Rome I, p. 63; *Magnus/Mankowski* (supra n. 45) 171; *Schlachter*, Fortentwicklung des Kollisionsrechts der Arbeitsverträge, in: Das Grünbuch zum Internationalen Vertragsrecht, ed. by *Leible* (2004) 155 (156); and generally *Junker* (supra n. 149) 183; Münchener Handbuch zum Arbeitsrecht[2] *(-Birk)* I (2000) § 20, no. 37.

[156] See *Max Planck Institute*, Comments on Green Paper Rome I, pp. 61 seq.

handling by the courts. This approach provides the flexibility needed in today's complex work environment as it allows the courts to consider the agreement initially concluded by the parties when determining if a posting does or does not alter the habitual place of work.

94. Second, Article 6(2)(a) 3rd sentence Rome I-P should be deleted as it provides for too rigid a definition of temporary employment. It covers postings in which the employee "is expected to resume working in the country of origin after carrying out his tasks abroad". Thus, the employee must have already worked in the home country before being posted abroad. Further, the parties must have agreed that the employee will return to work in his home country after he has completed his mission abroad. For a large majority of cases, this definition might prove adequate. However, three important constellations are not covered: First, if an employer hires a new employee to habitually work in country A but – before the employee starts his work there – sends him temporarily to country B, e.g., to help out in one of his foreign subsidiaries, the employee does not "resume" (in the French version "reprendre son travail dans le pays d'origine", in the German version "seine Arbeit im Herkunftsstaat wiederaufnehmen") his work in his "home state". Second, one can envision a posting that sends workers abroad for a period of time and after this period their contracts shall terminate, e.g., because they reach their retirement age. Third, the definition also does not cover the scenario that an employee will be sent abroad with the promise to return either to his home state or a third foreign country. In these cases, the employee was not "expected to return" to his "home state". Yet, in all three scenarios it may be reasonable to apply the law of the posting state.

Article 6(2)(a) 4th sentence Rome I-P: Temporary employment and the conclusion of a new employment contract

95. The Institute embraces the Commission's attempt to clarify that the conclusion of a new or a second employment contract by itself may not necessarily change the habitual place of work, and the Institute suggests only minor changes to the proposed language.

96. In line with GEDIP,[157] the Institute had called for such a clarification with regard to postings taking place within the same group of companies as multinational corporations in particular will often assign workers to a foreign branch or subsidiary. Sometimes these (re)assignments are precipitated by a decision of the group's management and the worker is as a result sent to work in another country without alteration in the employment contract. This scenario does not pose any particular problem. If the posting is temporary, the habitual place of work is still located in the employee's country of origin.

[157] Supra n. 45.

More often, the original employment contract is modified before the new posting takes place. Frequently, the employee concludes a contract with the initial employer which contains (1) a clause providing for (re-)employment upon return and (2) stipulations regarding special social benefits, e.g., staff pension funds. Subsequently, a second contract is concluded between the worker and the new employer, usually another company of the same group. It is sometimes limited in time; in other cases the first employer reserves his right to end the secondment to the second employer.

97. The recent ECJ decision in *Pugliese/Finmeccanica*[158] has demonstrated the difficulties in assessing the habitual place of work in such ambiguous situations under the Brussels Convention. In *Pugliese*, the ECJ held that in a dispute between an employee and the first employer, the place where the employee performs his obligations to a second employer can be regarded as the place where he habitually carries out his work when the first employer, with respect to whom the employee's contractual obligations are suspended, has, at the time of the conclusion of the second contract of employment, an interest in the performance of the service by the employee to the second employer in a place determined by the latter. According to the ECJ, the existence of such an interest must be assessed on a comprehensive basis, taking into consideration all the circumstances of the case.[159]

98. The Commission was right to reject this criticised[160] case law when drafting the Rome I-P. To base the applicable law on the "interest" of the first employer does not fit into the structure of Article 6 Rome I-P. The applicable law must be determined in accordance with the general rules set forth in Article 6(2) Rome I-P. The Commission's proposal clarifies that the habitual place of work under the first contract does not necessarily change when a new contract with an employer belonging to the same group of companies is entered into. The proposal does not touch upon the question of where the habitual place of work under the second contract is located. This solution gives courts the necessary leeway to take into account all relevant circumstances. In some cases, one can argue that according to Article 6(2)(a) Rome I-P both contracts shall be governed by the law of the posting country as the first contract is the *basis* for the posting and the second merely *shapes the conditions* of

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[158] See ECJ 10. 4. 2003 – case C-437/00 *(Giulia Pugliese* v. *Finmeccanica SpA, Alenia Aerospazio Division)*, E.C.R. 2003, I-3573.

[159] ECJ 10. 4. 2003 (previous note) para. 26.

[160] See e.g. *Huet*, [note ECJ 10. 4. 2003 (supra n. 158)]: Clunet 131 (2004) 632 (634); *Mankowski*, Rumpfarbeitsverhältnis und lokales Arbeitsverhältnis (komplexe Arbeitsverhältnisse) im Internationalen Privat- und Prozessrecht: RIW 2004, 133 (135 seq.); *Krebber*, Gerichtsstand des Erfüllungsortes bei mehreren, aber aufeinander abgestimmten Arbeitsverhältnissen: IPRax 2004, 309 (311 seq.); *Leipold*, Einige Bemerkungen zur Internationalen Zuständigkeit in Arbeitssachen nach Europäischem Zivilprozessrecht, in: Gedächtnisschrift für Wolfgang Blomeyer (2004) 143 (149 seq.).

the posting. However, in those cases where the circumstances suggest that a new employment has been taken up, it is reasonable to apply the law of this subsequent country to the second contract. In the latter case the question arises whether also the first contract is governed by the law of the country in which the employee works for his new employer. Again, courts are free to take into account all relevant circumstances.

99. In addition to the Institute's proposal, the Commission wants to further clarify that a new contract concluded with the same employer does not necessarily change the habitual place of work. The Commission seems to have in mind cases in which the original employer revises the existing contract or concludes a second contract with the employee before sending him abroad, for example to adjust salaries based on changes in a cost-of-living index. The Commission is correct that a posting may also be regarded as temporary under these circumstances. However, by expressly regulating two important constellations involving contract revisions (contracts concluded with the same employer or an employer within the same group of companies), courts may construe Article 6(2)(a) Rome I-P as covering these two scenarios exclusively. Such a construction would be too narrow. There are other constellations in which the fact that a second contract was concluded should not exclude the finding that the law of the home country shall govern the contract of employment even though the second contract was neither concluded with the old employer nor an employer belonging to the same group of companies. This may be the case in which a company sends one of his employees to work for some months in a "friendly firm" to obtain (international) work experience.

100. To overcome the danger of an overly narrow interpretation, we suggest rephrasing Article 6(2)(a) 4th sentence Rome I-P. It should be emphasised that the two constellations mentioned therein must be understood as examples. This clarification will ensure that the Regulation makes reference to the most important constellations without excluding similar cases. Moreover, if our suggestion to delete the rigid definition of temporary employment in Article 6(2)(a) 2nd and 3rd sentence Rome I-P is followed, and our proposal to include a flexible definition in Article 6(2)(a) 2nd sentence Rome I-P is adopted, one must adapt 6(2)(a) 4th sentence Rome I-P accordingly. Namely, it should state that the conclusion of a new contract "shall not exclude a finding that such a posting has taken place" instead of "does not preclude the employee from being regarded as carrying out his work in another country temporarily".

Working in "territories subject to no national sovereignty"

101. The Commission's proposal amends Article 6(2)(b) Rome Convention as to also apply to cases where the employee "habitually carries out his

work in or from a territory subject to no national sovereignty." The Institute strongly recommends deleting this amendment.

Deleting "or from"

102. If our suggestion to delete the "or from" in Article 6(2)(a) Rome I-P is followed, one also needs to delete it in the first part of Article 6(2)(b) 1st sentence Rome I-P ("if the employee does not habitually work in or from one country […]").

103. The second "or from" mentioned in Article 6(2)(b) Rome I-P must also be deleted, irrespective of whether our other recommendations are considered or not. It seems that the English version contains a translation error. Whereas the English provision reads, "work in *or from* a territory subject to no national sovereignty", the French and German version only refer to work *in* such a territory ("ou s'il accomplit habituellement son travail dans un espace non soumis à une souveraineté nationale"; "oder wenn er seine Arbeit gewöhnlich in einem Raum verrichtet, der keiner nationalen Staatsgewalt unterliegt").

The scope of the amendment is confusing

104. Also the reference to employment contracts carried out in (or from) "a territory subject to no national sovereignty" should be abolished. The Explanatory Memorandum does not explain which type of employment should be covered by the proposed amendment. Under public international law, territories subject to no national sovereignty are the High Seas, the Antarctica and the air space above these territories.[161] The High Seas have to be distinguished from the exclusive economic zone (EEZ), i.e. the area beyond and adjacent to the territorial sea which may extend to a distance of 200 nautical miles out from the baseline. The EEZ is subject to some form of national control[162] as the coastal State enjoys certain sovereign rights, mainly relating to the exploration and exploitation of natural resources.[163] The same can be said about the continental shelf (which in specific cases might stretch further out from the coast than the EEZ)[164] although the rights of the coastal State over the continental shelf do not affect the legal status of the superjacent waters or the air space above those waters.[165] Against this background, the amendment does not cover work on oil rigs or floating installations within the EEZ or the

[161] Cf. *Torres Bernadez*, Territorial Sovereignty, in: Encyclopaedia of Public International Law, ed. by *Bernhardt* (2002) 823 (824).

[162] Cf. Article 55 United Nations Conventions on Law of the Sea (UNCLOS).

[163] Cf. Article 56(1)(a) UNCLOS.

[164] Cf. Articles 76, 77 UNCLOS.

[165] Cf. Article 78 UNCLOS.

continental shelf.[166] Further, outer space is a territory under no national control. However, as work in outer space is not yet of permanent nature, employees on space stations and similar constructions must be regarded as temporarily posted and habitually working elsewhere.

105. When drafting this amendment, it seems that the Commission primarily had in mind crew members onboard ships as well as airline personnel on international flights. This becomes apparent if one reviews the Green Paper on the conversion of the Rome Convention into a Community instrument.[167] The Commission asked whether the Rome Convention should be clarified with regard to the position of employees carrying out their work "at a place not subject to national sovereignty". As examples, the Commission mentioned employment contracts of sailors and pilots.[168]

106. Although the Institute welcomes the attempt to introduce conflict rules for the employment contracts of personnel on international flights and seamen sailing on international routes, it calls for the deletion of the reference to work in a "territory subject to no national sovereignty" and the introduction of clear-cut rules for the employment contracts of personnel on international flights[169] and maritime employment contracts.[170] First, the amendment suggested by the Commission is ambiguous. If it is intended to cover employment contracts of flying personnel (which often fly over the High Seas), it is unclear how Article 6(2)(b) Rome I-P ("work habitually carried out in a territory subject to no national sovereignty") relates to Article 6(2)(a) Rome I-P ("work habitually carried out in or from a country"). As pointed out above, the Commission argues that employment contracts of flight attendants are governed by Article 6(2)(a) Rome I-P – at least if the employees are integrated to a base and carry out parts of their work there.[171] Also, with regard to the work of seamen sailing on international routes, the scope of the amendment is not clear: Even though a substantive part of the ship's voyage may lead through international waters, it is difficult to argue that the High Seas are the place where they have established the effective centre of their working activities. Further, by referring to work on territories subject to no national sovereignty, the amendment provides no guidance

[166] This would be in line with the ECJ case on jurisdictional issues. The Court has held that work carried out by an employee on fixed or floating installations positioned on or above the part of the continental shelf adjacent to a Contracting State, in the context of prospecting and/or exploiting its natural resources, is to be regarded as work carried out in the territory of that State for the purposes of applying Article 5(1) Brussels Convention, see ECJ 27. 2. 2002 – case C-37/00 *(Herbert Weber* v. *Universal Ogden Services Ltd.)*, E.C.R. 2002, I-2013.

[167] Green Paper Rome I (supra n. 2).

[168] Green Paper Rome I (supra n. 2) p. 37.

[169] See supra nos. 88–91

[170] See infra nos. 107–115.

[171] See supra no. 90.

with regard to maritime employment contracts habitually carried out in the EEZ of different states.

Introducing a special conflicts rule for maritime employment contracts

107. The Institute renews its call for the introduction of a clear-cut rule for the disputed question of which law should govern maritime employment contracts in the absence of a choice of law.[172]

The dispute

108. As pointed out in our comments to the Green Paper, some courts apply the national law of the ship's flag. It is argued that the ship is the place where a seaman habitually carries out his work according to Article 6(2)(a) Rome Convention and that the flag determines the nationality of the ship. However, if the ship flies a flag of convenience, constituting the only connection with the law of the flag state, the law of the country with the closest connection to the case is applicable according to Article 6(2) in fine Rome Convention (now Article 6(3) Rome I-P). This seems to be the majority view of academic opinions in Germany,[173] France,[174] and Belgium;[175] in the United Kingdom, however, the view prevails that the contract shall be governed by the law of the country in which the place of business is situated through which the seaman was engaged in accordance with Article 6(2)(b) Rome Convention.[176] The latter opinion is founded mainly on the argument that ships are constantly moving through waters belonging to different countries so that there is no habitual place of work in one country.

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[172] See *Max Planck Institute*, Comments on Green Paper Rome I, pp. 63 seq.

[173] See only *Basedow*, Billigflaggen, Zweitregister und Kollisionsrecht in der Deutschen Schiffahrtspolitik, in: Recht der Flagge und "billige" Flaggen, ed. by *Drobnig/Basedow/Wolfrum* (1990) 75 (83) (BerDGesVölkR, 31); *Mankowski*, Seerechtliche Vertragsverhältnisse im Internationalen Privatrecht (1995) 494; *Junker*, Die einheitliche europäische Auslegung nach dem EG-Schuldvertragsübereinkommen: RabelsZ 55 (1991) 674 (679); *Taschner*, Arbeitsvertragsstatut und zwingende Bestimmungen nach dem Europäischen Schuldvertragsübereinkommen (2003) 151; *Kegel/Schurig*, Internationales Privatrecht[9] (2004) 685; *Junker*, Internationales Arbeitsrecht in der geplanten Rom I-Verordnung: RIW 2006, 401 (408). But see *Palandt (-Heldrich)*, Bürgerliches Gesetzbuch[65] (2006) Art. 30 EGBGB, no. 8 (arguing for the application of the law of the place of business through which the crew member was engaged).

[174] *Audit*, Droit international privé[3] (2001) no. 811.

[175] *Rigaux/Fallon*, Droit international privé[2] II (1992) no. 1389.

[176] *Dicey/Morris*, The Conflict of Laws[13] II (2000) no. 33–067; *Kaye*, The New Private International Law of Contract of the European Community (1993) 235.

109. The court practice in Europe is unsettled. The German Bundesarbeitsgericht[177] left the connecting factor open and instead made reference to the law of the country with the closest connection to the case in accordance with Article 30(2) in fine EGBGB, i.e. the German incorporation of Article 6(2) Rome Convention. In the Netherlands, one can find judgments applying the law of the country whose flag the ship flies[178] as well as judgments applying the law of the country in which the place of business is situated through which the seaman was engaged,[179] while the French (Article 5 Code du travail maritime[180]) and the Italian laws (Article 9 Codice della navigazione[181]) are based on the flag state principle.

Secondary ship registers

110. Many countries have created special ship registers for merchant ships, thus offering ship owners an alternative to flagging out. Some states, such as the Netherlands, the United Kingdom, and France, have established such registers in their overseas territories possessing labour laws with lower standards of protection than the "mother country." However, the ships logged in these registers fly the mother country's flag. Nonetheless, this type of second ship register does not impact the operation of the conflict-of-law rules. If Article 6(2)(b) Rome I-P refers to the place of business through which the crew member was engaged, the law of the overseas territory applies since the ship owner(s) or its relevant branch will usually be established there. If courts apply the law of the country whose flag the ship flies, the law of the overseas territory will also apply. Article 21 Rome I-P provides that where a state comprises several territorial units, each of which has its own rules of law in respect to contractual obligations, each territorial unit shall be regarded as a country. However, Article 21 Rome I-P is of no avail where the conflict rule refers to the law of the flag state and where this state is divided in several units having their own contract law. Here, it must be left to the internal law of the flag state to determine the applicable rules of employment law. The national law leads

[177] BAG 3.5. 1996, IPRax 1996, 416 (418); cf. also LAG Hamburg 19.10. 1995, IPRspr. 1996, no. 50a.

[178] Pres. Rb. Rotterdam 5.10. 1995, Nederlands Internationaal Privaatrecht (Ned. IPR) 1996, 123, no. 94; Hof Arnheim 8.4. 1997, Ned. IPR 1998, 112, no. 100.

[179] Rb. Rotterdam 8.3. 1996, Ned. IPR 1996, 584, no. 445.

[180] It states: "La présente loi est applicable aux engagements conclus pour tout service à accomplir à bord d'un navire français. Elle n'est pas applicable aux marins engagés en France pour servir sur un navire étranger."

[181] It states: "I contratti di lavoro della gente del mare, del personale navigante della navigazione interna e del personale di volo sono regolati dalla legge nazionale della nave o dell' aeromobile, salva, se la nave o l' aeromobile è di nazionalità straniera, la diversa volontà delle parti."

to an application of the law of the overseas territories where the secondary ship registers are established.

111. Germany has created an international ship register which is not an alternative register but rather a supplement to the German ship register so that ship owners may employ seamen domiciled outside the EC at conditions below German standards. § 21 (4) FlaggRG,[182] which is considered to be a statutory interpretation of Article 30 EGBGB, i.e. the German incorporation of Article 6 Rome Convention, states that the law applicable to employment contracts of seamen without domicile or permanent residence in Europe on ships registered in the International Ship Register cannot simply be determined by applying the law of the flag. Rather, courts determine the applicable law by applying the law of the country which has the closest connection to the case.[183]

Choosing the law of the flag state as the relevant criterion

112. The foregoing survey shows that there is a need to introduce a special conflicts rule for maritime employment contracts in order to enhance legal certainty. It is clear that both criteria used in Article 6(2) Rome I-P and European court practice can be manipulated to establish artificial links. If the law of the flag state is applied as the general rule, ship owners can choose a flag of convenience for their vessels. If the law of the business through which the seaman was engaged is applied, employment agencies – so-called manning companies – can be deliberately incorporated in countries with lower protection standards in order to engage crew members there.

113. Nonetheless, the Institute favours the flag state rule. This nexus serves best the needs of legal certainty. It has the important advantage of being unambiguous, since the flying of two different flags is proscribed. Furthermore, many courts in Europe apply this traditional rule. From a comparative perspective, the flag is the most widely used connecting factor in maritime private international law. Also, the public law provisions relating to maritime employment, e.g., manning rules, are primarily based on the flag state principle. Finally, the structure of Article 6 Rome I-P supports this choice. Under

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[182] § 21(4) was inserted into the "Gesetz über das Flaggenrecht der Seeschiffe und die Flaggenführung der Binnenschiffe" (FlaggRG) by Art. 1 No. 2 des "Gesetzes zur Einführung eines zusätzlichen Registers für Seeschiffe unter der Bundesflagge im internationalen Verkehr (Internationales Seeschiffahrtsregister – ISR)" of 23. 3. 1989 (BGBl. 1989 I 550). A revised version of the FlaggRG (as announced on 4. 7. 1990) can be found in BGBl. 1990 I 1342.

[183] BAG 3. 5. 1995, IPRspr. 1995, no. 57. The German Constitutional Court (*Bundesverfassungsgericht*) has held for cases concerning ships of second ship registers that, according to § 21(4) FlaggRG, the flag state rule cannot be applied, cf. BVerfG 10. 1. 1995, BVerfGE 92, 26 (39).

Article 6(2) Rome I-P, priority is given to the habitual place of work, i.e. to a connecting factor related to the employee and the factual environment of his work, whereas the place where the contract is made is only of subsidiary significance. Since the ship can be considered as the place where crew members habitually carry out their work, a connecting factor that is related to the ship, such as the flag, should be relevant in accordance with Article 6(2)(a) Rome I-P. Despite the fact that a ship crosses waters belonging to many different countries, it can be connected with the country whose flag the ship flies.

114. Therefore, a subsection (c) should be added making the application of the law of the flag state the general rule. This rule should also, in principle, be applied to flags of convenience. If, however, the flag is the only connection to the flag state, there may be a closer link to another state. In that case, the applicable law shall be identified in accordance with Article 6(3) Rome I-P.[184] Courts then must apply the law of the country which has the closest connections to the employment contract. The criteria used to find the closest connection may be, inter alia, the nationality of the parties, the seat of the employer or the place where the contract was concluded.

115. There should be no special rules for secondary ship registers. Again, the law of the flag state should be applicable unless the circumstances of the case show that the contract as a whole is more closely connected with another country. However, it should be left to the internal conflict rules of the flag state to determine whether the employment standards of the overseas territory in which the special ship register was created or the rules of the "mother country" should apply.

Minor changes concerning the escape clause

116. The Institute suggests minor changes in the wording of the present Article 6(3) Rome I-P. Although a uniform interpretation of the Regulation should be ensured by the ECJ, it seems advisable to emphasise that the rules set forth in Article 6(2)(a) and (b) Rome I-P are to be disregarded in exceptional cases, where it is clear from the circumstances as a whole that the contract is manifestly more closely connected with another country. Further, some minor stylistic changes are recommended which do not alter the content of the escape clause. Specifically, instead of "designated by paragraph 2", we suggest the wording "determined in accordance with paragraph 2"; and as substitute for "may be excluded" we recommend the wording "may exceptionally not be applied".

[184] See LAG Baden-Württemberg 17.7. 1980, IPRspr. 1980, no. 51: The German nationality of the economic shipowner and the seaman prevail over the law of Cyprus as the flag state.

Article 7 – Contracts concluded by an agent

1. In the absence of a choice under Article 3, a contract between principal and agent shall be governed by the law of the country in which the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country in which the principal has his habitual residence, in which case the aw of that country shall apply.

2. The relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power, shall be governed by the law of the country in which the agent had his habitual residence when he acted.

However, the applicable law shall be the law of the country in which the agent acted if either the principal on whose behalf he acted or the third party has his habitual residence in that country or the agent acted at an exchange or auction.

Article 7 – ~~Contracts concluded by an agent~~ *Voluntary agency*

1. ~~In the absence of a choice under Article 3, a~~ *A* contract between principal and agent shall be governed by the law ~~of the country in which the agent has his habitual residence, unless the agent exercises or is to exercise his main activity in the country in which the principal has his habitual residence, in which case the law of that country shall apply~~ *designated by Articles 3 to 6*.

2. ~~The relationship~~ *As* between the principal and third parties ~~arising out of the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power~~ *the existence and extent of the agent's powers and the effects of the agent's exercise or purported exercise of his powers* shall be governed by the law of the country in which the agent had his habitual residence when he acted.

However, the applicable law shall be the law of the country in which the agent acted if ~~either the principal on whose behalf he acted or the third party has his habitual residence in that country~~

a) the agent did not act in the course of his trade or profession,

b) the third party neither knew nor ought to have known the habitual residence of the agent, or

c) the agent acted at an exchange or auction.

For the purpose of this paragraph, an employed agent who acts in his professional capacity but who has no personal

	business establishment, shall be deemed to have his habitual residence at the business establishment of the principal to which he is attached, provided that the third party knew or ought to have known that the agent is attached to the principal's establishment.
3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the agent and expressly accepted by the other party, the law thus designated shall be applicable to these matters.	3. Notwithstanding paragraph 2, where the law applicable to a relationship covered by that paragraph has been designated in writing by the principal or the ~~agent~~ *third party* and ~~expressly~~ accepted by the other party, the law thus designated shall be applicable to these matters*, provided that the agent knew or ought to have known this designation.*
	4. Notwithstanding paragraphs 2 and 3, to the extent that the subject matter of the agency is a right in immovable property the law of the country where the immovable property is situated shall apply to the matters covered by paragraph 2.
4. The law designated by paragraph 2 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers or without power.	~~4.~~ *5.* The law designated by paragraph*s* 2 *to 4* shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his powers, in excess of his powers, or without powers.

Summary

The Institute generally welcomes the introduction of a separate conflicts rule on the law applicable to voluntary (or consensual) agency in Article 7 Rome I-P. A uniform provision eliminates the existing uncertainties in this area of law and thus corresponds to the needs of international market transactions. While the basic concept of Article 7 Rome I-P is in line with the law of many legal systems, there are several important deviations in detail entailing impractical results. Therefore, the Institute recommends the following modifications of Article 7 Rome I-P:

– The law applicable to the internal relationship between principal and agent should be determined according to the general rules of Articles 3 to 6 Rome I-P (see infra nos. 117–119).

– The scope of Article 7(2) Rome I-P has to be redefined. The provision should only apply to questions relating to the consequences of the agent's acts as to the validity of the main operation, i.e. the question whether the agent was able to bind the principal vis-à-vis the third party, and should not determine the law governing the contract concluded by the agent as a whole. Therefore, the heading of the article should also be clarified (see infra nos. 120–122).

– In order to meet the sound expectations of international trade, the law of the place where the agent acted (Article 7(2) 2nd sentence Rome I-P) should merely apply as a fall back rule in cases in which (a) the agent did not act in the course of his trade or profession, (b) the habitual residence of the agent could not reasonably be known by the third party, or (c) the agent acted at an exchange or auction (see infra nos. 123–129).

– A new provision on the authority of employed agents should be introduced into Article 7(2) Rome I-P (see infra no. 130).

– In order to avoid unreasonable discrepancies resulting from the application of two different laws to the same situation, the law chosen by the principal and the third party (Article 7(3) Rome I-P) should apply to the agent/third party relation as well, provided that this choice could reasonably be known by the agent. Article 7(3) and (4) Rome I-P have to be changed accordingly (see infra nos. 131–133).

– The wording of Article 7(3) Rome I-P should be changed to allow for an implicit acceptance of a choice-of-law clause as already recognised in Article 3(1) 2nd sentence Rome I-P. Moreover, in the English language version the word "agent" must be replaced by the term "third party" (see infra nos. 134–136).

– A new paragraph dealing with the authority to affect rights in immovable property should be inserted into Article 7 Rome I-P. Otherwise, mandatory legal procedures required by the local land law could be seriously hampered (see infra nos. 137–138).

Comments

Article 7(1) Rome I-P: The connecting factors as to the internal relationship

117. Article 7(1) Rome I-P provides for a special regime for contracts between principal and agent. In the absence of a choice of law, their internal relationship is either governed by the law of the agent's habitual residence, or by the law of the principal's habitual residence if the agent has to exercise its main

activity in that latter country. This provision constitutes a departure from the general conflicts rules of the Commission's proposal contained in Articles 3–6 Rome I-P in two respects. First, party autonomy is not restricted irrespective of the nature of the contract. Second, it contains a flexible objective connecting factor. The Commission argues that the adoption of a comprehensive special regime for agency contracts as suggested in Article 7 Rome I-P has the advantage of bringing together all the rules governing the legal relationship arising from agency contracts in a single article.[185]

118. There are, however, several problems resulting from this proposal. First of all, Article 7(1) Rome I-P does not distinguish between commercial contracts on the one hand and consumer or employment contracts on the other hand although many contracts between principal and agent will meet the conditions of an employment contract or those of a consumer contract. For instance, a consumer contract may occur when a person not acting in his professional capacity appoints a foreign lawyer, a foreign estate agent, a foreign insurance agent, a foreign investment counsel, etc.[186] The scenario of an employment contract arises when a foreign principal engages a permanent agent who is dependent on the principal's instructions.[187] According to the wording of Article 7(1) Rome I-P, free choice of law is possible even if these contracts qualify as consumer contracts or employment contracts. Thus, consumers and employees could easily be deprived of the protection granted by Articles 5 and 6 Rome I-P which is obviously contrary to their underlying policy. Moreover, as regards consumers, they even cannot rely on the application of the law of their habitual residence in the absence of a choice-of-law clause because the contract will generally be localised at the agent's, i.e. the professional's, habitual residence by virtue of Article 7(1) Rome I-P.

Furthermore, this provision may give rise to difficult problems of characterisation because, different from Article 7(1) Rome I-P, Article 4(1) Rome I-P stipulates fixed and inflexible rules. If, e.g., a principal grants authority to a foreign agent in the context of a contract for the provision of services or a distribution contract and if the agent has to exercise its main activity in the country in which the principal has his habitual residence, Article 7(1) Rome I-P points to the law of that country whereas the law of the agent's habitual residence shall apply according to Article 4(1)(a) or (h) Rome I-P. It is unclear whether one of the two provisions is supposed to prevail or whether there shall be a dépeçage, i.e. some parts of the contract will be submitted to the law determined by Article 7(1) Rome I-P while the rest will be governed by the law designated by Article 4(1)(a) or (h) Rome I-P.[188]

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[185] Explanatory Memorandum Rome I-P, p. 7.

[186] Cf., e.g., *Dicey/Morris* (supra n. 176) no. 33–404; Münch. Komm. BGB *(-Martiny)* (supra n. 48) Art. 29 EGBGB, no. 18 seq.

[187] *Dicey/Morris* (supra n. 176) no. 33–405.

[188] See supra no. 55 (comment on Article 4).

119. Yet, such inconsistent results can readily be avoided by a rephrasing of Article 7(1) Rome I-P: A contract between two persons appointing one of them as the agent of the other constitutes a normal contractual agreement. Therefore, the general conflicts regime for contractual obligations, viz. Articles 3 to 6 Rome I-P, can be applied to these agreements without difficulty. This has always been the solution under the Rome Convention[189] and there is no obvious reason to change this approach. If necessary, the purpose of giving guidance to the courts as regards the law governing the internal relationship can be fully served by an explicit reference to the law designated by Articles 3 to 6 Rome I-P in Article 7(1) Rome I-P. In case the Commission wants to adopt a flexible conflicts rule as to the internal relationship this end would be achieved more appropriately by the (re)introduction of flexible presumptions and/or an escape clause[190] in Article 4 Rome I-P.[191] For these reasons, the Institute recommends rephrasing Article 7(1) Rome I-P and making an explicit reference to Articles 3 to 6 Rome I-P.

Article 7(2) Rome I-P: The objective connecting factors as to the external relationship

The scope of the law applicable to the external relationship

120. According to Article 7(2) 1st sentence Rome I-P, "the relationship between the principal and third parties arising out of the fact that the agent has acted in the exercise of his powers […] shall be governed by the law of the country in which the agent had his habitual residence when he acted". The principal/third party relationship created by the agent's acts will usually be a normal contract whose applicable law has to be determined according to Articles 3 to 6 Rome I-P.

121. However, the wording of Article 7(2) 1st sentence Rome I-P is at least misleading in this respect: For instance, assume that principal P situated in country X confers authority to agent A who has his business establishment in country Y. A concludes in country Y a sales contract on behalf of P according to which P has to deliver goods to third party T. In this scenario, A acts in exercise of his powers and creates a legal relationship between P and T, i.e. a contract of sale. Consequently, pursuant to their respective wordings, Article 4(1)(a) Rome I-P as well as Article 7(2) 1st sentence Rome I-P would apply to

[189] See *Giuliano/Lagarde* (supra n. 75) 13; *Max Planck Institute*, Comments on Green Paper Rome I, p. 92; this fact is also recognised by the Commission, cf. Rome I-P COM(2005) 650 final, p. 7.

[190] See further supra nos. 42–57 (comment on Article 4).

[191] Under the Rome Convention the situations addressed in Article 7(1) Rome I-P fell within the scope of Article 4(5) Rome Convention, cf., e.g., Hoge Raad 1. 11. 1991, Ned. IPR 1993, 241, 242; *Verhagen*, Agency in Private International Law (1995) 197; *Dicey/Morris* (supra n. 176) nos. 33–401.

this situation simultaneously. A possible interpretation of the Rome I-P would be that the law of the seller's habitual residence (law X) would govern the contract of sale if it was concluded by the seller personally, while the same contract would be subject to the law of the agent's habitual residence (law Y) if it was made through an agent. With regard to consumers and employees, the same problems already mentioned in the context of Article 7 (1) Rome I-P also result from Article 7(2) 1st sentence Rome I-P.[192] Finally, the current drafting of Article 7(2) 1st sentence Rome I-P has the effect that a possible choice of law for the contract arranged by A between P and T would have to meet a higher formal standard (written form, express acceptance, cf. 7(3) Rome I-P) compared to a contract concluded personally (no written form, implied acceptance, cf. Article 3(1) 2nd sentence Rome I-P). In summary, it neither makes sense to subject a normal contractual obligation to the law designated by Article 7(2) Rome I-P nor to require the special formal standards of Article 7 (3) Rome I-P as to party autonomy just because this contract was negotiated through an agent.

122. It is likely that Article 7(2) 1st sentence Rome I-P is essentially intended to only cover the question whether the agent was actually able to bind the principal vis-à-vis the third party and to address other related issues of voluntary agency whereas the main contract as such should be subject to its own governing law. This interpretation would be in line with all legal systems which already have a separate conflicts rule on the law applicable to the authority of an agent.[193] In order to clarify the true scope of Article 7(2)-(4) Rome I-P, the wording of Article 7(2) 1st sentence Rome I-P has to be

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[192] See supra no. 118.

[193] Cf., e.g., Argentina, France, the Netherlands, Portugal: Article 11(1) Hague Agency Convention of 1978: "As between the principal and the third party, the existence and extent of the agent's authority and the effects of the agent's exercise or purported exercise of his authority shall be governed by […]"; Austria/Liechtenstein: Article 49(1) IPRG/Article 53(1) IPRG: "Die Voraussetzungen und die Wirkungen der gewillkürten Stellvertretung im Verhältnis des Geschäftsherrn und des Stellvertreters zum Dritten sind nach dem Recht zu beurteilen […]"; Switzerland: Article 126(2) IPRG: "Die Voraussetzungen, unter denen eine Handlung des Vertreters den Vertretenen gegenüber dem Dritten verpflichtet, unterstehen […]"; Italy: Article 60(1) 1st sentence legge 31. 5. 1995, no. 218: "La rappresentanza volontaria è regolata […]"; Spain: Article 10(11) Código civil (C.c.): "A la representación legal se aplicará […] y a la voluntaria […]"; Belgium: Article 108 1st sentence Code de droit international privé (CDIP): "La question de savoir si un intermédiaire peut représenter envers les tiers la personne pour le compte de laquelle il prétend agir est régie […]"; Québec: Article 3116 Code civil (C.c. Québec): "L'existence et l'étendue des pouvoirs du représentant dans ses relations avec un tiers, ainsi que les conditions auxquelles sa responsabilité ou celle du représenté peut être engagée, sont régies […]"; Portugal: Article 39(1) Código civil (C.c.) (replaced by the Hague Agency Convention of 1978, a similar provision still applies in Angola and Mozambique): "A representação voluntaria é regulada, quando à […]".

changed accordingly. For the same reasons, the current heading of Article 7 Rome I-P ought to be replaced by "voluntary agency".

The relevance of the habitual residence of a non-professional agent

123. Issues relating to voluntary agency are governed by the law of the habitual residence of the agent (cf. Article 7(2) 1st sentence Rome I-P). The agent's habitual residence is deemed to be at the place of his business establishment if he acts in the course of his trade or profession (cf. Article 18 Rome I-P). Applying the law of the place of business of the professional agent is a sound and sensible solution which particularly meets the needs of international trade.[194] This place constitutes a fixed criterion which is easily perceptible both to the principal and the third party, and which can be readily operated in practice. That is why the connecting factor of the agent's business establishment is commonly accepted in most legal systems.[195]

124. At present, however, not a single national law provides for the application of the law of the habitual residence of an agent who does not act in his professional capacity.[196] This can be explained by the fact that, contrary to his business establishment, the habitual residence of a non-professional agent is not linked to his permanent economic activity. Accordingly, the place of the habitual residence has little (if any) relevance with regard to the agent's authority. The personal habitual residence of the agent may be chosen for purely private reasons such that this criterion appears to be quite fortuitous. In particular, the private habitual residence of the agent will not normally be easily perceptible for third parties. Moreover, outside the ambit of Article 18 Rome I-P, the legal concept of habitual residence is extremely flexible and allows for the balancing of various factors, in particular private circumstances. Thus, a choice-of-law provision based on this concept does not cater to the basic purpose of a separate conflicts rule on the tripartite setting of agency, i.e. the need

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194 See *Max Planck Institute*, Comments on Green Paper Rome I, p. 95.

195 Argentina, France, the Netherlands, Portugal: Article 11(1) Hague Agency Convention of 1978; Italy: Article 60(1) legge 31. 5. 1995, no. 218; Rumania: Article 95 I legea 105/92; Switzerland: Article 126(2) IPRG; Austria: Article 49(2) IPRG (cf. OGH 21. 2. 1985, ZRvgl. 28 [1987] 53 [62]; 11. 10. 1995, SZ 68/181 [415]; 22. 10. 2001, SZ 74/177 [366]); Liechtenstein: Article 53(2) IPRG (literally the same as Article 49(2) Austrian IPRG); Germany: cf. BGH 26. 4. 1990 IPRspr. 1990, no. 25 = NJW 1990, 3088; Korea: Article 18(2) Gukjesabeob; Portugal: Article 39(3) C.c. (replaced by the Hague Agency Convention of 1978, a similar provision still applies in Angola and Mozambique).

196 Indeed, according to Article 108 2nd sentence of the Belgian CDIP it is deemed that the agent has acted in the country in which he has his habitual residence. Yet, it flows from Article 108 1st sentence that the decisive connecting factor is the place of acting rather than the habitual residence, and that Article 108 2nd sentence only contains a rebuttable presumption.

for legal certainty.[197] Therefore, the Institute strongly recommends applying simply the law of the place of acting (lex loci actus) rather than the law of the agent's private habitual residence in cases in which the agent did not act in the course of his trade or profession.[198]

The third party's unawareness of the agent's habitual residence

125. The lex loci actus should also apply in cases in which the agent acted in his professional capacity but the third party was not and could not reasonably be aware of the agent's habitual residence (more precisely: his business establishment, cf. Article 18 Rome I-P). In these cases it would be unfair to third parties to apply the law of the agent's place of business because they would not have had a chance to ascertain the true scope of the agent's authority.[199] Nonetheless, under the proposed Article 7(2) Rome I-P such a situation may arise in fact when the agent acts in a third state which is neither the country of the principal's habitual residence nor that of the third party's habitual residence.

126. Such a setting may occur, for instance, at an international trade fair. Assume that an Italian commercial agent negotiates car supply contracts with French and Spanish customers at the international motor show in Geneva/Switzerland, or that a Dutch agent of a software company is supposed to sell computer programs to various European clients at the CeBIT fair in Hannover/Germany. Assume further that the agent does not disclose the place of his business establishment (Italy, the Netherlands) during the negotiations and finalises the whole transaction at the place of the trade fair. In this fact pattern, the application of Italian or Dutch agency law as prescribed by Article 7(2) 1st sentence Rome I-P comes as a surprise to the third parties. In the absence of any other perceptible connecting factor, the trading partners will rather have relied on the lex loci actus (Swiss or German law respectively) as the law governing the existence and the extent of the agent's authority. Consequently, the application of the lex loci actus should primarily depend on whether the third party could reasonably be expected to know the agent's business establishment rather than on the question whether the agent acted in the country of the third party or the principal.[200]

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[197] See *Max Planck Institute*, Comments on Green Paper Rome I, pp. 92 seq.

[198] See further infra nos. 125–126.

[199] See *Max Planck Institute*, Comments on Green Paper Rome I, p. 95.

[200] Cf., e.g., the existing provisions in Italy: Article 60(1) 1st sentence legge 31. 5. 1995, no. 218; Switzerland: Article 126(2) IPRG; Liechtenstein: Article 53(2) IPRG; Austria: § 49 (2) IPRG; Korea: Article 18(2) Gukjesabeob; for Germany see BGH 26. 4. 1990 (supra n. 195); Portugal: Article 39(3) C.c. (replaced by the Hague Agency Convention of 1978, a similar provision still applies in Angola and Mozambique). See further infra nos. 127–129.

The precedence of the agent's business establishment over the place of acting

127. The main rationale underlying the connecting factor of the agent's place of business is that it provides legal certainty to each of the three parties involved in the agency situation. As this criterion is usually easily perceptible both for the principal and for the third party, they can readily ascertain the law applicable to the agent's authority right from the beginning of the business contact. Consequently, they can check (or limit) the actual scope of the powers of the agent before the contract is concluded. Furthermore, the application of the law of the agent's business establishment to voluntary agency accounts for the fact that professional agents play a crucial role in international commercial practice and that their authority should be subject to a single law with which they are familiar, provided that legitimate interests of third parties are not prejudiced.[201]

128. Yet, under the Commission's proposal the place of acting becomes the most important connecting factor: By virtue of Article 7(2) 2nd sentence Rome I-P, the lex loci actus always takes precedence if the agent either acts in the country of the principal or in that of the third party. One might argue that at least the second rule can be justified by the consideration that the agent travels to the third party so that the latter should be able to rely on his "home territory".[202] It is to be borne in mind, however, that counterparties negotiating with professional agents from foreign countries usually qualify as experienced business people who ought to be aware of the possibility of as well as the dangers linked to the application of a foreign law to cross-border transactions. Foreign law may apply, e.g., to the main contract concluded through the agent (cf. Articles 3 seq. Rome I-P), to the authority of a legal representative of a company (which has to be determined according to the lex societatis), or to an authority of an agent acting in a situation where the agent and the third party are in different countries and the contract is concluded by means of telecommunication (in such cases the agent's authority is either subject to the law of the place where the agent actually executes the relevant acts, or more generally to the law of his business establishment, cf., e.g., Article 13 of the Hague Agency Convention of 1978). Thus, the reasoning of having to protect a third party's reliance on the application of their own law when the agent acts in their country does not seem to be compelling.[203]

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[201] See also supra no. 123 and *Max Planck Institute*, Comments on Green Paper Rome I, p. 95.

[202] Cf. *Karsten*, Explanatory Report, in: Actes et documents de la Treizième session 4 au 23 octobre 1976, IV: Contrats d'intermédiaires/Agency (1979) 378 (427) no. 211.

[203] In the same sense, e.g., OGH 21. 2. 1985, 55 and 62; 22. 10. 2001, 366 (both supra n. 195).

129. Most importantly, the solution suggested by the Commission entails unsound results in common, international commercial transactions as may be shown by the following examples:

First of all, this is true for an authority which shall be exercised vis-à-vis different counterparties but concerns the same type of transactions or negotiations.[204] The trade fairs mentioned above[205] can serve as examples. If the Commission's proposal applied to these situations, the authority of the Dutch agent at the CeBIT fair in Hannover would have to be determined according to German law when the agent deals with a German client (cf. Article 7(2) 2nd sentence Rome I-P) while the agent's powers would be subject to Dutch law (cf. 7(2) 2nd sentence Rome I-P) when negotiating with counterparties from other countries. The same problem would arise when, e.g., a German company appoints a German law firm to sell parts of the company's business to foreign investors. Assume that the law firm arranges a meeting with possible buyers from several countries in London. Pursuant to Article 7(2) Rome I-P, the power of the lawyers to negotiate on behalf of the German company would depend on English law with regard to third parties situated in England (cf. Article 7(2) 2nd sentence Rome I-P), and on German law with regard to all other participants in the meeting (cf. Article 7(2) 1st sentence Rome I-P). In a variant of this scenario one might imagine that a Luxembourg bank has been mandated by a client to arrange a syndicated loan in London or Zurich. In each of these common fact patterns the agent is supposed to effect the same types of negotiations, at the same place, and at the same time. Hence, a sensible solution would have been to apply the same law to the agent's powers, i.e. the law of the business establishment of the agent (on condition that the business establishment could reasonably be known by the third party). By virtue of Article 7(2) Rome I-P, however, the law applicable to the authority would inevitably have to be split. This outcome is clearly contrary to the sound expectations of the parties involved and consequently of the business world as a whole.

Secondly, the solution laid down in Article 7(2) Rome I-P is impractical in the case of ongoing business relations between principals and third parties which are mediated by a permanent agent. Assume that the agent initially travelled to the third party where he concluded the first contract. This constituted the beginning of a longstanding business relationship. Some of the following transactions are arranged at the agent's place of business, others at the principal's place of business, and again others at the third party's place of

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[204] See with regard to Article 11(2) Hague Agency Convention of 1978 *Hay/Müller-Freienfels*, Agency in the Conflict of Laws and the 1978 Hague Convention: Am. J. Comp. L. 27 (1979) 1 (46); *Verhagen* (supra n. 191) 295 seq.; cf. also *Ruthig*, Vollmacht und Rechtsschein im IPR (1996) 136 seq.; *Rueda Valdivia*, La representación voluntaria en la contratación internacional (1998) 189 seq.

[205] See supra no. 126.

business. The Commission's proposal leads to a constant change of the law applicable to the agent's authority in such cases. Again, this consequence does not seem to cater to the sound expectations of business practice.

Finally, the solution embodied in Article 7(2) Rome I-P is unsuited to cases in which the agent acts on behalf of both sides when forming a contract.[206] It is hardly understandable why the agent's powers should be subject to the law of principal A if the agent acts in this country while the law of principal B should prevail if the agent concludes the contract in the latter country. A more convincing solution would be applying the law of the business establishment of the agent as a compromise because both parties have chosen this intermediary. Consequently, this law is equally foreseeable for both of them.

In summary, the connecting factor of the habitual residence of an agent who acts in the course of his trade or profession, i.e. his business establishment (cf. Article 18 Rome I-P), should always prevail if the agent's business establishment could reasonably be known by the third party.[207] This would also correspond to the law as it stands in many legal systems today.[208] Thus, the Institute suggests adjusting Article 7(2) 2nd sentence Rome I-P accordingly.

The assimilation of employed agents and self-employed agents

130. Employed agents are of considerable commercial importance. Strictly speaking, many of them will not have a business establishment of their own.[209] However, they perform a permanent economic activity on behalf of a principal which is at least comparable to that of self-employed agents. In fact, in commercial reality employed agents serve as the "alter ego" of the principal.[210] Such employees are typically attached to a particular business establishment of the employer where they receive their instructions, coordinate their work and to which they are bound by virtue of their contract of employment.

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[206] See with regard to the Hague Agency Convention of 1978 *Verhagen* (supra n. 191) 293 seq.

[207] See *Max Planck Institute*, Comments on Green Paper Rome I, p. 95.

[208] Italy: Article 60(1) 1st sentence legge 31. 5. 1995, no. 218; Switzerland: Article 126(2) IPRG; Korea: Article 18(2) Gukjesabeob; Austria: § 49(2) IPRG (cf. OGH 21. 2. 1985, at 55, 62; 22. 10. 2001, 366 [both supra n. 195]); Liechtenstein: Article 53(2) IPRG; Portugal: Article 39(3) C.c. (replaced by the Hague Agency Convention of 1978, a similar provision still applies in Angola and Mozambique); for Germany see OLG Frankfurt 11. 7. 1985, IPRspr. 1985, no. 21 = IPRax 1986, 373 (375); LG Bielefeld 23. 6. 1989, IPRspr. 1989, no. 32 = IPRax 1990, 315 (316); *Reithmann/Martiny (-Hausmann)* no. 2444; *Staudinger (-Magnus)* Einl. zu Art. 27–37 EGBGB, no. A 26; *Kropholler*, Internationales Privatrecht[5] (2004) 302.

[209] According to the Commission's understanding of Article 18 Rome I-P, only persons exercising a liberal profession or a business activity in a self-employed capacity have an "establishment" of their own. This follows from the Explanatory Memorandum of the 2003 Rome II proposal, COM(2003) 427 final (supra n. 5) p. 27.

[210] *Karsten* (supra n. 202) 400, no. 78.

When performing their services on behalf of the principal, employed agents will regularly disclose the principal's identity as well as the fact that they work for this principal on a permanent basis at the beginning of the negotiations. Thus, third parties will be in a position to foresee the fact that the agent is attached to the principal's business establishment and that his authority is subject to the law of that place. Hence, employed agents ought to be equated with self-employed agents. A corresponding provision exists in several countries[211] and should also be introduced into the future Rome I Regulation. To a certain extent, such a rule would synchronise the law governing the authority of employed agents with the law applicable to the powers of the legal representatives of a corporate body, i.e. the lex societatis. As a result, it will usually make no difference concerning the applicable law whether a managing employee or a director of a company concludes a contract on behalf of the corporate body. For these reasons, the Institute recommends inserting a third sentence into Article 7(2) Rome I-P dealing with employed agents.

Article 7(3) Rome I-P: The subjective connecting factor as to the external relationship

The scope of the law chosen by the parties

131. According to the wording of Article 7(3) and (4) Rome I-P, a possible choice of law for the agent's authority only affects the legal relationship between principal and third party whereas the agent/third party relation always has to be determined according to the objective connecting factors of Article 7(2) Rome I-P. As a consequence, two different laws can apply to the same situation which might result in difficult problems:[212]

Assume that principal P grants authority to agent A who is supposed to travel to third party T to conclude a contract. P is established in country X while T is established in country Y. The parties agree that law X shall apply to the agent's authority. Assume further that A actually exceeds his authority when agreeing on the precise terms of the contract concluded with T. Pursuant to Article 7(3) Rome I-P, the question whether A was nonetheless able to bind P vis-à-vis T, e.g., as a result of apparent authority, has to be decided according to law X. Yet, the question whether A can be held liable by T as

[211] Cf. Argentina, France, the Netherlands, Portugal: Article 12 Hague Agency Convention of 1978; Switzerland: Article 126(3) IPRG; Korea: Article 18(3) Gukjesabeob; Austria: § 49(2) IPRG (cf. OGH 21. 2. 1985, 55, 62; 11. 10. 1995, 415 [both supra n. 195]); Luxembourg: Article 53 IPRG (literally the same as § 49(2) Austrian IPRG); for Germany see OLG Frankfurt 8. 7. 1969, IPRspr. 1968/69, no. 21 = AWD 1969, 415; 11. 7. 1985 (supra n. 208), IPRax 1986, 373 (375); LG Bielefeld 23. 6. 1989 (supra n. 208), IPRax 1990, 315 (316); *Reithmann/Martiny (-Hausmann)* no. 2443; *Kropholler* (supra n. 208) 302 seq.

[212] See also *Max Planck Institute*, Comments on Green Paper Rome I, p. 97.

falsus procurator has to be answered by law Y (cf. Article 7(4) Rome I-P). Clearly, these two questions are closely connected with each other and should be subject to a single law. What would happen, e.g., if law X decides that A's acts did not bind P because A exceeded his powers while law Y states that A acted within his (apparent) authority? The outcome of the Commission's proposal seems to be that T has no debtor at all. The opposite scenario might occur as well: Inadvertently, T is entitled to proceed against two debtors. Obviously, such inconsistencies have to be avoided.

For this reason, the law chosen by the principal and third party has to apply to the agent/third party relation as well.[213] Hence, Article 7(4) Rome I-P should refer not only to para. 2 but also to para. 3 (as well as to the new rule concerning immovable property).

132. A consequence of the proposed change is that the choice of law between principal and third party as to the agent's authority can also affect legitimate interests of the agent, viz. his possible liability as falsus procurator. Therefore, this choice should only be valid if it could reasonably be known by the agent.

133. In the context of Article 7(4) Rome I-P, a remark with regard to the Rome II proposal has to be made. Its recital 16 states: "Special rules should be laid down for non-contractual obligations arising from unjust enrichment and agency without authority."[214] Consequently, the Rome II-AP seems to cover the aforementioned case as well, i.e. the liability of the falsus procurator. However, one can infer from the German ("Geschäftsführung ohne Auftrag") and French ("gestion d'affaires") language versions that the recital is meant to address the issue of negotiorum gestio. In order to prevent misunderstandings, the wording of recital 16 Rome II-AP should be changed accordingly.[215]

The possibility of an implied acceptance of the choice of law

134. The Commission's proposal advocates a bilateral choice of law between principal and third party with regard to the law governing the agent's

[213] This is expressly laid down in the corresponding provisions in Argentina, France, the Netherlands, Portugal (cf. Article 15 Hague Agency Convention of 1978), and Rumania (cf. Article 100 legea 105/92). Implicitly, this is also recognised in Austria (cf. OGH 22. 10. 2001 [supra n. 195] 365 seq.), Spain (cf. Derecho International Privado[5], ed. by *Caravaca/Carrascosa González* II [2004] 632 et seq.; *Rueda Valdivia* [supra n. 204] 152 seq.), and Germany (cf. OLG Karlsruhe 8. 5. 1998, IPRspr. 1998, no. 27 = MDR 1998, 1470; *Staudinger [-Magnus]* Einl zu Art. 27–37 EGBGB, no. A 12; *Reithmann/Martiny [-Hausmann]* no. 2436).

[214] Cf. Rome II-AP (supra n. 7) p. 11.

[215] It has been suggested to implement the term "benevolent intervention of another's affaires" as English term for negotiorum gesto, cf. Principles of European Law on Benevolent Intervention in Another's Affairs (PEL Ben. Int.), ed. by *v. Bar* (2006) 53.

powers (cf. Article 7(3) Rome I-P). By contrast, the Institute favoured in its former proposal a unilateral determination of the applicable law by the principal, provided that the third party and the agent were or could reasonably be aware of this designation.[216] This latter solution is already implemented in several jurisdictions.[217] In favour of a unilateral approach one can argue that it is fully in line with the legal concept of voluntary agency in substantive law: In every legal system the principal grants the authority and determines its extent without participation of the third party.[218] It is difficult to see why this should be different in the conflict of laws.

135. However, if one wants to stick to the bilateral concept, at least an implicit acceptance of the choice of law should be allowed: Assume that an agent travels to country X and presents to the third party a written proxy expressly stating that the authority is subject to law Y. Hence, the third party is fully aware of the principal's intention as to the choice of law. If the third party does not object expressly but negotiates a contract with the agent, there is no need to protect the third party by applying law X to the authority. Rather, one should interpret the behaviour of the third party as an implied acceptance of the choice-of-law clause in favour of law Y. Otherwise, Article 7(3) Rome I-P seems to be deprived of any practical significance – from the perspective of the principal at least. In order to allow such an implied acceptance, the term "expressly" should be deleted in Article 7(3) Rome I-P.[219]

136. A final amendment which is necessary applies to the English language version only: The word "agent" in Article 7(3) Rome I-P has to be replaced by the term "third party". This would correspond to the German and French language versions. The contractual choice of the law applicable to agency is made by agreement between the principal and the third party who are affected by the extent of the agent's powers.

The additional connecting factor as to authorities relating to immovable property

137. The Commission's proposal does not provide for a special provision as to an authority whose subject matter is a right in immovable property. Thus, free choice of law would be possible with regard to these types of authority

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[216] See *Max Planck Institute*, Comments on Green Paper Rome I, pp. 93 seq.

[217] Cf. Austria: § 49(1) IPRG; Liechtenstein: Article 53(1) IPRG; Spain: Article 10(11) C.c. (cf. Derecho Internacional Privado [supra n. 213] 632); Korea: Article 18(4) Gukjesabeob; for Germany see *Reithmann/Martiny (-Hausmann)* no. 2436; *Staudinger (-Magnus)* Einl. zu Art. 27–37 EGBGB, no. A 12; *Kropholler* (supra n. 208) 303.

[218] Possibly with the consent of the agent.

[219] This would correspond even to legal systems following a bilateral construction, cf., e.g., Rumania: Article 95 I legea 105/92 and Switzerland: Article 126(2) in connection with Article 116(2) IPRG.

(cf. Article 7(3) Rome I-P). Moreover, even the objective connecting factors for the agent's authority laid down in Article 7(2) Rome I-P might point to a country other than the country in which the property is situated. This would be the case, for instance, when a German principal appoints a German estate agent to sell the principal's holiday apartment in Austria to a third party not situated in Austria. In this case, the agent's power to transfer the apartment would have to be determined under Article 7(2) Rome I-P according to a law different from the law governing the transfer itself because the latter is commonly subjected to the lex rei sitae, i.e. the law of the country in which the property is situated.

138. Yet, many countries have implemented a special legal regime with regard to the transfer or change of rights in immovable property. Regularly, this regime is mandatory and provides for special procedural requirements before public authorities. Often, a legal title relating to immovable property is only effective vis-à-vis third parties when it is registered in an official land register.[220] The purpose of these regimes is to enhance legal certainty to the greatest possible extent and to protect third parties as well as the legal owner.[221] Against this background, it is hardly conceivable that the registrar would accept an authority subjected to a foreign law with the inevitable uncertainties resulting from it.[222] If constrained to do so by a future Rome I Regulation, the registrar would insist on a potentially time-consuming documentation of foreign agency law, and the transaction would not be finalised until he was satisfied with the proof of foreign law. For these reasons, it would be more appropriate to apply the lex rei sitae not only to the transfer of a right in immovable property but also to an authority which is supposed to effect such a transfer or change. Thus, the introduction of a corresponding conflicts rule, as is already the case in many legal systems,[223] seems reasonable.

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[220] Such a system is adopted, e.g., in Germany, Austria, Switzerland, Australia, Canada, England, Greece, Turkey, the Czech Republic, Slovakia and (partly) Poland, cf. the comprehensive comparative surveys in *Böhringer*, Comparison of the Land Registry System in Central Europe with Other Forms of Property Law: Introduction to the Basic Features of Central European Land Registry Law and Apartment Ownership: Notarius International 2 (1997) 166 (169 seq.); *Reithmann/Martiny (-Limmer)* no. 1013 seq.; *v. Hoffmann*, Das Recht des Grundstückkaufs (1982) 29 seq.

[221] See *Böhringer* (previous note) 174.

[222] See *Max Planck Institute*, Comments on Green Paper Rome I, p. 95.

[223] Cf. Rumania: Article 100 legea 105/92; Portugal: Article 39 (4) C.c. (replaced by the Hague Agency Convention of 1978, a similar provision still applies in Angola and Mozambique); for Austria cf. *Rummel (-Schwimann)*, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch II (1992) § 49 IPRG, no. 5; for Germany cf. RG 18. 10. 1935, RGZ 149, 93 (94) = IPRspr. 1935–44, no. 153; OLG München 10. 3. 1988, IPRspr. 1988, no. 15 = IPRax 1990, 320 (322); *Staudinger (-Magnus)* Einl. zu Art. 27–37 EGBGB, no. A 30; *Kropholler* (supra n. 208) 303; for Switzerland cf. *Vischer/Huber/Oser*, Internationales Vertragsrecht[2] (2000) no. 1023; Zürcher Kommentar zum IPRG[2] *(-Keller/Girsberger)* (2004) Art. 126, no. 35; for Spain cf. *Rueda Valdivia* (supra n. 204) 319 seq.

Article 8 – Mandatory rules

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

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.

3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.

Article 8 – *Internationally* mandatory rules

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

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are *internationally* mandatory.

3. Nothing in this Regulation shall restrict the application of the internationally mandatory rules contained in European Regulations nor the application of Member State rules which implement internationally mandatory European Directives. In the latter case, the provisions of the relevant Directive apply as implemented in the domestic law of the forum.

4. The internationally mandatory rules of the law governing the contract under this Regulation apply to the contract if they so demand.

~~3~~. *5.* Effect may be given to the *internationally* mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these *internationally* mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non-application for the objective pursued by the relevant *internationally* mandatory rules and for the parties.

Summary

The Institute generally endorses the Commission's proposal for Article 8 Rome I-P. Nevertheless, for the sake of clarity, the Institute considers some changes necessary:

– As in the French and German version of the Commission's proposal, the mandatory rules dealt with in Articles 3(4), 3(5) and 6 Rome I-P should be clearly distinguished from the *internationally* mandatory rules protected by Article 8 (see infra no. 141).

– Article 8(1) Rome I-P and a new Article 8(3) should clarify that internationally mandatory provisions of Community law should, like those of the lex fori, prevail over the law designated by Articles 3 to 7, 9 and 10 Rome I-P (see infra nos. 142–144).

– As there is uncertainty under the Rome Convention whether the internationally mandatory provisions of the law governing the contract apply, an added Article 8(5) should make clear that they do, if they so demand (see infra no. 145).

Comments

Overview of the proposal

139. Article 8 Rome I-P addresses the application of internationally mandatory rules as defined in Article 8(1) Rome I-P. So far, it is confined to internationally mandatory rules of the lex fori (Article 8(2) Rome I-P) and of third states (Article 8(3) Rome I-P). The Institute, in general, endorses the approach taken by the Commission.[224] It explicitly welcomes the definition in Article 8(1) Rome I-P being based upon the ECJ's reasoning in its *Arblade* judgment which refers to the crucial importance of internationally mandatory provisions for safeguarding the political, social or economic order of the State in question.[225] A definition of internationally mandatory provisions, although shaped in very general terms, is necessary as guidance for the national courts to ensure a uniform application of Article 8 Rome I-P.

140. The Institute further shares the view that, as under Article 7(1) Rome Convention, the courts must not only apply the internationally mandatory rules of the forum state, but may give that effect also to such rules of third states. Even those Member States which filed reservations under Article 22(1)(a) Rome Convention and did not accept the recognition of foreign mandatory rules pursuant to Article 7(1) Rome Convention take into account foreign internationally mandatory rules. They do so on the basis of

[224] *Max Planck Institute*, Comments on Green Paper Rome I, pp. 69 seq.

[225] ECJ 23. 11. 1999 – joined cases C-369/96 and C- 376/96 *(Arblade)*, E.C.R. 1999, I-8453, para. 30.

their domestic private international law which, in effect, does not render results other than Article 7(1) Rome Convention or the now proposed Article 8(3) Rome I-P would have yielded.[226]

Reference to "internationally" mandatory rules

141. Despite its general approval the Institute advocates certain amendments of Article 8 Rome I-P for reasons of clarification. As outlined above in connection with Article 3(4) Rome I-P, Article 8 Rome I-P deals only with *internationally* mandatory rules and not with mandatory provisions in the wider sense of Articles 3(4), 3(5) and 6 Rome I-P.[227] The wording of Article 8 Rome I-P should reflect this difference. It is confusing and possibly misleading if both Article 3(4) Rome I-P and Article 8 Rome I-P define mandatory rules without further qualifications, but in fact relate to different types of provisions. Thus, a distinction should be made as, for example, in the French and German versions of the Commission's proposal which refer in Article 3(4) Rome I-P to "*dispositions impératives*" and "*zwingende Bestimmungen*" and in Article 8 Rome I-P to "*lois de police*" and to "*Eingriffsnormen*". As a consequence, the heading and wording of Article 8 Rome I-P should refer to *internationally* mandatory rules rather than mandatory rules.

Article 8(3) Rome I-P: Internationally mandatory rules of Community law

142. As already seen, the Commission is committed to specifically protect internationally mandatory provisions of Community law as was done, for example, by the ECJ in its *Ingmar* decision.[228] However, as pointed out above, Article 8 Rome I-P should provide this protection rather than Article 3(5) Rome I-P.[229]

143. In the first place, one could even question whether a special provision for the protection of internationally mandatory rules of Community law is necessary at all. To the extent that provisions of Community law explicitly claim international application regardless of the law governing the contract, those provisions might already take precedence over the choice of law rules contained in the Regulation according to Article 22 Rome I-P. If, though, the international applicability is not ruled out explicitly, such Community law is at least part of the lex fori and thus already protected by Article 8(2)

[226] See the references in *Max Planck Institute*, Comments on Green Paper Rome I, pp. 71 seq.

[227] See supra no. 29 (comment on Article 3).

[228] ECJ 9. 11. 2000 (supra n. 58).

[229] See supra no. 41 (comment on Article 3).

Rome I-P.[230] Hence, for example, in a recent decision on the application of certain provisions implementing the Consumer Credit Directive[231] the German Bundesgerichtshof took for granted that, in principle, internationally mandatory rules derived from Community law can be protected by Article 7(2) Rome Convention, i.e. the current Article 8(2) Rome I-P, if the parties choose the law of a non-Member State.[232] Furthermore, Article 13 Rome II-AP addressing the application of internationally mandatory provisions within the future Rome II Regulation does not provide for any special protection of internationally mandatory rules of Community law[233].

144. Nevertheless, it would be sensible to expressly clarify that Article 8(1) and (2) Rome I-P apply to provisions of Community law as well,[234] especially because the opinions differ whether *Ingmar* is really a case of Article 7(2) Rome Convention[235] and of Article 8(2) Rome I-P. Additionally, at least theoretically, situations are conceivable where a provision of Community law might be vital for the protection of the political, social or economic order of the Community, but not of the forum Member State. In such cases it would be difficult for the national court to apply Article 8(2) Rome I-P due to the current wording of Article 8(1) Rome I-P which only makes reference to the importance of the provision for a "country". Therefore, it has to be made clear in Article 8(1) Rome I-P that provisions which are of importance for safeguarding the political, social or economic order of the Community are internationally mandatory as well. Consequently, a new Article 8 (3) should extend Article 8(2) Rome I-P to internationally mandatory provisions contained in European regulations and directives. Finally, as in Article 3(5) of the Institute's proposal, it must be clarified that internationally mandatory rules in Directives apply as implemented in the domestic law of the forum Member State.

An added Article 8(4): Internationally mandatory rules of the lex contractus

145. The inclusion of a new Article 8(4) should provide further clarification, as already indicated in the Institute's 2004 comments.[236] Article 8 Rome

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[230] *Dickinson* 172.

[231] Council Directive 87/102/EEC of 22.12. 1986 for the approximation of the laws, regulations and administrative provisions of the Member States concerning consumer credit, O.J. EC 1987 L 42/48.

[232] Cf. BGH 13.12. 2005, NJW 2006, 762 (764).

[233] See Article 13 Rome II-AP (supra n. 7) p. 18.

[234] Reply of *Rauscher* (supra n. 45) 19.

[235] For further details see Münch. Komm. BGB *(-Martiny)* (supra n. 48) Art. 34 EGBGB, no. 32.

[236] *Max Planck Institute*, Comments on Green Paper Rome I, p. 75; as to the same result Reply of the *Nordic Group for Private International Law* to the Commission's Green Paper (supra n. 45) pp. 49 seq.

I-P in its current wording leaves open whether internationally mandatory rules of the law governing the contract, especially according to Articles 3 and 4 Rome I-P, are applicable as part of the lex contractus.[237] This issue has to be addressed because in some Member States, as for example, Germany, the opinion prevails that the conflict rules only refer to the private law of the State whose law has been elected, but not to its internationally mandatory provisions as far as they form part of its public law.[238] In contrast, common law courts traditionally apply the internationally mandatory provisions of the lex contractus as part of the governing law.[239] The Institute proposes again that those provisions of the lex contractus should be applied if they so demand, i.e. if they claim international application to the case at hand. By adding this paragraph, all questions of internationally mandatory rules would be covered comprehensively.

Article 9 – Consent and material validity

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.	[no changes]
2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.	

Article 10 – Formal validity

1. A contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or the law of the country in which one or other of	1. A contract is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or the law of the country in which ~~one or other~~

[237] *Mankowski*, Vorschlag Rom-I-VO 110.

[238] Cf. BGH 27.2. 2003, NJW 2003, 2020 (2001).

[239] Cf. *Kahler* v. *Midland Bank LD*, [1950] A.C. 24 (H.L.) 27 (per Lord Simonds), 47 (per Lord Reid), 57 (per Lord Radcliffe).

the parties or his agent is when it is concluded or the law of the country in which one or other of the parties has his habitual residence at that time.

2. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation or of the law of the country in which the act is performed or the law of the country in which the person who drafted it has his habitual residence at that time.

3. Paragraphs 1 and 2 of this Article shall not apply to contracts that fall within the scope of Article 5. The form of such contracts shall be governed by the law of the country in which the consumer has his habitual residence.

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are mandatory provisions within the meaning of Article 8.

either of the parties or his agent is *present* when it is concluded or the law of the country in which ~~one or other~~ *either* of the parties has his habitual residence at that time.

2. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation or of the law of the country in which the act ~~is performed~~ *was done* or the law of the country in which the person who ~~drafted~~ *effected* it has his habitual residence at that time.

[no changes]

Summary

The Institute basically welcomes the new rule on formal validity which corresponds to the Institute's own recommendations[240] and enhances the generally recognised principle of favor negotii. As to the English language version, however, some linguistic amendments seem to be necessary.

[240] Cf. *Max Planck Institute*, Comments on Green Paper Rome I, pp. 77 seq., 110.

Comments

146. The first paragraph of Article 10 Rome I-P evidences linguistic deficiencies which might result from a translation of the original draft from French to English: First, the words "one or other" have to be replaced by the proper English term "either", and second, the word "present" has to be integrated into the text behind the word "is".

147. The wording of paragraph 2 is basically modelled on Article 9(4) Rome Convention which also addresses the problem of formal validity of unilateral acts. The only change in substance consists of the introduction of a third connecting factor (habitual residence) at the end of the paragraph. All the other rules are exactly the same as under the Rome Convention. Consequently, the French and German language versions copy the wording of the Rome Convention literally to the extent that there is no change in substance (i.e. concerning the first two connecting factors). However, the English language version changes the words "was done" from Article 9(4) Rome Convention into "is performed" in the context of Article 10(2) Rome I-P. Again, this seems to be due to the English translation and cannot be explained by any sound rationale. Therefore, the words "is performed" ought to be replaced by the words "was done". This would also be in line with Article 18 Rome II-AP dealing with the same issue. In order to achieve a coherent set of European conflicts rules, the two provisions should be synchronised to the greatest possible extent.[241]

148. Finally, the last part of paragraph 2 has to be changed as well: The English language version refers to the habitual residence of the person who "drafted" the unilateral act. The "draftsman" of that act, however, appears to be totally irrelevant as to its formal validity. The proper criterion would rather be the person who actually "effected" the unilateral act. This would correspond to the German ("Person, die das Rechtsgeschäft vorgenommen hat") and the French ("la personne qui l'a établi") language versions of the proposal. Hence, the English text has to be changed accordingly.

[241] Regarding Article 18 Rome II-AP, however, two additional remarks have to be made: Firstly, the word "and" has to be deleted as it seems to be linguistically superfluous and does not appear in the original text of the Rome Convention. Secondly, the words "is done" have to be changed into "was done" which would correspond to Article 9(4) Rome Convention.

Article 11 – Scope of applicable law

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

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of the total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

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

(e) the consequences of nullity of the contract.

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

[no changes]

Article 12 – Incapacity

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

[no changes]

Article 13 – Voluntary assignment and contractual subrogation

1. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a right against another person shall be governed by the law which under this Regulation applies to the contract between the assignor and assignee.	1. The mutual obligations of assignor and assignee under a voluntary assignment or contractual subrogation of a *claim* ~~right against another person~~ shall be governed by the law which under this Regulation applies to the contract between the assignor and assignee.
2. The law governing the original contract shall determine the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.	2. The law governing the *assigned claim* ~~original contract~~ shall determine the effectiveness of contractual *and legal* limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged.
3. The question whether the assignment or subrogation may be relied on against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the material time.	3. The question whether the assignment or subrogation may be relied on against third parties shall be governed by the law of the country in which the assignor or the author of the subrogation has his habitual residence at the ~~material time~~ *time of the assignment or subrogation*.

S u m m a r y

The Institute generally welcomes the Commission's proposal for Article 13 Rome I-P as it introduces a widely recognised conflicts rule regarding the third party effects of an assignment, a rule which was also proposed by the Institute in its first comment.[242] However, the new proposal could be further improved by taking into account the following issues:

– Concerning the ambit of Article 13 Rome I-P, it is unclear whether the new Article 13 Rome I-P also encompasses the assignment of non-contractual rights. At the same time, the proposed Regulation on the law applicable to non-contractual rights (Rome II-AP) does not address this issue. Consequently, the recitals should clarify that Article 13 Rome I-P applies to the as-

[242] *Max Planck Institute*, Comments on Green Paper Rome I, pp. 79 seq.

signment of both contractual and non-contractual claims, and the wording of the English draft ought to be changed accordingly (see infra no. 150).[243]

– Moreover, the text of Article 13 Rome I-P leaves open the question of whether it also covers the creation of limited rights in rem, such as pledges, charges, nantissements, gages etc. As security rights over receivables usually fulfil the same economic function as outright transfers or contractual subrogations, this issue should be addressed in the recitals.[244]

– The wording of Article 13(2) Rome I-P needs improvement. There are divergences between the German and French versions on the one hand and the English version on the other. These ought to be eliminated as they might give rise to confusion regarding the scope of the different paragraphs and their content (see infra nos. 151–154).

– As far as contractual subrogation is concerned, an alignment of the French, German and English versions is also desirable (see infra no. 155).

– The English version's reference to "material time" as used in Article 13(3) Rome I-P does not satisfactorily answer the question as to the relevant time for the assessment of the assignor's location. It should therefore be harmonised with the German and French drafts (see infra no. 156).

Comments

Overview of the proposal

149. The Commission's proposal aims at determining the applicable law regarding the effects of an assignment on third-parties. This issue has been subject to intense discussions in courts as well as in legal literature over the years.[245] Whereas the Commission's proposal leaves the first paragraph of Article 12 Rome Convention dealing with the contractual relationship between assignor and assignee mainly unchanged, the wording of the second paragraph addressing the legal status of the debtor has been altered slightly.[246] Additionally, a third paragraph has been introduced which subjects the third-party effects of an assignment to the law of the place where the assignor has his habitual residence. According to the Explanatory Memorandum, the Commission has chosen this solution because it is favoured by the majority of re-

[243] See also supra no. 11 (comment on Recitals).

[244] See supra no. 11 (comment on Recitals).

[245] For an overview with further references see *Kieninger/Schütze*, Die Forderungsabtretung im Internationalen Privatrecht – Bringt die "Rom I-Verordnung" ein "Ende der Geschichte"?: IPRax 2005, 200 (201). In contrast to the recent developments, *Flessner/Verhagen* (supra n. 17) 21 seq. argue in favour of the implementation of party autonomy regarding the proprietary aspects of the assignment.

[246] This accounts for the English version, see infra nos. 152–155.

spondents to the Green Paper and has been adopted in the UN Convention on the Assignment of Receivables in International Trade.[247]

Finally, the scope of application of Article 12 Rome Convention has been extended to contractual subrogation since its economic function is similar to that of voluntary assignments.[248]

Assignment of non-contractual claims

150. The English version of Article 13 Rome I-P does not satisfactorily answer the question whether assignments of non-contractual claims fall into its ambit. In Article 13(1) Rome I-P, a very general reference is made to "the voluntary assignment or contractual subrogation of a *right against another person* […]" but paragraph 2 submits certain aspects of the assignment to "the law governing the *original contract*". Because of the latter reference to the "original contract" and due to the limitation of the whole proposal to contractual obligations (see Article 1(1) Rome I-P), it might be argued that Article 13(1) Rome I-P applies only to the assignment of contractual claims. However, the Commission did not address the assignment of non-contractual claims in the proposed Rome II Regulation; such assignments therefore might be covered neither by Rome II nor by Rome I if interpreted in a narrow way. In order to avoid such a gap, the Institute assumes that Article 13 Rome I-P is intended to cover the assignment of both non-contractual and of contractual claims. This assumption corresponds to the respective parts of the German and the French texts which use the more general expressions "Forderung" and "créance cédée".[249] In order to avoid ambiguities, the Regulation should clearly state in an added Recital 13a that the ambit of Article 13 Rome I-P will generally include contractual and non-contractual claims.[250] Therefore, the English text needs to be aligned with the wording of the German and French versions by inserting the term "claim" in both paragraphs 1 and 2.

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[247] The Convention was adopted in 2001 (supra n. 19). Its text as well as the explanatory report can be found at <www.uncitral.org>. See also the Convention's Article 22 ("Law applicable to competing rights"): "With the exception of matters that are settled elsewhere in this Convention and subject to Articles 23 and 24, the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant."

[248] See Explanatory Memorandum Rome I-P, p. 8.

[249] French version Article 13(1) Rome I-P: "Les obligations entre le cédant et le cessionnaire ou entre le subrogeant et le subrogé […]"; Article 1 (2) Rome I-P: "La loi qui régit la *créance cédée* […]". German version Article 13(1) Rome I-P: "Für die Verpflichtungen zwischen Zedent und Zessionar aus der Übertragung einer *Forderung*"; Article 13(2) Rome I-P: "Das Recht, dem die übertragene *Forderung* unterliegt […]" (emphasis added).

[250] See supra no. 11 (comment on Recitals).

Interaction between Article 13(2) and (3) Rome I-P

Wording

151. According to the English text of Article 13(2) Rome I-P, which is generally consistent with the French and German versions, the debtor can rely on the application of the law governing the original contract regarding "the effectiveness of contractual limitations on assignment as between the assignee and the debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and whether the debtor's obligations have been discharged." However, the English text deviates from the German and French versions by referring only to "the effectiveness of *contractual*[251] limitations on assignment as between the assignee and the debtor" rather then to the far broader term "caractère cessible [de la créance]" in the French version and the equally broad expression "Übertragbarkeit [der Forderung]" in the German version.[252] At the same time, all three language versions subject (only) the third party effects of an assignment to the law of the country where the assignor has his habitual residence (Article 13(3) Rome I-P).

Wording results in uncertainty as to the scope of the different paragraphs

152. This wording is inconsistent and may result in confusion as to which law generally governs the assignment itself, including its effects on third parties, and the validity and effect of the assignment as between the assignor and the assignee. The English version suggests that the assignment should generally be subject to the assignor's habitual residence (Article 13(3) Rome I-P) because only the effectiveness of *contractual* limitations on assignments and not the "assignability" of the claim as such shall be subject to the law governing the original claim between the debtor and the assignee (Article 13(2) Rome I-P). The French and German versions on the other hand use broader terms and, thus, suggest that Article 13(2) Rome I-P encompasses the entire assignment, including, e.g., the relationship between the assignee and the assignor. Hence, according to the French and German versions, only the third party effects would be subject to the law of the assignor's habitual residence (Article 13(3) Rome I-P).

Solution: Reformulation of the English version of Article 13(2) Rome I-P

153. These divergences require amendment of all three language versions. By only submitting the effectiveness of *contractual* limitations between the as-

[251] Emphasis added.

[252] The latter would be equivalent to the English terms "assignability" or "assignable character" of a receivable.

signee and the debtor to the law governing the original claim, the English text of Article 13(2) Rome I-P does not cover other limitations on assignments under national law which may similarly affect the legal status of the debtor. This applies, e.g., to statutory limitations on the assignment of rights with a personal character or tax claims. Thus, the English version of Article 13(2) Rome I-P, which is supposed to ensure the protection of the debtor's legal position, is too narrow.

154. Including *legal* limitations on assignment in Article 13(2) Rome I-P, as done in the Institute's proposal, enlarges the ambit of debtor protection in the English version. As a consequence, the debtor can refer to the law governing the original claim vis-à-vis the assignee whenever his legal status is affected. Moreover, the expression "legal limitations" ensures that Article 13(2) Rome I-P not only applies to statutory limitations but also to other limitations, such as those established in case law. At the same time, Article 13(3) Rome I-P remains unchanged. The French and the German text should be amended accordingly: instead of "caractère cessible" and "Übertragbarkeit", Article 13(2) Rome I-P should refer to "restrictions contractuelles et non-contractuelles de la cession" and to "vertragliche und nicht-vertragliche Abtretungsbeschränkungen".

Inconsistency as to the wording regarding contractual subrogation

155. The Institute would also like to draw attention to the fact that the newly introduced reference to contractual subrogation is implemented differently in each of the three versions: Whereas in the French version reference to subrogation is constantly made in each paragraph, in the German version no reference to subrogation can be found and only the broad term "Übertragung" is used. Finally, the English version refers to subrogation but not as comprehensively as the French version. The Institute is aware that the comprehensive use in the French version results from the fact that French law (and legal systems influenced by French law) frequently refers to subrogation. Furthermore, reference to subrogation leaves the Commission with the problem of how to adjust the text in the English and particularly the German version. In the German version, especially, reference to contractual subrogation causes problems with regard to the translation, as the term "vertragliche Subrogation" is hardly known in the German legal system. Nevertheless (and even if it may be obvious to the reader that no material difference is intended in the different texts), an alignment of the three versions should be achieved in order to enhance uniformity, e.g., by using the English version as a model.

Relevant point in time

156. Concerning the point in time to which the new conflicts rule (Article 13(3) Rome I-P) refers, the German and French texts differ from the English one. The English version simply mentions the "material time" whereas the French and German versions refer to the time in which the subrogation or assignment takes place.[253] It is far from clear what "the material time" referred to in the English text means. It should therefore be aligned with the French and German versions.

Article 14 – Statutory subrogation	**Article 14 – ~~Statutory~~ *Legal* subrogation**
Where a person has a contractual claim against another and a third person has a duty to satisfy the creditor, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to proceed against the debtor.	Where a person*, the creditor,* has a contractual claim against another*, the debtor,* and a third person has a duty to satisfy the creditor, the law which governs the third person's duty to satisfy the creditor shall determine *whether and to what extent that* third person is entitled to ~~proceed~~ *exercise the creditor's rights* against the debtor. *The protective rules of the law governing the debtor's obligation remain applicable.*

Summary

The Institute generally welcomes the new proposal, which adopts in essence the Institute's earlier recommendations. However, the provision as it stands is not sufficiently clear on some points:

– The title should be changed to include legal subrogation based not on statute but on common law (see infra no. 157).

– The text should clarify who is meant by the words "debtor" and "creditor" (see infra no. 158).

– The unclear formulation "proceed against the debtor" should be replaced with "exercise the creditor's rights" to indicate that the provision deals only with subrogation and similar instruments, not with other possible claims (see infra no. 159).

– The provision should make clear that the law governing the third person's duty determines not only whether the third person can proceed against the debtor but also to what extent (see infra no. 160).

[253] French version Article 13(3) Rome I-P: "au moment de la cession ou du transfert"; German version Article 13(3) Rome I-P: "zum Zeitpunkt der Übertragung".

– The debtor's right to rely on defences he had against the creditor should be included (see infra no. 161).

Comments

Wording

157. The proposal correctly excludes conventional subrogation through its title. However, the restriction to "statutory" subrogation is too narrow (at least in the English version) since subrogation by law can also occur through common law doctrines. "Legal" subrogation is preferable.

158. Article 13 Rome Convention defines debtor and creditor for the purpose of the provision. This is helpful, since the roles are not obvious: The "third person" is typically also both a debtor (vis-à-vis the main creditor) and a creditor (vis-à-vis the main debtor after subrogation). Therefore, it is preferable to return to the wording of the Rome Convention and define the terms used.

Scope of the applicable law

159. Three questions arise in subrogation. The first is the "if" question: Does the third person (the one who fulfills the obligation) acquire the creditor's claim against the debtor, or the power to enforce it, at all? The second is the "how much" question: To what extent does he acquire the claim? The third is the "how" question: In what way exactly can the third person proceed? The proposal right now is not clear as to which of these questions are addressed.

The Institute recommends two clarifying amendments: First, substituting "whether and to what extent" for "whether" makes clear that the law governing the third person's obligation applies to both the "if" and the "how much" question. Second, substituting "exercise the creditor's rights" for "proceed" achieves two clarifications. First, the provision deals only with subrogation and functionally similar situations in which the third person's claim is based on the original creditor's claim. "Proceed" is too broad because it suggests that all claims the third person has, or at least all claims in connection with his payment, are governed by this provision. Second, "exercise the creditor's rights" makes clear that the third question, the "how" question, is governed by the law governing the creditor's claim.[254] This formulation essentially simplifies the language in Article 13 Rome Convention, which reads: "[…] whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor". It encompasses both the

[254] Cf. ECJ 2.6. 1995 – case C-428/92 *(DAK* v. *Lærerstandens Brandforsikring G/S)*, E.C.R. 1994, I-2259, para. 18 (regarding Article 93(1) of Regulation [EEC] No. 1408/71).

situation where the third person acquires the creditor's right and enforces it as his own right as well as the situation where the creditor retains the right and the third person only acquires the power to enforce it.

Debtor's protection

160. Article 14 Rome I-P, unlike Article 15 Rome I-P, includes no provision regarding the debtor's protection against the creditor. Such a provision is unnecessary if the debtor's obligation and that of the third person are governed by the same law. Yet, both obligations can be governed by different laws; in this case the debtor has a reasonable interest in maintaining the protection against third parties afforded to him under the law governing his own obligation to the creditor. For example, the debtor may have paid his debt to the creditor in ignorance of the subrogation. If the law governing his obligation to the creditor protects him in such a situation against the subrogated claim brought by a third person, he must be able to rely on this protection even if the law governing the third person's obligation does not provide for a similar protection. The debtor cannot control the relationship between the creditor and the third person, and creditor and third person should not be able to limit the debtor's legal protection through a choice of law agreement.

161. The Institute proposes to add a second sentence clarifying that the debtor enjoys the same protection vis-à-vis the third party as he would under the law governing his own obligation. Although the exact extent of this protection is in dispute between different scholars, there is virtually no doubt about this point in general. The exact definition of "protective rules" can be left to the courts. However, rules disabling subrogation altogether, which could in theory also be viewed as such protective rules, are not covered by the second sentence because whether subrogation is possible at all is part of the "if" question. It is governed not by the law governing the debtor's own obligation, but by the law governing the third person's obligation. From a choice of law perspective, the debtor needs protection against the change in the law applicable to his obligation, not against alterations in the person of his creditor.

Article 15 – Multiple liability	**Article 15 – Multiple ~~liability~~ *debtors***
Where a creditor has a claim upon several debtors who are jointly liable and one of those debtors has in fact satisfied the creditor, the law of the obligation of this debtor towards the creditor governs the right of this debtor to claim against the other	Where a creditor has ~~a claim~~ *claims* upon several debtors, ~~who are jointly liable~~ and one of those debtors has in fact satisfied the creditor, the law of *that debtor's* obligation ~~of this debtor~~ towards the creditor governs the right of *that same* debtor to claim *re-*

debtors. Where the law applicable to a debtor's obligation to the creditor provides for rules to protect him against actions to ascertain his liability, he may also rely on them against other debtors.

course against the other debtors. ~~Where the law applicable to a debtor's obligation to the creditor provides for rules to protect him against actions to ascertain his liability, he may also rely on them against other debtors.~~ *The other debtors can rely on the defences they had against the creditor to the extent allowed by the law governing their obligations to the creditor.*

Summary

The Institute welcomes the new proposal, which adopts in essence the Institute's earlier recommendations. However, the text as it stands now invites misunderstandings:

– The title should read "multiple debtors" (see infra no. 162).

– Neither joint liability of the debtors nor the identity of the claims against the debtors should appear as a preliminary requirement for the claim to contribution (see infra no. 164).

– The unclear formulation "claim against" should be replaced with "claim recourse against" to make clear that the provision deals only with recourse, not with other possible claims (see infra no. 165).

– The protection of the other debtor should be clarified (see infra no. 166).

Comments

Title

162. "Multiple liability" is not a clear title and should be replaced by "multiple debtors", a term used already in the Explanatory Memorandum.[255]

Applicable law

163. The Institute welcomes the Commission's decision to let the law governing the obligation of the debtor who has satisfied the creditor ("the payor") also govern his claim for contribution and recoupment against the other debtors, in parallel with Article 14 Rome I-P. If all debtors are liable according to the same law, this solution guarantees consistency in the relations between debtors and creditor on the one hand and in the relations between the debtors on the other. If the debtors are liable according to different laws, this solution runs parallel to that in Article 14 Rome I-P; problems regarding

[255] Explanatory Memorandum Rome I-P, p. 8.

the relationship between both provisions are minimised. Even if a contractual relation exists between the debtors, it is unnecessary to apply the law governing that contract to the claim for contribution or recoupment as well. It suffices that the contract may prevail on the level of substantive law.[256]

When both contractual and delictual obligations are involved, it is unclear whether Article 15 Rome I-P or the parallel provision of the Rome II-AP applies. This suggests that Rome I and Rome II should be combined at least for the provisions concerning the general law of obligations.[257] If not, the provisions in Rome I and Rome II should at least contain the same wording.

Article 15 1st sentence Rome I-P: Requirements

164. The proposal requires that the creditor has "a claim upon several debtors who are jointly liable". This formulation is not sufficiently precise. First, even in a case of joint liability, the claims against different debtors are normally separate claims, so the provision should mention "claims" rather than "a claim". Second, the provision appears to make joint liability a requirement for the provision to apply. This is awkward in several ways. First, as it stands, the provision does not cover contribution between debtors who are jointly and severally liable. Second, whether debtors are jointly liable, as the text now requires, is a question of substantive law that may well be answered differently by different debtors' personal laws. For example, if a principal enters into a contract for the carriage of goods with a carrier, and the carrier then enters into a contract with a subcontractor, both contracts may well be governed by different laws. If the subcontract is a contract for the principal's benefit as a third party, the carrier and the subcontractor are both liable to the principal for damages to the goods, yet their obligations to the principal are governed by different laws, and both may be jointly liable under one of the laws but not under the other. Now, in order to determine whether the provision is applicable or not, it is first necessary to determine whether joint liability exists or not, and this requires determination of the law applicable to this preliminary question. As such, it raises the issue as to what law determines whether joint liability exists or not. This is unnecessarily complicated. The existence of joint liability is relevant only as to whether a claim for contribution or recoupment exists, and this question is to be answered pursuant to the law designated by Article 15 Rome I-P. Joint liability should therefore not be formulated as a requirement for the provision's applicability.

165. The amendment makes clear that the provision is applicable only if the first debtor fulfills his own debt. Cases in which the payor is not in fact in debt

[256] *Hamburg Group for Private International Law*, Comments on Draft Proposal Rome II (supra n. 4) 50.

[257] See also supra no. 5 (Introduction).

and merely fulfils a real debtor's obligation, whether by accident or on purpose, are too diverse to be formulated as a rule.[258] In most cases, such claims will be regulated by the provision for restitution in the Rome II-AP (another reason to combine Rome I and Rome II into one regulation).

Article 15 2nd sentence Rome I-P: Debtors' protection

166. The Institute welcomes the introduction of a provision regarding the other debtors' protection. Such a provision should also be added to Article 17 Rome II-AP, where it is currently absent. However, the current wording is unclear. First, it protects the debtor against "actions" by the payor. This wording introduces a procedural consideration into a rule dealing with choice of substantive law and does not cover other ways in which the payor may proceed – for example, by way of a set-off between the debtors. Yet the other debtors require protection in such cases as well. Second, the proposal points to "rules to protect [the debtor]". However, the main way in which legal orders protect debtors against recourse is not through specific protective rules, but rather by denying the creation of a regime of joint liability in the first place.

The proposed amendment makes clear that the protection goes to the substantive claim, not only to its procedural enforcement. It also makes clear that when the law governing a debtor's obligation does not create joint liability, the debtor is protected against a claim for recourse based on a regime created under another law. The protection is granted by rules of choice of law, not substantive law; so whether the debtor can in fact rely on his defence vis-à-vis the payor is a matter of the substantive law determined by this provision.

Article 16 – Statutory offsetting	**Article 16 – ~~Statutory offsetting~~ *Set-off***
1. Statutory offsetting shall be governed by the law applicable to the obligation in relation to which the right to offset is asserted.	1. ~~Statutory offsetting~~ *Set-off* shall be governed by the law applicable to the ~~obligation in relation to~~ *claim against* which the right to ~~offset~~ *set-off* is asserted. *2. This rule does not apply to set-off by agreement.*

Summary

The Institute welcomes the proposal and agrees with the substance of the proposed rule as it provides for a fair protection of the party facing set-off and

[258] *Max Planck Institute*, Comments on Green Paper Rome I, p. 81.

for a synchronisation of the laws governing the principal claim and the set-off. Nevertheless, the Institute suggests the following changes:

– Article 16 Rome I-P should make clear that the provision is not limited to statutory set-off but also encompasses set-off by unilateral declaration (see infra no. 169).

– Article 16 Rome I-P should state unambiguously that set-off is not governed by the law applicable to the claim of the party which asserts set-off but by the law applicable to the claim of the other party. The wording "obligation in relation to which" is not clear enough on this point and should be replaced by "claim against" (see infra no. 169).

– A second paragraph should be inserted to expressly exclude set-off by agreement from the scope of application of the rule (see infra no. 170).

Comments

Overview of the proposal

167. Article 16 Rome I-P proposes to introduce a specific rule on set-off which is not to be found in the Rome Convention. Article 16 Rome I-P subjects set-off to the law of the obligation in relation to which the right to set-off is asserted. Set-off by contractual agreement does not fall in the scope of Article 16 Rome I-P and is instead subject to the general rules on contractual obligations in Articles 3 and 4 Rome I-P.[259]

168. The Institute welcomes this proposal and completeley agrees with the solution adopted.[260] It is not only in line with Article 6 of the Insolvency Regulation,[261] but also provides for a fair protection of the party facing set-off and – as set-off is in most cases invoked as a defence – for a synchronisation of the laws governing the principal claim and the set-off.

Clarification of the rule

169. The Institute suggests a reformulation of the text: "Set-off" seems to be more commonly used than "offsetting". "Statutory" set-off could be misunderstood as relating only to a set-off effected by operation of law, as for instance espoused by French law, and as excluding set-off by unilateral declaration, which is the concept adhered to by the substantive law of several Member States, e.g., Germany and the Netherlands. Therefore, the limitation to "statutory" set-off contained in the headline should be dropped. As a conse-

[259] Explanatory Memorandum Rome I-P, p. 8.

[260] For a detailed opinion see *Max Planck Institute*, Comments on Green Paper Rome I, pp. 81–86.

[261] Council Regulation (EC) No. 1346/2000 of 29. 5. 2000 relating to insolvency proceedings, O.J. EC L 160/1.

quence, an explicit exclusion of contractual set-off has to be adopted in a new paragraph 2.[262] "Obligation in relation to" could be misunderstood as referring to the claim of the party that asserts the set-off (while it is in fact the obligation of the other party). It should be replaced by "claim against" to make it clear that the claim of the other party is the relevant claim for determining the applicable law.

Exclusion of set-off by agreement

170. In addition, the Institute proposes adding a second sentence to Article 16 Rome I-P clarifying that set-off by agreement does not fall in the scope of Article 16 Rome I-P. This sentence expresses the Commission's (correct) interpretation of the provision for courts and legal practioners who will have to apply the regulation and cannot always be expected to read the Explanatory Memorandum.

Article 17 – Burden of proof

1. The law governing the contract under this Regulation shall apply to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.	[no changes]
2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 10 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.	

Article 18 – Assimilation to habitual residence

1. For companies or firms and other bodies or incorporate or unincorporate, the principal establishment shall be considered to be the habitual residence for the purposes of this Regulation.	1. For companies or firms and other bodies ~~or~~ incorporate or unincorporate, the principal establishment shall be considered to be the habitual residence for the purposes of this Regulation.

[262] See infra no. 170.

Where the contract is concluded in the course of operation of a subsidiary, a branch or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, this establishment shall be considered the habitual residence.

2. For the purposes of this Regulation, where the contract is concluded in the course of the business activity of a natural person, that natural person's establishment shall be considered the habitual residence.

Where the contract is concluded in the course of operation of a ~~subsidiary~~, ~~a~~ branch, *agency* or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, this establishment shall be considered the habitual residence.

2. [no changes]

Summary

The Institute welcomes the introduction of a general provision in Article 18 Rome I-P defining the habitual residence for companies and persons acting within their trade or profession. This constitutes a sound and reasonable approach which has already been implemented in the context of Brussels I (cf. Article 60(1) Brussels I Regulation) and the 2003 Rome II proposal[263] (cf. its Article 19) as well as the amended 2006 proposal (cf. Article 20 Rome II-AP).

However, the respective wordings of the Rome I and Rome II proposals differ considerably regarding the basic connecting factors and the different language versions. Yet, there does not seem to be any substantial reason for these differences since the provisions are supposed to address exactly the same question. Hence, they should generate the same results and therefore should be fully synchronised. In other words, Article 18 Rome I-P is a good example of the need for a common pool of standardised and literally identical general provisions for implementation in the different European instruments of private international law.

Comments

171. In order to have a coherent conflicts regime within the European Community and in particular with regard to a possible (and reasonable) future merger of Rome I and Rome II, such general questions as addressed in Article 18 Rome I-P ought be dealt with identically in the two instruments. According to the Explanatory Memorandum of Article 18 Rome I-P, the article is modelled on the corresponding rule in Rome II, i.e. Article 20 Rome II-

[263] COM(2003) 427 final (supra n. 5).

AP and Article 19 of the 2003 proposal.[264] Rome II equates the habitual residence of a company with their "principal establishment" in the English,[265] French ("principal établissement") and German ("Hauptniederlassung") language versions. Hence, this basic decision in favour of the principal establishment should be the starting point when drafting a similar rule for Rome I. While the English language version of Article 18(1) 1st sentence Rome I-P is in line with this concept, the French ("administration centrale") and the German ("Hauptverwaltung") texts point to the central administration as the habitual residence of a company. Consequently, either the German and French language versions of Rome I, or the Rome II proposal as well as the English language version of Rome I have to be adjusted.

As to the question which connection factor seems to be preferable, there is a theoretical argument in favour of the principal place of business because it consists of the centre of the company's business activity and commercial intercourse vis-à-vis third parties while the central administration is defined as the centre of the company's internal organisation.[266] Hence, at least theoretically, the principal establishment can be identified more readily by third parties.[267] In practice, however, it is hardly conceivable that the principal establishment and the central administration actually diverge. Moreover, such cases appear to be already covered by Article 18(1) subpara. 2 Rome I-P. Thus, both terms will regularly yield similar results in practice. The Institute nonetheless recommends sticking to the connecting factor "principal establishment" ("principal établissement", "Hauptniederlassung") as a matter of uniformity of terminology.

172. The word "or" in Article 18(1) 1st sentence Rome I-P of the English language version should be deleted for linguistic purposes. The same holds true for Article 20(1) 1st sentence Rome II-AP.

173. It has been pointed out above that Article 18(1) 2nd sentence Rome I-P is rooted in Article 19(1) 2nd sentence of the 2003 Rome II proposal. According to the Explanatory Memorandum of the 2003 Rome II proposal on

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[264] Explanatory Memorandum Rome I-P, p. 8.

[265] It may be noted that Article 18(1) Rome I-P refers to the "principal establishment" like Article 19(1) of the 2003 Rome II proposal (supra n. 5) originally did. However, Article 20(1) Rome II-AP now uses the term "principal place of business" while the German ("Hauptniederlassung") and the French ("principal établissement") language versions stick to the literal equivalent of the term "principal establishment". As a matter of linguistic coherence with the English versions of Rome I and II, the English version of the Rome II-AP should stick to the latter term as well.

[266] Cf. *von der Groeben/Schwarze (-Troberg/Tiedje)*, Kommentar zum EU-/EG-Vertrag[6] (2003) Art. 48 EG, no. 9 seq.; *v. Bar/Mankowski*, Internationales Privatrecht[2] I (2003) § 7, no. 36; *Kropholler*, Europäisches Zivilprozessrecht[8] (2005) Art. 60, no. 2; *Rauscher (-Staudinger)*, Europäisches Zivilprozessrecht (2004) Art. 60 Brüssel I-VO, no. 1.

[267] Cf. also the Explanatory Memorandum of the 2003 Rome II proposal on Article 19, COM(2003) 427 final (supra n. 5) p. 27.

Article 19, the provision is explicitly modelled on Article 5(5) Brussels I Regulation.[268] However, the English language version of Article 18(1) 2nd sentence Rome I-P replaces the term "branch, agency or other establishment" as embedded in Article 5(5) Brussels I Regulation with the term "subsidiary, a branch or any other establishment". Hence, the word "agency" is deleted, and the word "subsidiary" is newly introduced into the text. Consequently, a judge might interpret this change as to the wording as a change in substance, in particular with regard to the term "subsidiary". Yet, it follows from the German and the French language versions of Article 18(1) 2nd sentence Rome I-P and from the Rome II proposals as well as from the Explanatory Memorandum[269] that neither a linguistic nor a substantive deviation from Article 5(5) Brussels I Regulation was actually intended: Both the German and French language versions copy the wording of Article 5(5) Brussels I Regulation verbatim. Therefore, the English language version of Article 18(1) 2nd sentence Rome I-P (and of Article 20 Rome II-AP) should also be aligned with Article 5(5) Brussels I Regulation in order to avoid unnecessary problems of interpretation.

Article 19 – Exclusion of renvoi

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law.	The application of the law ~~of any country~~ specified by this Regulation means the application of the *substantive* rules of law ~~in force in that country other than its~~ *and not the* rules of private international law.

Summary / Comments

174. With regard to the proposed Article 3(2) Rome I-P, Article 19 Rome I-P has to be modified insofar as it is based on the presumption that only the law of a country can be chosen by the parties as their governing law. Renvoi should also be excluded in cases where the parties avail themselves of Article 3(2) Rome I-P and elect as the governing law principles and rules of substantive law of contract recognised internationally or in the Community. In that case those rules and principles should apply irrespectively of any conflict rules they might contain. Otherwise the parties would not be able to choose, for example, an international convention as their lex contractus if the contract lies outside the convention's international scope.

[268] Explanatory Memorandum, COM(2003) 427 final (supra n. 5) p. 27.
[269] Cf. COM(2003) 427 final (supra n. 5) p. 27.

Article 20 – Ordre public

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

Summary

Apart from a minor technical change,the Institute recommends for reasons of clarification that Article 20 Rome I-P should not only refer to the forum state's public policy but should also explicitly safeguard the ordre public of the Community.

Comments

Technical change: Reference to any rule of law

175. Article 20 Rome I-P should apply to any rule of law specified by the Regulation rather than the law of a country. As Article 3(2) Rome I-P allows the choice of non-State rules and principles as the governing law, those rules and principles must also be subject to the forum state's public policy. However, this will not apply to a future Common Frame of Reference[270] which according to Article 22(b) Rome I-P will not be subject to the conflict rules of the envisioned Regulation and thus not be subject to Article 20 Rome I-P.

Public policy of the Community

176. Furthermore, the Institute recommends that by employing the same technique as in Article 8(1) Rome I-P the public policy of the Community should be explicitly protected against the application of any law specified by the future Rome I Regulation. One might question whether such an amendment is necessary for safeguarding the Community's ordre public, bearing in mind that Community law is part of the Member States' legal systems and thus shares the protection of the national ordre public.

177. Nevertheless, Community public policy should be explicitly mentioned in Article 20 Rome I-P. As Community law increasingly grows and more and more becomes a legal system of its own,[271] the emerging of a Euro-

[270] See supra no. 9 (comment on Recitals) with n. 14.

[271] See supra no. 31 (comment on Article 3).

pean ordre public is not an academic question.[272] In many areas of Community law basic standards exist and need – as national basic standards – to be protected against the application of foreign law. In *Eco Swiss*, for example, the ECJ regarded Article 81 EC as such a fundamental standard being essential for the accomplishment of the tasks entrusted to the Community.[273] Consequently, the court considered the observance of Article 81 EC to be a matter of public policy even if under national law the infringement of national competition rules would not amount to a violation of the national ordre public.[274] As basic standards of Community law like Article 81 EC are not any longer at the disposal of the Member States, they deserve a more prominent position within the international private law instruments of the Community.[275] Fundamental policies of the Community should not only be clearly protected in the area of Article 8 Rome I-P and internationally mandatory rules,[276] but also within the domain of the ordre public reservations. After all, an explicit allusion to the Community public policy would also clarify that in cases of a conflict between the public policies of the forum and of the Community the ordre public européen always prevails.

Article 21 – States with more than one legal system

Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.	[no changes]

Summary / Comments

178. Article 21 Rome I-P relates to states that comprise several territorial units having different substantive laws in respect of contractual obligations. It provides that each territorial unit shall be considered as a country for the purpose of identifying the law applicable under the proposed Regulation and,

[272] See *Basedow*, Die Verselbständigung des europäischen ordre public, in: FS Hans Jürgen Sonnenberger (2004) 291 seq.; *id*, Recherches sur la formation de l'ordre public européen dans la jurisprudence, in: Mélanges en l'honneur Paul Lagarde (2005) 55 seq.

[273] ECJ 1.6. 1999 – case C-126/97 *(Eco Swiss China Time Ltd.* v. *Benetton International NV)*, E.C.R. 1999, I-3055, para. 36.

[274] Cf. ECJ 1.6. 1999 (previous note) para. 39.

[275] *Basedow* (supra n. 272) 291 (319).

[276] See supra nos. 142–144 (comment on Article 8).

thus, adopts Article 19(1) Rome Convention. It deviates from the current regime only in so far as it does not adopt Article 19(2) Rome Convention which releases states with several territorial units from the obligation to apply the Rome Convention to internal conflicts between these units. As a result, the envisioned Regulation will not only apply to international but also to domestic contracts.[277]

179. The Institute welcomes Article 21 Rome I-P as it stands. It provides for an approved method for choosing the applicable law where states with more than one legal system are involved. Additionally, it abandons the coexistence of different choice-of-law regimes by submitting both international and domestic contracts to the same choice-of-law rules. This, in turn, makes the private international law of contracts less complex, more transparent and thus more certain.

Article 22 – Relationship with other provisions of Community law

This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:	*1.* This Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which:
(a) in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list of such acts currently in force is provided in Annex 1; or	(a) in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list of such acts currently in force is provided in Annex 1; or
(b) govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or	(b) govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or
(c) lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.	(c) lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.
	2. This Regulation replaces conflict-of-law provisions contained in the Directives enumerated in Annex 1 bis and the pertinent national transpositions.

[277] Explanatory Memorandum Rome I-P, p. 9.

Summary

The Institute generally welcomes the scope and purpose of Article 22 Rome I-P. However, a few clarifications with respect to the interpretation of this provision seem necessary. Also, its text should be slightly amended for the sake of clarity regarding existing conflict-of-law provisions in certain EC Directives already in force. The Institute suggests the following amendments:

– A second paragraph should be added in order to clarify that certain conflict-of-law rules contained in EC Directives on consumer contracts, as listed in a new Annex 1 bis, are replaced by the regime of the Rome I-P (see infra no. 181).

– Annex 1 of the Rome I-P ("List of instruments mentioned in Article 22(a)") should be revised, as it is incomplete and does not refer to the current versions of the relevant directives (see infra no. 182).

Comments

180. The Institute supports the Commission's suggestion in general. Nevertheless, a few modifications and remarks are in order.

181. Several EC Directives on consumer contracts provide that certain minimum standards of European consumer law cannot be discarded by a choice-of-law clause choosing the law of a non-member country with a lesser standard. The following Directives contain such provisions:

– Article 6(2) of the Directive 93/13/EEC on unfair terms in consumer contracts,

– Article 9 of the Directive 94/47/EC on the protection of purchasers of rights to use immovable properties on a timeshare basis,

– Article 1(2) of the Directive 97/7/EC on the protection of consumers in respect of distance contracts,

– Article 7(2) of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees, and

– Article 12(2) of the Directive 2002/65/EC concerning the distance marketing of consumer financial services.

The Member States have transposed these provisions into national codifications or statutes. Such rules, however, are no longer warranted because under Articles 3 and 5 Rome I-P the law of the Member State in which the consumer has his habitual residence governs consumer contracts. The parties are not entitled to replace this law through a choice-of-law clause according to Article 3(1) Rome I-P. Therefore, Article 22 Rome I-P should make clear that the Rome I Regulation replaces the national transpositions of the "non-member country clauses" of the above-mentioned Directives.

182. Annex 1 is not complete and does not refer to the current versions of the relevant Directives. It should therefore be amended accordingly:

– Directive 2002/83/EC of 5. 11. 2002 concerning life assurance, as amplified and amended by Directive 2004/55/EC of 26. 4. 2004, should be added.

– Directive 619/1990/EC should not be listed in Annex 1, as Article 72 in connection with Annex V, part A of Directive 2002/83/EC has repealed Directive 619/1990/EEC of 8. 1. 1990 as amplified and amended by Directives 96/1992/EC and 12/2002/EC.[278]

If, however, a special conflict rule on insurance contracts is adopted as proposed above,[279] reference to the insurance directives in Annex 1 would have to be deleted.

183. Finally, it should be emphasised that a future optional Community instrument containing a comprehensive set of contract law rules should be governed by Article 22(b) Rome I-P. According to Article 3(2) Rome I-P, the parties to a contract may choose a body of rules of non-national origin that is internationally recognised in the Community. As it stands, this refers for instance to the Principles of European Contract Law.[280] In the future, institutions will draft other comparable bodies amenable to a choice by the parties. Further, the European Commission is currently drafting the Common Frame of Reference.[281] In order to provide a viable optional alternative body of rules to be chosen by the parties, the Common Frame should be as comprehensive as possible. It is therefore desirable that this Common Frame contain the current *acquis communautaire* regarding minimum rules such as consumer protection rules not subject to derogation by the parties: The Common Frame's attractiveness for the parties also depends on whether it provides a comprehensive body of rules whose content the parties can oversee and foresee without having to fear the application of exceptional rules, for instance, under Article 5(1) Rome I-P. As already noted,[282] however, the Commission's Explanatory Memorandum is contradictory with respect to Rome I-P's relationship with a possible future optional Community instrument because it is unclear whether Article 3(2) or Article 22(b) Rome I-P address this problem. Since it is of utmost importance whether Article 3(2) Rome I-P (applicability of restrictions resulting from Articles 5, 6 and 8 Rome I-P to uniform instrument) or Article 22(b) Rome I-P (no such applicability) deal with this relationship, this question should be resolved in a recital.[283] For the sake of creating a truly

[278] See supra no. 77 (comment on Article 5a).

[279] See supra no. 79 (comment on Article 5a).

[280] Supra n. 11.

[281] See the Commission's reference to the European Contract Law project, i.e. the Common Frame of Reference, in its Explanatory Memorandum on Article 22 Rome I-P, p. 10; see also supra no. 9 (comment on Recitals) with n. 14.

[282] See supra nos. 9 (comment on Recitals) and 28 (comment on Article 3).

[283] See supra no. 9 (comment on Recitals).

uniform optional instrument, the Institute emphasises its position that Article 22(b) Rome I-P should govern the hierarchy between the Rome I-P and a future uniform body of rules such as the Common Frame of Reference.

Article 23 – Relationship with existing international conventions

1. The Member States shall notify the Commission, no later than six months after the entry into force of this Regulation, of the list of multilateral conventions governing conflicts of laws in specific matters relating to contractual obligations to which they are Parties. The Commission shall publish the list in the *Official Journal of the European Union* within six months thereafter.

After that date, the Member States shall notify the Commission of all denunciations of such conventions, which the Commission shall publish in the *Official Journal of the European Union* within six months after receiving them.

1. [no changes]

2. This Regulation shall not prejudice the application of international conventions referred to in paragraph 1. However, where, at the time of conclusion of the contract, material aspects of the situation are located in one or more Member States, this Regulation shall take precedence over the following Conventions:

– the Hague Convention of 15 June 1955 on the law applicable to international sales of goods;

– the Hague Convention of 14 March 1978 on the law applicable to agency.

2. This Regulation shall not prejudice the application of international conventions referred to in paragraph 1. However, where, at the time of conclusion of the contract, *all* material aspects of the situation are located in one or more Member States, this Regulation shall take precedence over the following Conventions:

– the Hague Convention of 15 June 1955 on the law applicable to international sales of goods;

– the Hague Convention of 14 March 1978 on the law applicable to agency.

3. This Regulation shall take precedence over bilateral international conventions concluded between Member States and listed in Annex II if they concern matters governed by this Regulation.	3. [no changes]

Summary/Comments

184. Article 23(1) Rome I-P is a standard formulation on the relationship of Rome I-P with existing international conventions. It should not be changed. In accordance with Article 65 EC, Article 23(2) 2nd sentence Rome I-P takes account of the need to establish, within the European Union, a set of uniform conflict rules which is not disturbed by international conventions to which single Member States are parties.

185. In Article 23(2) Rome I-P a translation error should be corrected. The second sentence should read: "However, where, at the time of conclusion of the contract, *all* material aspects ….". This would align the English version with the wording contained in the German and French draft ("*alle* relevanten Sachverhaltselemente", "*tous* les éléments pertinents").[284]

186. Also the German version seems to contain a translation error. Article 23(3) Rome I-P in the English and French versions clearly states that the Rome I Regulation shall take precedence over the bilateral conventions listed in Annex II if they concern matters governed by this Regulation. The German version is ambiguous. For the sake of clarity it should be changed into: "Dieser Vorschlag geht auch den in Anhang II aufgeführten bilateralen Übereinkommen zwischen Mitgliedstaaten vor, soweit diese Übereinkommen Bereiche betreffen, die von dieser Verordnung geregelt werden."

Annex 1: List of instruments mentioned in Article 22 (a)	**Annex 1: List of instruments mentioned in Article 22(*1*)(a)**
– Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC of 15.3. 1993)	– Directive on the return of cultural objects unlawfully removed from the territory of a Member State (Directive 7/1993/EC of 15.3. 1993)
– Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC of 16.12. 1996)	– Directive concerning the posting of workers in the framework of the provision of services (Directive 71/1996/EC of 16.12. 1996)

[284] Emphases added.

– Second non-life insurance Directive (Directive 357/1988/EEC of 22.6. 1988, as amplified and amended by Directives 49/1992/EC and 13/2002/EC)

– Second life assurance Directive (Directive 619/1990/EEC of 8.1. 1990 as amplified and amended by Directives 96/1992/EC and 12/2002/EC)

[The following Directives are only to be incorporated in the instance the proposed Article 5a is not adopted (see supra nos. 79, 182)]

– Second non-life insurance Directive (Directive 357/1988/EEC of 22.6. 1988, as amplified and amended by Directives 49/1992/EC and 13/2002/EC)

~~– Second life assurance Directive (Directive 619/1990/EEC of 8.1. 1990 as amplified and amended by Directives 96/1992/EC and 12/2002/EC)~~

– Directive 2002/83/EC of 5.11. 2002 concerning life assurance, as amplified and amended by Directive 2004/66/EC of 26.4. 2004.

Annex 1 bis: List of provisions mentioned in Article 22(2)

– Article 6(2) of the Directive 93/13/EEC on unfair terms in consumer contracts

– Article 9 of the Directive 94/47/EC on the protection of purchasers of rights to use immovable properties on a timeshare basis

– Article 12(2) of the Directive 97/7/EC on the protection of consumers in respect of distance contracts

– Article 7(2) of the Directive 1999/44/EC on certain aspects of the sale of consumer goods and associated guarantees

– Article 12(2) of the Directive 2002/65/EC concerning the distance marketing of consumer financial services

Annex II: List of bilateral conventions mentioned in Article 23(3)

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Annex II: List of bilateral conventions mentioned in Article 23(3)

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