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THE ROME I REGULATION

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1. European choice of law rules for contracts

At the end of 2005, the European Commission tabled a proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I) (hereafter: *the Proposal*).[1] *The Proposal* was adopted on 17 June 2008, following two years of negotiations in a Council Working Group and between the Council and the European Parliament.[2]

As from 17 December 2009, the adopted Regulation (Reg. 593/2008, hereafter: *Rome I*) will supersede the Rome Convention on the same subject matter, and apply to contracts concluded after the same date.[3] The Convention was ratified or acceded to by all Member States of the European Union.[4] The Rome Convention is a sophisticated private international law instrument, applying to all contractual obligations. The Convention supplemented the Brussels I Regulation on Jurisdiction and Recognition and Enforcement of Judgments in Civil Matters (hereafter: *Brussels I*).[5] As such, *Rome I*, being the successor of the Convention, will be a cornerstone in European civil law cooperation; its prin-

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1. COM(2005)650 of 15 Dec. 2005. The Commission presented *the Proposal* on 17 May 2006, and it was tabled after careful examination of comments made following a public hearing and the Green Paper of 14 Jan. 2003 (COM(2002)654); see *the Proposal*, 3. The thorough comments made by the Max Planck Institut für ausländisches und internationales Privatrecht during the process of consultation were particularly important; see 68 *Rabels Zeitschrift* (2004), 1–118, and the comments by Magnus and Mankowski, "The Green paper on a Future Rome I Regulation – on the Road to a Renewed European Private International Law of Contracts", (2004) ZvglRwiss, 131. For comments on *the Proposal*, see the Editorial Comment, "On the Way to a Rome I Regulation", 43 CML Rev. (2006), 913–922, and Lando and Nielsen, "The Rome I Proposal", (2007) *Journal of Private International Law*, 29–51.

2. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 Jun. 2008 on the Law Applicable to Contractual Obligations (*Rome I*), O.J. 2008, L 177/6.

3. Convention of 19 Jun. 1980. O.J. 1980, L 266/1. See Lando, "The EEC Convention on the Law Applicable to Contractual Obligations", 24 CML Rev. (1987), 159–214.

4. *The Proposal*, 3.

5. The Rome Convention does not prejudice the application of choice of law rules in Community Law or Conventions binding on Member States, which in respect of particular matters lay down choice of law rules for contracts (Arts. 20 and 21). This is also the case under *Rome I*

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cipal purpose is to eliminate *forum shopping* by harmonizing the choice of law rules for contracts.[6]

The Convention was an innovation as far as the choice of law rules of many Member States were concerned. It needed a gloss, and that was provided by the Explanatory Report on the Rome Convention by M. Giuliano and P. Lagarde.[7] This was an important guideline, and it still has relevance for the interpretation of those provisions in *Rome I* that are more or less identical to the provisions of the Convention.

Whereas the Rome Convention was negotiated and agreed under the institutional framework for civil cooperation during the 1970s, and was adopted on an international legal basis as a Convention, *Rome I* has been adopted under Articles 61 and 65 of the EC Treaty as a Regulation. This new institutional framework ensures swift and efficient harmonization, because Regulations, unlike Conventions, do not have to be further implemented in accordance with each Member State's constitutional requirements.[8] Furthermore, new instruments become part of the "*acquis communautaire*".

The Commission's *Proposal* was met with significant attention, as *Rome I* creates an instrument governing the choice of law for contracts in a Union of 27 Member States with approximately 500 million inhabitants and a dynamic, varied and vast business community. *The Proposal,* however, was not revolutionary, as it was firmly based on the Rome Convention. On the other hand, the Commission did propose some interesting and significant amendments. Many of those proposals were adopted, but not all. Furthermore, some important proposals from Member States were adopted as well as some proposals from the European Parliament.

(Art. 23). See Council Reg. 44/2001 of 22 Dec. 2001, O.J. 2001, L 12/1, as amended by Council Reg. 1496/2002 of 21 Aug. 2002, O.J. 2002, L 225/13.

6. Explanatory Report on the Rome Convention by Giuliano and Lagarde, O.J. 1980, C 282/1, 10.

7. Ibid., cited hereafter as *Giuliano* and *Lagarde*.

8. On the modern legal institutional framework for cooperation in civil matters under the Treaty; see e.g. Bogdan, *Concise Introduction to EU Private International Law* (European Law Publishing, Groningen, 2006), pp. 3–33; Nielsen, *International handelsret* (Thomson, Copenhagen, 2006), pp. 77–98; Kohler, "Interrogations sur les sources du droit international prive européen apres le traite d'Amsterdam", (1999) Revue critique de droit international privé, 1–30; Beaumont, "European Court of Justice and Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters", (1999) ICLQ, 223–229, 219–234; Boele-Woelki, "Unification and Harmonization of Private International Law in Europe" in J. Basedow et al (eds.), *Private Law in the International Arena: Liber Amicorum Kurt Siehr* (TMC Asser, The Hague, 2000), pp. 61–77; Basedow, "The Communitarization of the Conflict of Laws under the Treaty of Amsterdam", 37 CML Rev. (2000), 687–708; and Remien, "European Private International Law, the European Community and its emerging Area of Freedom, Security and Justice", 38 CML Rev. (2001), 53–86.

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When *Rome I* enters into force, it will be binding upon all Member States apart from those using their reservation in relation to Title IV of the Treaty. The United Kingdom, Ireland and Denmark have such reservations. However, Ireland announced from the outset of the negotiations on *the Proposal* that it will opt in. The United Kingdom did not do so at the start, but after the negotiations ended, the Government of the United Kingdom concluded preliminarily that the country should opt in. The Government wished to test this conclusion by seeking the views of its stakeholders by means of a consultation that was closed on 25 June 2008.[9] At the end of July 2008, the British Government informed the Council that it does indeed wish to opt in to *Rome I*.[10]

Denmark, on the other hand, does not have an opt-in possibility. Consequently, Denmark will either have to ask for a *Parallel Agreement* – such as applies between the EU and Denmark in respect of *Brussels I* and the Service Regulation – or, failing that, must "copy" the provisions of *Rome I* in a Danish Statute on Choice of Law for Contractual Obligations.[11] None of these options, however, will be relevant if Denmark lifts its reservation against Title IV before *Rome I* enters into force. This will require a referendum on the maintenance of the Danish reservations *vis-à-vis* Justice and Home Affairs, Defence Cooperation and the Euro. Until one of these solutions is found, Danish courts will continue to apply the Rome Convention.

When *Rome I* enters into force, the Member States will apply the Regulation whether or not the law specified by it is the law of a Member State.[12] However, *Rome I* does not deal with the relationship between the Convention and the Regulation in respect of Denmark. The other Member States are still bound by the Convention in that relationship, and therefore the application of the Convention could be considered. However, it seems unreasonable to ask courts of the other Member States to solve this issue. Consequently, for all practical purposes, we suggest that the Member States should apply *Rome I* to

9. Ministry of Justice, "Rome I – Should the UK opt in?", Consultation Paper CP05/08, published on 2 Apr. 2008 (cited as *UK Consultation Paper*), 37–38.

10. The British Government informed the Council about the decision at the 2,887th meeting in the Justice and Home Affairs Council, held on 24 and 25 Jul. 2008; see press release 11653/08 (Press 205) (provisional version).

11. The Service Regulation: Council Regulation (EC) No. 1348/2000 of 29 May 2000, O.J. 2000, L 160/37. See Lando and Nielsen, "The Rome I Proposal", (2007) *Journal of Private International Law*, 48–51. The *Parallel Agreements* between the EU and Denmark, Agreement of 19 Oct. 2005 between the European Community and Denmark on *Brussels I* and Agreement of 19 Oct. 2005 between the European Community and Denmark on the Service Regulation, are discussed by Nielsen, "Brussels I and Denmark", (2007) IPRax, 506–509.

12. *Rome I*, Art. 2.

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such cases, i.e. when the law specified is Danish law, one of the parties is from Denmark or the contract in other ways has a connection to Denmark.[13]

Last year, the European Parliament and the Council adopted a Regulation on Choice of Law in Non-contractual Obligations (hereafter: *Rome II*).[14] This Regulation lays down choice of law rules for tort and delict, including unjust enrichment, *negotorium gestio* and *culpa in contrahendo*.[15] With the adoption of *Rome I* and *Rome II*, the EU now has a coherent and complete system of choice of law rules for obligations, thereby fulfilling an old European ambition.[16] The interpretation of the substantive scope and of the provisions of *Rome I* and *II* should be consistent with each other and with *Brussels I*.[17] It is submitted that the European Court of Justice is likely to apply its case law on *Brussels I*, in particular on Article 5(1) on contract jurisdiction and Article 5(3) on jurisdiction for claims in tort and delict, when drawing the borderline between *Rome I* and *II*.[18]

In this article, we discuss the most important features of *Rome I*.

13. *Rome I* replaces the Rome Convention in the Member States, except in the territories of the Member States that fall within the territorial scope of the Convention and to which *Rome I* does not apply pursuant to Art. 299 of the Treaty (*Rome I*, Art. 24(1)). Furthermore, as the Rome Convention is tacitly renewed every five years, the Convention will remain in force alongside *Rome I*, unless all Member States denounce it; see the Convention, Art. 30(1) and (2).

14. Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 Jul. 2007 on the Law Applicable to Non-contractual Obligations (*Rome II*), O.J. 2007, L 199/40.

15. For comments on *Rome II*; see e.g. the *Yearbook of Private International Law* Vol. IX (2007) dedicated to *Rome II*, and Kozyris, "Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' Missed Opportunity", 56 AJCL (2008) (forthcoming).

16. The first draft of the Rome Convention from 1972 contained choice of law rules for contractual and non-contractual obligations, but the latter were taken out of the draft following the entry of the United Kingdom and Ireland into the EEC and the working party.

17. *Rome I* and *II*, Recitals 7.

18. In particular Case C-26/91, *Jakob Handte & Co. GmbH* v. *Traitements mécano-chimiques des surfaces SA (TMCS)*, [1992] ECR I-3967, Case C-51/97, *Réunion europeénne SA* v. *Spliethoff's Bevratingskantoer BV*, [1998] ECR I-6511 and Case C-334/00, *Fonderie Officine Maccaniche Tacconi SpA* v. *Heinrich Wagner Sinto Maschinenfabrik GmbH*, [2002] ECR I-7357. For instance, in the last-mentioned judgment, the ECJ found that pre-contractual liability is a non-contractual matter covered by *Brussels I*, Art. 5(3). This classification has been endorsed by the legislator in the context of choice of law as *Rome I*, Art. 1(2)(i) and Recital 10 provide that obligations arising out of dealings prior to the conclusion of a contract are excluded from *Rome I* and covered by *Rome II*.

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2. Scope of application

Generally, *Rome I* applies to all situations involving a conflict of laws regarding contractual obligations in civil and commercial matters. Consequently, all civil and commercial contracts are covered. It does not apply to revenue, customs or administrative matters.[19]

However, a number of matters are excluded from *Rome I*. These exclusions cover: questions on status or legal capacity of natural persons; obligations arising out of family relationships, including maintenance and matrimonial property regimes, and succession and wills. Also excluded are obligations arising under bills of exchange, cheques and promissory notes; arbitration agreements and agreements on the choice of court; questions governed by the law of companies and other bodies, such as the creation, legal capacity, internal organization or winding-up of companies and other bodies, and the personal liability of officers and members as such for the obligations of the company or body; the question whether an agent is able to bind a principal, or an organ to bind a company or other body, in relation to a third party; the constitution of trusts and the relationship between settlers, trustees and beneficiaries; obligations arising out of dealings prior to the conclusion of a contract; and certain insurance contracts.[20] Finally, *Rome I* does not apply to evidence and procedure apart from certain matters covered by Article 18.[21]

2.1. *Agency, insurance and certain third party rights*

The working party on *Rome I* discussed three questions in respect of the scope of application of the Regulation.

First, the Rome Convention applies to the relationship between the principal and the agent as well as the relationship between the agent and the third party when that relationship is qualified as contractual.[22] On the other hand, the relationship between the principal and the third party is not covered by the Rome Convention.[23] The Commission had proposed that *Rome I* should cover

19. *Rome I*, Art. 1(1). This provision is in substance identical to the Rome Convention, Art. 1(1).

20. *Rome I*, Art. 1(2). This provision is in substance identical the Rome Convention, Art. 1(2) with the exception that insurance contracts are covered by *Rome I*.

21. *Rome I*, Art. 1(3). This provision is in substance identical to the Rome Convention, Art. 1(3). Art. 18 of *Rome I* states that the law governing an obligation under Rome I applies "to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof".

22. *Giuliano* and *Lagarde*, 12.

23. The Rome Convention, Art. 1(2)(f).

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all three relationships.[24] However, this proposal was not adopted. Consequently, nothing has changed in this respect.

Second, the Rome Convention does not apply to insurance contracts that cover risks situated in a Member State, apart from reinsurance contracts. Under the system of the Convention, it is the insurance Directives which provide for choice of law for such contracts.[25] On the other hand, the Convention does apply to insurance contracts where the risk is situated outside a Member State. However, following a proposal from Finland and Germany on behalf of a number of Member States, it was decided to transfer the provisions of the insurance Directives to *Rome I*.[26] As a consequence, *Rome I*, Article 7 now provides choice of law rules for insurance contracts whether or not the risk is situated in a Member State. The rules are by and large in accordance with the provisions of the Insurance Directives. In our view, this is an improvement. It ensures that all relevant choice of law rules for insurance contracts are situated in one instrument. Article 7 is discussed further in section 8 below.

Third, in respect of voluntary assignment and contractual subrogation, the Commission had proposed that *Rome I* should also govern the priority of successive assignments in respect of third parties, and that the law of the country where the assignor is habitually resident should govern this question.[27] However, neither this proposal nor a compromise proposal was adopted.[28] In conclusion, nothing has changed in this area of law, although it was agreed that the issue should be reviewed at a later stage.[29] The provisions on assignment and subrogation are presented in section 10 below.

2.2. *Jurisdiction agreements*

The working party could have considered applying *Rome I* to the substantive validity of jurisdiction agreements. In fact, neither the Rome Convention nor *Rome I* applies to jurisdiction agreements.[30] At present, each Member State applies its own choice of law rules on this issue and Article 23 of *Brussels I* to formal validity of such agreements. The ECJ has consistently held that the

24. *The Proposal*, Art. 7.

25. Council Directive (EC) No. 90/619 of 8 Nov. 1990, O.J. 1990, L 330/50; Council Directive (EC) No. 88/357 of 22 Jun. 1988, O.J. 1988, L 172/1; and Council Directive (EC) No. 92/49 of 18 Jun. 1992, O.J. 1992, L 228/1.

26. *UK Consultation Paper*, 30.

27. *The Proposal*, Art. 13(3).

28. *UK Consultation Paper*, 35. As there is a strong will to find a solution, the Commission is obliged to review the topic in accordance with the review clause in *Rome I*, Art. 27(2) and, if appropriate, table a proposal within two years from the entry into force of *Rome I*.

29. *Rome I*, Art. 27(2).

30. The Rome Convention, Art. 1(2)(d) and *Rome I*, Art. 1(2)(e).

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purpose of Article 23 *Brussels I* is to ensure that there is real consent on the part of the persons concerned in respect of the jurisdiction clause, so as to protect the weaker party to the contract by avoiding situations where such clauses, incorporated in a contract by one party, go unnoticed. Furthermore, the ECJ has consistently held that the provision imposes upon a court the duty of examining whether the jurisdiction clause was in fact the subject of consensus between the parties and that consensus was in fact established.[31] The jurisprudence of the ECJ means that Article 23 of *Brussels I* covers these *material* issues, but not others.

Unfortunately, the working group did not discuss this matter of significant practical importance, possibly due to lack of time. This "gap" in *Rome I* enables parties to a formally valid jurisdiction agreement to have it set aside by a court in a country not designated in the jurisdiction agreement as the competent court. Such a launch of so-called *Italian Torpedoes* has caused alarm in Europe, for instance in the *Gasser* case, where an Italian party to a contract containing a jurisdiction clause in favour of Austrian courts initiated proceedings in Italy under the Brussels Convention, Article 5(1) claiming that the clause was invalid in terms of substance.[32] The ECJ found that the Austrian court, which was seized of proceedings after proceedings had been initiated in Italy, had to await a decision of the Italian court on the validity of the jurisdiction agreement under the *lis pendens* provision of the Brussels Convention, Article 21, and decline jurisdiction if the Italian court set aside the clause and found it had jurisdiction. Furthermore, such a decision would probably take a long time. Had *Rome I* been extended to cover the substantive validity of jurisdiction agreements, there would have been less room for speculating on having the clause set aside in a country whose choice of law rules designates a law that has unreasonably strict requirements on the substantive validity of jurisdiction agreements.[33] On the other hand, this solution would not have

31. Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG)* v. *Les Gravières Rhénanes SARL*, [1997] ECR I-911, para 15, and Case C-387/98, *Coreck Maritime GmbH* v. *Handelsveem BV and Others*, [2000] ECR I-9337, para 13.

32. Case C-116/02, *Erich Gasser GmbH* v. *MISAT Srl*, [2003] ECR I-4693. See case note by Fentiman, 42 CML Rev. (2005), 241–259 For criticism, see Hartley, "Choice of Court Agreements, Lis Pendens, Human Rights and the Realities of International Business" in *Liber amicorum Paul Lagarde* (2005), pp. 322–335. The solution to amend, or rather interpret, the Brussels Convention in this respect was submitted by the British Government in *Gasser*, see paras. 29–32. Italian torpedoes were "invented" by Franzosi, "Worldwide Patent Litigation and the Italian Torpedo", 7 *European Intellectual Property Review* (1997), 382–385.

33. See Study JLS/C4/2005/03, Report on the Application of Regulation Brussels I in the Member States, Munich 2007, by Hess, Pfeiffer and Schlosser, 159 and 194–201, where this problem is characterized as very serious. See also Bogdan, "The Brussels/Lugano Lis Pendens Rule and the Italian Torpedo", 51 *Scandinavian Studies in Law* (2007), 89–97; Fawcett, "The

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eliminated the possibility to institute proceedings in another Member State than the one whose courts have been given exclusive jurisdiction under an agreement.

Consequently, a better solution might be to amend *Brussels I* by giving a court or the courts designated in an exclusive choice of court agreement exclusive competence to decide on the substantive as well as the formal validity of such agreements. This solution, partly inspired by the doctrine of competence-over-the-competence, is well known and efficient in international commercial arbitration.[34] It would mean that the court having exclusive jurisdiction under the jurisdiction agreement has exclusive competence to decide on the validity of the jurisdiction agreement and, if valid, exclusive competence to determine the dispute between the parties. In *Gasser*, following this solution, the Italian party would be obliged to – and could only – institute proceedings before the Austrian courts in order to have the jurisdiction agreement set aside.

One could also combine both solutions in a future revision of *Brussels I*. By doing so, the Austrian court would have exclusive jurisdiction to decide the substantive validity of the jurisdiction agreement, and it should do so in accordance with the law governing the contract between the parties under *Rome I*.

3. Lex mercatoria

The principle of party autonomy is fundamental in European and international contract law. Consequently, Article 3 of the Rome Convention and *Rome I* allow parties to choose the law governing their contract.[35]

A controversial issue is whether the Rome Convention allows the parties to subject their contract to *lex mercatoria* instead of the law of a State. *Lex mer-*

Impact of Article 6(1) of the ECHR on Private International Law", 56 ICLQ (2007), 1–48; Fentiman, "Jurisdiction Agreements and Forum Shopping in Europe", (2006) *Butterworth Journal of International Banking and Financial Law*, 304–308; Gebauer, "Lis Pendens, Negative Declaratory-Judgment Actions and the First-in-Time Principles" in *Conflict of Laws in a Globalized World* (Cambridge University Press, Cambridge, 2007), pp. 89–100; Mance, "Exclusive Jurisdiction Agreements and European Ideals", 120 *The Law Quarterly Review* (2004), 357–365; and Merrett, "The Enforcement of Jurisdiction Agreements with the Brussels Regime", 55 ICLQ (2006), 315–336.

34. See e.g. Art. 16 in combination with Art. 8 of the UNCITRAL Model Law on International Commercial Arbitration, as adopted by the United Nations Commission on International Trade Law on 21 Jun. 1985.

35. According to *Rome I*, Recital 11, the parties' freedom to choose the applicable law is one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

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catoria is a body consisting of international commercial usages and of principles and rules common to most States.[36] The opponents of this suggestion argue that when the Rome Convention was made, the common understanding was that only State law should be applied under the Convention. The supporters, on the other hand, argue that the interpretation of the Convention should be dynamic and based on the development and needs of international business for common principles. Furthermore, the supporters argue, since an important development of *lex mercatoria* has taken place after 1980, it is outdated to refuse to allow parties to select *lex mercatoria* when interpreting the Rome Convention.

In comparison, in international commercial arbitration it is commonly accepted that the parties may authorize the arbitral tribunal to apply *lex mercatoria.* Article 28 of the UNCITRAL Model Law on International Commercial Arbitration states that the tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the dispute.[37] The UNCITRAL Model Law has been used as a basis for modern legislation on international as well as national arbitration in more than 50 States, including England and Wales, Scotland, Germany, Sweden, Norway and Denmark.[38] Furthermore, most internationally recognized arbitration institutes, such as the International Chamber of Commerce and the London Court of International Arbitration, allow parties to choose *lex mercatoria.*[39] Finally, UNCITRAL's Arbitration Rules, designed for ad hoc arbitration, also provide for application of *lex mercatoria.*[40]

The Commission proposed a compromise to the effect that "the parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community".[41] The Commission's proposal attempted to "further boost the impact of the parties' will, a key principle in the Convention" and in *Rome I.*[42] The proposal, however, did not authorize the parties to choose *lex mercatoria* as such. The brief comments

36. On the concept of *lex mercatoria*; see e.g. Lando, "Some Features of the Law of Contract in the Third Millennium", 40 *Scandinavian Studies in Law* (2000), 343, especially at 367. See also Nielsen, op. cit. *supra* note 8, p. 114.

37. *Supra* note 34. See Lando, op. cit. *supra* note 36, 371.

38. See the list of Model Law States on UNCITRAL's homepage www.uncitral.org.

39. Art. 17 of the International Chamber of Commerce Rules of Arbitration and Art. 22(2) of the London Court of International Arbitration Rules of Procedure.

40. Art. 33(1) of the Arbitration Rules of the United Nations Commission on International Trade Law, Resolution 31/98 adopted by the General Assembly on 15 Dec. 1976.

41. *The Proposal*, Art. 3(2).

42. *The Proposal*, 5.

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explained *the Proposal* as follows: "The form of words used would authorize the choice of the UNIDROIT Principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognized by the international community".[43]

In our view, the proposed compromise would have been an improvement, as it expressly authorizes the parties to choose that part of *lex mercatoria* which is "codified" and internationally recognized, such as the UNIDROIT Principles of International Commercial Contracts (UNIDROIT Principles) and the Principles of European Contract Law (PECL).[44]

It is submitted that it would have been preferable if, like arbitral tribunals, European courts could apply *lex mercatoria* to international commercial contracts. The Commission's argument was that the *lex mercatoria* is not precise enough. That is questionable, as it is possible to identify a large number of principles and rules that form part of *lex mercatoria* in general.[45] The UNIDROIT Principles and the PECL are part of *lex mercatoria*.[46] They have provided *lex mercatoria* with structure and precision. However, they have *lacunae* as they do not deal with all issues in contract covered by the Rome Convention and *the Proposal*. The lacunae will be fewer when and if the Common Frame

43. *The Proposal*, 5.

44. See also the Editorial Comment, cited *supra* note 1, 914 et seq. The UNIDROIT Principles were published in 1994 and revised in 2004. They were drafted by a working group under UNIDROIT, and they aim at regulating international commercial contracts. The Principles are drafted as a statutory instrument. They consist of 10 chapters and more than 180 articles. See "UNIDROIT Principles of International Commercial Contracts", 2nd ed. (UNIDROIT, Rome, 2004). According to the preamble of the Principles, they shall be applied when the parties have agreed that their contract be governed by them, when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like, or when the parties have not chosen any law to govern their contract. PECL was drafted by a European working group with the purpose of creating a basis for a common European Contract Code, and it has the structure and content of a statutory instrument. The principles comprise of 17 chapters and more than 200 articles. They were published in 1995 and revised in 1999 and 2003. See Lando and Beale (Eds.), *Principles of European Contract Law, Parts I & II, prepared by the Commission on European Contract Law* (Kluwer Law International, The Hague, 1999), (PECL I & II), and Lando, Clive, Prüm and Zimmermann (Eds.), *Principles of European Contract Law, Part III* (Kluwer Law International, The Hague, 2003), (PECL III). The rules and structures of the PECL and the UNIDROIT Principles offer strong resemblance to each other.

45. Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International, The Hague, 1999), enumerates 78 principles and rules, which he regards as part of *lex mercatoria*.

46. The preamble of the UNIDROIT Principles and PECL Art. 1:101.

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of Reference (CFR), presently under preparation by the Commission, is adopted.[47] A first and preliminary draft was published in early 2008.[48]

Lex mercatoria is frequently applied in international commercial arbitration. There is a considerable advantage in doing so. Choice of law rules often lead to application of the national law of one of the parties to the contract, either due to an agreed choice or in its absence according to the choice of law rules governing the applicable law.[49] Consequently, one of the parties will have the benefit of "playing at home", whereas the other party, often ignorant of the foreign law, will suffer the serious handicap of "playing away". On the other hand, an agreement to subject the contract to *lex mercatoria* will lead to the application of a "neutral" system of law.

However, during the negotiations, it was quite clear that even the Commission's compromise proposal in respect of *lex mercatoria* was unacceptable to all Member States. The opponents' main argument was that the internationally recognized principles of contract law lack a democratic basis since they have been drafted and agreed by working groups not established by legislatures. However, in our view, the crucial factor in this respect should be that the decision of the EU to allow the use of internationally recognized principles of contract law is as democratic as any other decision of the EU. As the "democratic" principle of party autonomy is fundamental in European and international contract law, one cannot demand that the substantive rules of law to which the parties' choice of law refer are "democratically based". Nevertheless, the outcome of the negotiations was that the Commission's proposal was completely deleted. Consequently, it is quite clear that parties to European litigation cannot choose either *lex mercatoria* in general or only the part of *lex mercatoria* consisting of internationally recognized principles and rules of contract law.

On the other hand, some of the recitals in *Rome I* refer to *lex mercatoria* and similar rules. The Working Party agreed on Recital 13, stating that "this Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." Furthermore, as

47. Decision of 18 Apr. 2008 by the Council (Coreper) on the basis of a report of 4 Apr. 2008 from the Presidency, available at: register.consilium.europa.eu/pdf/en/08/st08/st08092.en08.pdf (8092/08 Note from Presidency to Coreper II: Subject: Draft report to the Council on the setting up of a Common Frame of Reference for European contract law).

48. "Principles, Definitions and Model Rules of European Contract Law, Draft Common Frame of Reference (DCFR), Interim Outline Edition prepared by the Study Group on a European Civil Code and the Research Group on EC Private Law (Acquis Group). Based in part on a revised edition of the Principles of European Contract Law" (Sellier European Law Publishers, Munich, 2008) (hereafter: DCFR).

49. E.g. Art. 4 of the Rome Convention and *the Proposal.*

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part of the co-decision procedure, the Council accepted the European Parliament's proposal for Recital 14, stating that the parties may choose to apply "rules of substantive contract law, including standard terms and conditions", should the Community adopt a Common Frame of Reference or a similar instrument. It is submitted that the latter agreement will be treated as a choice of law and not a mere incorporation.

In conclusion, under *Rome I,* application of the entire *lex mercatoria* or internationally recognized principles of contract law will be permissible before European courts as an incorporation of these rules, which will only apply to the extent they do not violate mandatory provisions of the otherwise applicable national law. If, on the other hand, parties wish their contract to be governed fully by the *lex mercatoria,* they have to agree to arbitration and agree that the tribunal has its seat in a country whose arbitration law provides for this choice of law.

4. Party autonomy

The Rome Convention allows party autonomy. It accepts both express and implied agreements on choice of law.[50]

Under the Rome Convention, an agreed choice of law must be express or demonstrated with *reasonable certainty* by the terms of the contract or the circumstances of the case.[51] Under *Rome I*, party autonomy is also permitted, but the choice shall be made "expressly or *clearly demonstrated* by the terms of the contract or the circumstances of the case."[52]

The words *reasonable certainty* under the Convention have been substituted by the words *clearly demonstrated* in *Rome I.* This clarification is to be welcomed, as it removes the uncertainty linked to the word *reasonable.* Consequently, for an implied choice of law agreement the threshold is higher under *Rome I* than under the Convention, although not as high as under the Hague Convention on the Law Applicable to International Sales of Goods (the Hague Convention), where an implied choice of law agreement must *résulter indubitablement des dispositions du contrat.*[53]

One of the controversial issues is whether an exclusive jurisdiction agreement is to be regarded as an implied choice of law. In some Member States, such a jurisdiction agreement is to be regarded as an implied choice of law in

50. The Rome Convention, Art. 3(1).
51. The Rome Convention, Art. 3(1), 2nd sentence, emphasis added.
52. *Rome I,* Art. 3(1), 2nd sentence, emphasis added.
53. Convention of 15 Jun. 1955, Art. 2(2).

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favour of the law of the forum State, whereas in other Member States, it is not. The Explanatory Report on the Rome Convention by Giuliano and Lagarde states that an exclusive jurisdiction agreement does not have this effect, but it may be different if other aspects of the contract or the circumstances as a whole indicate that the parties have implicitly chosen the law of the forum State.[54]

The Commission proposed a provision according to which the parties shall be presumed to have chosen the law of a Member State if the parties have agreed to confer jurisdiction on one or more courts or tribunals of that Member State to hear and determine disputes that have arisen or may arise out of the contract.[55]

The Commission did not explain the background and purpose of this proposal, but it may be justified on several grounds. Firstly, it is always convenient for a court to be authorized to apply its own law instead of foreign law, as judges know their own law, but not foreign law. Secondly, application of foreign law is often time-consuming and expensive. Finally, the Commission's proposal is likely to be in accordance with the expectations of the parties when, due to either ignorance or forgetfulness, they fail to include an express choice of law clause in their contract. Parallelism between choice of court and choice of law is cost saving, efficient and preferred by business.

Against this proposal it is argued that, as a matter of principle, choice of court and choice of law are two distinct and different issues. Therefore, they should be treated separately. However, although parties sometimes agree to jurisdiction in one State and on application of the law of another, it rarely happens, and the Commission's proposal does not exclude parties from such an agreement.

For these reasons, the proposed provision would have been a significant improvement. However, the presumption should only apply to clauses providing for exclusive jurisdiction. Failing that, the choice of law will be unpredictable. If, for instance, a party may institute proceedings in more than one State, or if a party can only sue the other in the defendant's State, the applicable law will depend on where proceedings are instituted. The proposal was amended in this way during the negotiations. However, because Member States were split in their opinion on the proposal, a compromise was adopted. The Commission's proposal was not adopted as a rule, but Recital 12 now states that "an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining

54. *Giuliano* and *Lagarde*, 16.
55. *The Proposal*, Art. 3(1), 2nd para.

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whether a choice of law has been clearly demonstrated" by the terms of the contract or the circumstances of the case.

We support this compromise, as it is a clear improvement giving courts a strong hint as how to treat such clauses when determining whether parties have made an implied choice of law. We also believe that judges will be tempted to apply this principle; especially if the clause provides for exclusive jurisdiction in the judge's country.

5. Choice of law in the absence of an agreed choice

The Rome Convention Article 4 regulates choice of law in the absence of an agreed choice. The main principle is Article 4(1), stating that a contract shall be governed by the law of the country with which it is most closely connected. This principle is complemented by the presumptions in Article 4(2)-(4). Under Article 4(2), a contract shall be presumed to be most closely connected with the law of the country in which the party who is required to perform the characteristic obligation of the contract has his habitual residence at the time of the conclusion of the contract. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.[56] Special presumptions apply to contracts for rights *in rem* over immovable property and contracts of carriage of goods. Finally, Article 4(5) contains an "escape" clause providing two exceptions to the presumptions. First, the presumption in Article 4(2) is to be disregarded if the obligation characterizing the contract cannot be identified. Second, all presumptions can be disregarded if it appears from the circumstances of the case that the contract is more closely related to another country.

Article 4 of the Rome Convention is a complicated combination of flexibility and predictability. On the one hand, the presumptions are meant to "tame" the judge's discretion under Article 4(1) and point to the law of the State to which the closest connection presumably exists. On the other hand, he may resort to the escape clause if he believes the presumption does not work in accordance with its purpose. This sophisticated system may be justified by the fact that the Rome Convention applies to all types of contracts.

In practice, however, the unclear relationship between the presumptions and the escape clause causes significant uncertainty. This can be illustrated by

56. The Rome Convention, Art. 4(2), 2nd sentence.

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the *BOA* case decided by the Dutch Supreme court, *Hoge Raad*. A Dutch seller sold a machine to a French buyer. The negotiations took place in France. The price was in French francs. The seller delivered and installed the machine in France. The contract did not contain a choice of law clause. There was hardly any doubt that the contract was more closely connected with France than with the Netherlands. Therefore, one might have expected the *Hoge Raad* to subject the contract to French law under the escape clause of Article 4(5). However, the *Hoge Raad* held that the contract was governed by Dutch law under the presumption in Article 4(2). By doing this, the *Hoge Raad* emphasized the need for predictability by turning the presumption into an almost hard and fast rule.[57] Many Continental courts and the Scottish courts also put greater weight on the presumptions than to flexibility.[58]

In contrast, courts of other Member States, including England, France and Denmark, hold the presumptions to be weak and to be disregarded if *on balance* there is *a closer* connection to another State.[59] This interpretation is supported by the wording of Article 4(5) and the need for flexibility in an instrument applicable to all types of contracts.[60]

A judgment of the ECJ might settle the issue, but the Commission decided to propose a new article – which was adopted with one crucial amendment.[61] According to *Rome I*, Article 4(1), hard and fast choice of law rules are provided for certain types of contracts. The provision contains a list of different types of contracts and the decisive connecting factor for each type of contract in (a)-(h): (a) sale of goods: the seller's law, (b) provision of services: the service provider's law, (c) rights *in rem* in immovable property or a tenancy of immovable property: the *lex situs* with an exception for (d) tenancies of im-

57. *Société Nouvelle des Papéteries* v. *BV Machinenfabriek BOA*, reported in XLII *Netherlands International Law Review* (1995), 259.

58. *UK Consultation Paper*, 22. See also *Caledonia Subsea Ltd* v. *Micoperi Srl*, [2003] S.C.70 (the presumption is quite strong in Scotland).

59. On English case law: see *Dicey, Morris and Collins on The Conflict of Laws*, 13th ed. (Thomson/Sweet & Maxwell, London, 2000), pp. 1234–1242; French case law: Lagarde, (1991) *Revue critique de droit international privé*, 745. In *Definitely Maybe (Touring) Ltd* v. *Marek Lieberberg Konzertagentur GmbH*, [2001] 2 Lloyd's Rep. 455, the English court held the presumption in Art. 4(2) to be very soft. In the Danish judgments reported in (1996) *Ugeskrift for Retsvæsen*, 937 H, (2001) *Ugeskrift for Retsvæsen*, 713 Ø and (2002) *Ugeskrift for Retsvæsen*, 1370 Ø, the Danish courts applied Art. 4(2) and came to the conclusion that Art. 4 (5) should not be applied, since the closest connection, on balance, existed with the law that followed from the presumption.

60. Lando, "Some Issues Relating to the Law Applicable to Contractual Obligations", (1996/97) *King's College Law Journal*, 70, and Nielsen, op. cit. *supra* note 8, p. 160. Compare J. Lookofsky, *International privatret*, 4th ed. (DJOEF, Copenhagen, 2008), p. 81, who finds the presumptions "medium strong".

61. *The Proposal*, Art. 4(1).

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movable property concluded for less than six months, (e) franchise contracts: the franchisee's law, (f) distribution contracts: the distributor's law, (g) sale of goods by auction: the law of the country where the auction takes place, and (h) certain financial contracts: the law that regulates those contracts.[62] Under *Rome I*, Article 4(2), contracts not listed in Article 4(1) or contracts covered by more than one of points (a) to (h) are governed by the law of the country in which the party required to effect the characteristic performance of the contract has his habitual residence. If the law applicable cannot be determined pursuant to Article 4(1) or (2), the contract shall be governed by the law of the country with which it is most closely connected.[63]

The Commission's proposal for a new Article 4 was a radical break with the approach of the Rome Convention. The latter's closest connection test, combined with presumptions and an escape clause, was to be replaced by a system of hard and fast rules for most contracts, flexibility for the remainder and, most importantly, no escape clause.

The choice of law rules in *Rome I*, Article 4(1) will undoubtedly provide more predictability for the parties to contracts "on the list" than Article 4 of the Rome Convention. So far, Article 4 of the Convention has not done away with the *homeward trend*, which courts in all countries are addicted to. Therefore, we support the list. However, the closest connection test of the Convention is a just and sound principle. It is applied in Switzerland and in several US States, and it is an overall principle governing every choice of law in Austria.[64]

During the negotiations on *the Proposal*, most Member States favoured the Commission's approach in general. Consequently, the "list system" was adopted. However, a large number of Member States also wanted to combine the proposal with a narrow escape clause as provided for in *Rome II*.[65] As a compromise, this was finally adopted, and we support this compromise. Consequently, *Rome I*, Article 4(3) states that if "it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a coun-

62. *Rome I*, Art. 4(1) (h). Infra, note 88.

63. *Rome I*, Art. 4(4). These two rules correspond to *the Proposal*, Art. 4(2).

64. See the Austrian Code of 15 Jun. 1978 on Private International Law, § 1. Russia follows the Rome Convention approach, see Badykov, "The Russian Civil Code and the Rome Convention: Applicable Law in the Absence of Choice by the Parties" (2005) *Journal of Private International Law*, 269, esp. 279.

65. *Rome II*, Art. 4(2): "Where it is clear from all the circumstances of the case that the tort/delict is manifestly more closely connected with a country other than that indicated in paragraph 1, the law of that other country shall apply. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question." The introduction of a narrow escape clause has been recommended, *inter alia*, by the Editorial Comment cited *supra* note 1, 917.

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try other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."

Unlike *Rome II*, Article 4(2), *Rome I*, Article 4(3) does not contain any guidelines as how to exercise this discretion. However, a guideline exists in *Rome I*, Recital 20, second sentence, which states that "in order to determine" whether the contract is manifestly more closely connected to another country, "account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts."

We believe that the outcome of the negotiations is a workable and reasonable compromise. Even though the new Article 4 of *Rome I* is radically different in terms of structure and methodology from Article 4 of the Rome Convention, the new provision manages to combine predictability with some flexibility. Predictability now plays the leading part and flexibility a subordinate part for those contracts listed in Article 4(1) and for those types of contract not on the list, but where the characteristic obligation can be identified (contracts falling under Art. 4(2)). For contracts not on the list and where the characteristic obligation cannot be identified (contracts falling under Art. 4(4)), nothing has changed, as these contracts are still governed by the law of the country of the closest connection.

The list in Article 4(1) may give rise to problems of delineation between the different categories of contracts in points (a)-(h). A contract may be categorized under two or more headings. Article 4(2) lays down that where the elements of a contract is covered by more than one of points (a)-(h) in Article 4(1), the contract shall be governed by the law of the country where the party who is required to effect the performance which is characteristic of the contract has his habitual residence.

To take an example: point (c) provides that a contract relating to a right *in rem* in immovable property shall be governed by the law of the country where the property is situated, and point (b) that a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence. Assume that S in country A has sold a newly erected factory building in country B to P and that the contract provides that S shall supply important after-sales services to help P make the factory run. As the contract is covered by both point (b) and (c) in Article 4(1), the contract will governed by the law of A by virtue of Article 4(2).

It is, however, not always easy to determine whether an agreement containing elements that are covered by two or more points of paragraph 1 is one contract under paragraph 2, or whether it is in fact two contracts, which are to be governed by different laws. Some distributorship contracts contain provisions on the individual sales from the supplier to the distributor. If the terms relating to the distributorship are severable from the sales terms, it would seem

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that under point (f) the law of the habitual residence of the distributor should govern the terms of the distributorship and the law of the habitual residence of the seller each sale of goods under point (a). It they are not severable, the guideline in Article 4(2) should decide which law governs the entire contract.[66]

5.1. *Habitual residence*

Habitual residence is the decisive connection factor in of *Rome I*, Article 4.[67] However, in terms of jurisdiction, domicile is decisive. *Brussels I*, Article 59 leaves it to national law to define the concept of domicile for natural person. Domicile (the seat) for legal persons is defined autonomously in *Brussels I*, Article 60 as being in any Member State in which the legal person has its statutory seat, central administration or principal place of business. In the context of jurisdiction for legal persons, this is a sensible solution, but it cannot be applied in the context of choice of law, as this area of law requires one connecting factor only in order to avoid the application of two or more laws to a contract.

Habitual residence is defined in *Rome I*, Article 19. Consequently, for the purposes of *Rome I*, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.[68] Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.[69] In both cases for the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.[70] This definition is clearly helpful, and the concept should be seen as a uniform one for both natural and legal persons.

66. See the Hague Convention on the Law Applicable to Agency of 14 Mar. 1978, Art. 7 and Lando, *The International Encyclopaedia of Comparative Law*, Vol. III, "Private International Law", Chapt. 24, Contracts, (1976), at p. 253 et seq.

67. Habitual residence is also the decisive connecting factor in Arts. 5–7, 10(2) and 11.

68. *Rome I*, Art. 19(1).

69. *Rome I*, Art. 19(2).

70. *Rome I*, Art. 19(3).

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5.2. *The Hague Convention*

France, Italy, Finland, Sweden and Denmark are contracting parties to the Hague Convention on the Law Applicable to International Sales of Goods.[71] Belgium used to be a party, but it denounced its ratification some years ago in order to have a more transparent system of choice of law rules by being bound only by the Rome Convention. *Rome I* allows Member States to be parties to international conventions containing choice of law rules for contracts in spite of *Rome I*, but only if they are parties to the convention in question at the time *Rome I* is adopted.[72] Consequently, Member States lose their external competence in this area once *Rome I* enters into force. Furthermore, for conventions concluded exclusively between two or more Member States, *Rome I* take precedence over such conventions insofar they concern matters governed by the Regulation.[73]

As a general rule, the Hague Convention provides for the application of the law of the country where the seller has his habitual residence at the time of conclusion of the contract. If the order is received by an establishment of the seller, the sale is governed by the domestic law of the country in which the establishment is situated.[74] However, the sale is governed by the law of the country in which the buyer has his habitual residence, or in which he has the establishment that has given the order, if the order was received in that country by the seller or by his representative, agent or commercial traveller.[75] In case of a sale at an exchange or at a public auction, the sale is governed by the law of the country in which the exchange is situated or the auction takes place.[76] The choice-of-law rules of the Hague Convention are strict.

Rome I, Article 4(1)(a) leads to the same result as the general rule in Article 3(1), first sentence of the Hague Convention, however with the addition of the escape-clause. The provisions on sale by actions are almost identical in the two instruments.[77] Consequently, in almost all cases *Rome I* will lead to the same result as the Hague Convention. Therefore, when *Rome I* enters into force, the Member States of the European Union that are parties to the Hague Convention no longer need this Convention, and they may consider denouncing it.

71. Switzerland, Norway and Niger are also contracting States to this Convention.
72. *Rome I*, Art. 25(1).
73. *Rome I*, Art. 25(2). The Hague Convention is not covered by Art. 25(2), as the Convention is not concluded exclusively between Member States of the European Union.
74. The Hague Convention, Art. 3(1).
75. The Hague Convention, Art. 3(2).
76. The Hague Convention, Art. 3(3).
77. *Rome I*, Art. 4(1)(g) and the Hague Convention, Art. 3(3).

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6. Contracts of carriage

The Rome Convention, Article 4(4) contains a special presumption for contracts of carriage of goods. Under this provision, such contracts are not subject to the presumption in Article 4(2) (the characteristic obligation). Instead, Article 4(4) provides a presumption in favour of the law of the country in which the carrier has his principal place of business, provided this is also the country where, at the time the contract is concluded, the place of loading or the place of discharge or the principal place of the consignor is situated. Other contracts of carriage are subject to the ordinary provisions of the Rome Convention.[78]

The Member States preferred a new solution. *Rome I*, Article 5 distinguishes between contracts of carriage of goods and of passengers. The principle of party autonomy applies in full to contracts of carriage of goods, but it is restricted for contracts of carriage of passengers.

For contracts of carriage of goods, *Rome I*, Article 5(1) provides that the parties may choose the law applicable to the contract under Article 3. Failing such a choice, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply. This provision is a slightly modernized version of Article 4(4) of the Rome Convention, the interpretation of which remains the same as that of the Convention.[79] This is a satisfactory solution.

78. The Commission proposed that contracts of carriage should be governed by the law chosen by the parties and that the law applicable to such contracts in the absence of an agreed choice should be the law of the country in which the carrier has his habitual residence; *the Proposal*, Arts. 3 and 4(1)(c). It did not explain why the provisions on contracts of carriage under the Rome Convention needed to be amended and why there should be no distinction between contracts of carriage of goods and passengers; *the Proposal*, 5–6. One can suppose however, that the Commission's proposal was based on the general idea underlying its proposal for the new Art. 4 based on strict rules and the application of the law of the party who performs the characteristic obligation of the contract.

79. This is clear from *Rome I*, Recital 22: "As regards the interpretation of contracts for the carriage of goods, no change in substance is intended with respect to Article 4(4), third sentence, of the Rome Convention. Consequently, single-voyage charter parties and other contracts the main purpose of which is the carriage of goods should be treated as contracts for the carriage of goods. For the purposes of this Regulation, the term 'consignor' should refer to any person who enters into a contract of carriage with the carrier and the term 'the carrier' should refer to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself." The second sentence is a replica of the Rome Convention, Art. 4(4), second sentence, and the third sentence of the recital is copied from *Giuliano* and *Lagarde*, 21.

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For contracts of carriage of passengers, the working party introduced passenger or consumer protection by limiting party autonomy.[80] In accordance with *Rome I*, Article 5(2), second paragraph, the parties can only choose between the law where a) the passenger has his habitual residence; (b) the carrier has his habitual residence; (c) the carrier has his place of central administration; (d) the place of departure is situated; or (e) the place of destination is situated. The choice of law agreement must meet the requirements of Article 3.

If the parties to a contract of carriage of passengers have not agreed on the law applicable to the contract, the contract is governed by the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply according to *Rome I*, Article 15(1), first paragraph.

Both *Rome I*, Article 5(1) and (2) are strict choice of law rules in accordance with the philosophy underlying Article 4(1) and (2). Consequently, Article 5, just like Article 4, contains an escape clause in paragraph (3) with the same wording as Article 4(3).

7. Certain consumer contracts

The Rome Convention is one the first instruments providing choice of law rules aimed at protecting a consumer dealing with a professional party. According to Article 5, these contracts are governed by the law of the country in which the consumer has his habitual residence. The parties may agree on another law, but their choice of law may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement (mandatory provisions) in the country in which he has his habitual residence.

However, under the Convention these rules only apply 1) where the conclusion of the contract was preceded by a specific invitation, addressed to the consumer in the country of his habitual residence, or by advertising in that country, and the consumer took in that country all the steps necessary on his part for the conclusion of the contract; 2) where the professional party or his agent received the consumer's order in the consumer's country; or 3) where the contract is for sale of goods and the consumer travelled from his country to another country and gave his order there, provided the journey was arranged by the professional party for the purpose of inducing the consumer to buy. In

80. *UK Consultation Paper*, 24.

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addition, the rules do not apply to contracts for carriage apart from package tours and to contracts for services to be supplied exclusively in a country other than that of the consumer's habitual residence.[81]

For consumer contracts not covered by Article 5, the ordinary choice of law rules of the Convention, notably Articles 3 and 4, apply.

7.1. *Certain consumer contracts and party autonomy*

Over the years, Article 5 of the Rome Convention has been criticized. With the increase in e-commerce, criticism has increased. Members of the business community criticize the fact that the consumer obtains a "double" protection in the case of an agreed choice of law, in that the chosen law in its entirety and the mandatory provisions of the consumer's law apply to the contract.[82] It was argued that this leads to hybrid and complex choices of law.

Following this criticism, the Commission proposed to eliminate party autonomy in consumer contracts covered by Article 5. Consequently, such contracts would always be subject to the law of the country where the consumer has his habitual residence.[83]

In contrast, other parts of the business community, in particular the small business and e-commerce sectors, felt that the Commission's proposal to eliminate party autonomy was unjustified given the generally satisfactory operation in practice of Article 5 of the Rome Convention. It was argued that the Commission's proposal would require businesses to examine the entire law of contract in every country where it supplied goods and services and that this would be an impediment to the proper functioning of the internal market.[84]

In our view, the proposed elimination of party autonomy also reduces the level of consumer protection. The consumer will not be able to rely on provisions in the chosen law that offer him a better protection than those of his own law. Furthermore, the elimination serves no purpose. Today, professionals who wish to avoid the double protection can simply abstain from inserting in their standard contracts clauses choosing another law than the consumer's law.[85]

81. The Rome Convention, Arts. 5(2) and (4).

82. See e.g. Pålsson, *Romkonventionen, Tillämplig lag för avtalsforpliktelser* (Norstedts Juridik, Stockholm, 1998), p. 77 on the so-called raisin theory: consumers get the best out of two worlds by being able to "pick out raisins from the cake". For further criticism; see T.S. Schmidt, *International formueret*, 2nd ed. (Thomson, Copenhagen, 2000), p. 77. See also Larsson, *Konsumentskyddet over gränserna – särskilt inom EU* (Iustus Förlag, Uppsala, 2002), pp. 165–212, esp. 191 and 212 where the author calls for simplicity.

83. *The Proposal*, 6–7 (Art. 5(1)).

84. *UK Consultation Paper*, 26.

85. The Editorial Comment, cited *supra* note 1, 918, note 18.

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Then, the consumer's law will apply, and there will be no double protection. In addition, we see no advantage for the business enterprises in eliminating their option to select another law than that of the consumer. This will deprive them of the advantage of being able to make their own law applicable. Many of them may prefer that option, even if the operation of their own law is modified by the mandatory provisions of the consumer's law.

During the negotiations, some Member States and the European Parliament could not accept the Commission's proposal. As a compromise, the proposal was not adopted, and the double protection rule of Article 5 of the Rome Convention was restored. Consequently, under *Rome I*, Article 6(2), businesses and consumers still enjoy the benefits of limited party autonomy.[86]

7.2. *Certain consumer contracts and scope of application*

The Member States as well as the European Parliament agreed on a number of helpful clarifications in respect of the scope of application for Article 6 of *Rome I*.

First, following the Commission's proposal, the scope of application for contracts covered by Article 6 was simplified. According to *Rome I*, Article 6(1), Article 6 will only apply to cases where the contract has been concluded with a person who pursues his commercial or professional activities in the country where the consumer has his habitual residence or by any means directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities. This provision is a useful replica of Article 15(1)(c) of *Brussels I*, which aims at regulating jurisdiction for especially, but not only international business-to-consumer e-commerce contracts.[87]

Second, it is stated in *Rome I*, Article 6(3) that if the requirements in Article 6(1) are not fulfilled, the law applicable to the business-to-consumer contract shall be determined in accordance with Articles 3 and 4.

Third, Article 5 of the Rome Convention is restricted to contracts for the supply of goods and services. *Rome I*, Article 6 contains no such limitation. This clarification is also inspired by *Brussels I*, Article 15(1)(c).

Fourth, the scope of *Rome I*, Article 6 has been narrowed compared to the scope of the Rome Convention. *Rome I*, Article 6(4) provides five exceptions

86. For further analysis of the consumer contract provisions, see Gillies, "Choice-of-Law Rules for Electronic Consumer Contracts: Replacement of the Rome Convention by the Rome I Regulation", (2007) *Journal of Private International Law*, 87; Tang, "Parties' Choice of Law in E-Consumer Contracts", (2007) *Journal of Private International Law*, 111; and Editorial Comment, cited *supra* note 1, 917–919.

87. *The Proposal*, 6. See also Editorial Comment, cited *supra* note 1, 918.

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(a-e). Only the first two, contracts for the supply of services exclusively in another country than that in which the consumer has his habitual residence and contracts of carriage other than package travel, also exist in the Rome Convention. The remaining three exceptions are new. The most significant exclusions concern the financial sectors covered by the EU MiFID rules.[88] This system sets up a high level of harmonization, including an important degree of consumer protection. Consequently, it was felt that it would be against the underlying purpose of the European MiFID system, which is to foster a thriving internal market in investment services and deliver savings to MiFID regulated firms and thereby their clients, to let Article 6 cover such contracts. These firms rely on their own law and harmonized Community law in the sectors and should continue to be able to do so.[89]

Fifth, Article 6 applies without prejudice to Articles 5 and 7. Consequently, consumers contracts for either carriage of goods or passengers or insurance are governed the special rules set up in Article 5 and 7 respectively.

8. Insurance contracts

A mentioned, it was decided to transfer the provisions of the Insurance Directives to *Rome I*.[90] During the negotiations on *the Proposal*, it was discussed whether the provisions of the Directives should be amended and whether insurance contracts concerning risks located outside and inside the Community should be subject to the same rules.[91] However, it was decided that it would be premature to do so, as no proposals to this effect had been tabled by the Commission in *the Proposal* and as no impact assessment had been carried out. Consequently, it was agreed that the issue should be reviewed at a later stage.[92]

88. *Rome I*, Art. 6(4)(d) and (e). This covers the so-called MIFID-contracts, which are "contracts concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Art. 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law". The MIFID (Markets in Financial Instruments) Directive is a major part of the EU Financial Services Action Plan.

89. *UK Consultation Paper*, 27–28.

90. Section 2.1.

91. Compare the Editorial Comment, cited *supra* note 1, 920 calling for reform in respect of the "the paradoxical situation that risks located inside and outside the Community follow a totally different set of conflict rules".

92. *Rome I*, Art. 27 (1)(a).

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Rome I, Article 7 regulates choice of law for insurance contracts. The provision does not amend the rules of the Insurance Directives.[93] It distinguishes between reinsurance contracts, insurance contracts concerning large risks and other insurance contracts. In respect of other insurance contracts, Article 7 also distinguishes between contracts where the risk is situated inside or outside the Community.[94]

Article 7 neither applies to reinsurance contracts regardless where the risk is situated nor to other insurance where the risk is situated outside the Community. Consequently, Articles 3 and 4 apply to such contracts. In these cases, the parties enjoy un-restricted party autonomy. Failing a choice of law agreement, the insurance contract will be governed by the law of the insurer, unless the escape clause in Article 4(3) applies. This is fair for reinsurance contracts where the parties usually are large insurance companies, but less justifiable for other insurance contracts.

Insurance contracts covering large risks regardless of where the risk is situated are governed by the law chosen by the parties in accordance with *Rome I*, Article 3.[95] Failing an agreed choice, such contracts are governed by the law of the country where the insurer has his habitual residence. However, if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country applies.[96]

For other insurance contracts (where the risk is situated in a Member State), *Rome I* allows restricted party autonomy. A choice of law agreement must meet the requirements of Article 3. The parties can only choose between: (a) the law of any Member State where the risk is situated at the time of conclusion of the contract; (b) the law of the country where the policy holder has his habitual residence; (c) in the case of life assurance, the law of the Member State of which the policy-holder is a national; (d) for insurance contracts covering risks limited to events occurring in a Member State other than the Member State where the risk is situated, the law of that Member State; and (e) where the policy-holder of a contract falling under this paragraph pursues a

93. The Insurance Directives have not been repealed, as they still apply to the Member States of the European Free Trade Association and Denmark since they all are not bound by *Rome I*.

94. For the purposes of Art. 7, the country in which the risk is situated shall be determined in accordance with Art. 2(d) of Council Directive 88/357/EEC of 22 Jun. 1988, and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Art. 1(1)(g) of Directive 2002/83/EC of 5 Nov. 2002; see *Rome I*, Art. 7(6).

95. A large risk is defined in Art. 5(d) of Council Directive (EC) No. 73/239 of 24 Jul. 1973.

96. *Rome I*, Art. 7(2). The same result would follow from an application of Arts. 3 and 4(2) and (3) to such contracts.

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commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy-holder.[97] For contracts covered by points (a), (b) or (e), the parties are entitled to take advantage of a greater freedom of choice of the applicable law in the law of a Member State.[98]

If the law applicable has not been chosen by the parties, such contracts are governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.[99]

For insurance contracts covering risks, for which a Member State imposes an obligation to take out insurance, additional rules are set up in *Rome I*.[100]

9. Individual employment contracts

Rome I, Article 8 deals with individual employment contracts. The provision is identical to the Rome Convention, Article 6.

As a starting point, party autonomy is allowed for such contracts, and the choice of law agreement must meet the requirements of Article 3. However, since employees, like consumers, are in need of protection for social and economic reasons, they are considered weak parties and party autonomy is thus restricted in the same manner as it is for consumer contracts under *Rome I*, Article 6(2). Consequently, a choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable to the employment contract.[101]

If the law governing the employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country. In cases where the law applicable cannot be determined pursuant to this provision, the contract is governed by the law of the country

97. *Rome I*, Art. 7(3), 1st sentence.
98. *Rome I*, Art. 7(3), 2nd sentence.
99. If the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State; see *Rome I*, Art. 7(5).
100. *Rome I*, Art. 7(4).
101. *Rome I*, Art. 8(1).

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where the place of business through which the employee was engaged is situated.[102] These two rules are only presumptions. If it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in these rules, the law of that other country applies to the contract.[103] This system is more flexible than the general system adopted under *Rome I*, Article 4.

10. Assignment, subrogation, multiple liability and set-off

Rome I does not substantially amend the provisions on assignment, subrogation and multiple liability in the Rome Convention. Furthermore, like the Convention, *Rome I* does not contain provisions on the law governing the priority of successive assignments in respect of third parties.[104]

Consequently, the relationship between the assignor and the assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) is governed by the law that applies to the contract between the assignor and assignee under this Regulation.[105] The law governing the assigned or subrogated claim determines its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.[106] The concept of assignment includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.[107]

Legal subrogation is defined as situations where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty. For such relationships, the law which governs the third person's duty to satisfy the creditor determines whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.[108]

For multiple liability, which is defined as situations where a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, *Rome I* determines

102. *Rome I*, Art. 8(2) and (3).
103. *Rome I*, Art. 8(4).
104. Section 2.1.
105. *Rome I*, Art. 14(1) and the Rome Convention, Art. 12(1).
106. *Rome I*, Art. 14(2) and the Rome Convention, Art. 12(2).
107. This provision is new.
108. *Rome I*, Art. 15 and the Rome Convention, Art. 13(1).

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that the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.[109]

The Rome Convention does not contain a provision on set-off. In *Rome I*, however, such a provision has been included, and that is a useful innovation. Set-off is governed by the law applicable to the claim against which the right to set-off is asserted if the right to set-off is not agreed by the parties. Thus, when A, who has a claim on B, wishes to set-off that claim against B's claim on him, it is the law governing B's claim on A that governs the set-off. If the law governing set-off is agreed, the agreed law governs the right to set-off.[110]

11. Scope of applicable law

The main provision on the scope of the law applicable is *Rome I*, Article 12. Furthermore, Article 10 deals with consent and material validity. The provisions are identical with the Rome Convention, Articles 8 and 10.[111]

The law applicable to a contract by virtue of *Rome I* governs "*in particular*: (a) interpretation; (b) performance; (c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law; (d) the various ways of extinguishing obligations, and prescription and limitation of actions; and (e) the consequences of nullity of the contract."[112] The list of topics covered by the *lex causae* is not exhaustive given the use of the words *in particular*. Consequently, unless otherwise provided in *Rome I*, the *lex causae* governs any issue in contract, at least of a private law character.[113] This is also implied in Articles 4–8, which lay down

109. *Rome I*, Art. 16 and the Rome Convention, Art. 13(2).

110. *Rome I*, Art. 17.

111. *Rome I*, Art. 13 deals with incapacity and has little importance in practice. It is identical to the Rome Convention, Art. 11, which states that in a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

112. *Rome I*, Art. 12(1), our emphasis. However, regard shall be had to the law of the country in which performance takes place in relation to the manner of performance and the steps to be taken in the event of defective performance; see *Rome I*, Art. 12(2).

113. Rules of a public law character may have their own regime; see Art. 9 on mandatory rules safeguarding public interests and the German judgment in BGH 27.3.2003, VII ZR NJW 2003.2020.

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that the contract shall be "governed by the law" provided for in these articles. These words imply a presumption that issues in contract are to be governed by the same law.

By *interpretation* is understood the meaning of the language of the contract as well as supplementing the contract with implied or omitted terms.[114] *Performance* is to be understood broadly.[115] It covers the acts of performance, the contents and effects of the contract, such as price, quality, effects of stipulations in favour of a third party, the duties in relation to a contractual obligation assumed by several debtors or in favour of several creditors etc.[116]

The applicable law also governs breach of a contract and its consequences. Thus, it governs the aggrieved party's right to damages, to terminate the contract, to withhold his own performance and to claim a reduction in the price in case of defects in the performance. Though in the common law the right to specific performance was formerly regarded as procedural and governed by the *lex fori*, English authors now tend to regard it as a consequence of the breach to be governed by the law applicable.[117]

The assessment of damages is governed by the law applicable "in so far as it is governed by rules of law".[118] This is an unfortunate passage. Issues in contract are governed by rules of a law. The Explanatory Report on the Rome Convention states that according to some delegations, the assessment of the amount of damages is a question of fact and should not be covered by the Rome Convention.[119] This does not make sense either. The idea is probably that in the common law recoverable heads of damages are regarded as substance governed by the applicable law, whereas the measure and quantification of damages are governed by the *lex fori*.[120] This is probably how the distinction adopted in Article 12 should be understood. For example, the *lex causae* decides whether an aggrieved party is entitled to damages for pain and suffering, whereas the *lex fori* decides the amount he can get.

For consent and material validity, *Rome I*, Article 10(1) provides that the existence and validity of a contract, or of any term of a contract, shall be determined by the law that would govern it under this Regulation if the contract

114. Unidroit Principles, Art. 5.4.8, PECL, Art. 6:102 and DCFR Book II, Art. 9:101.

115. *Giuliano* and *Lagarde*, 32.

116. See Unidroit Principles, Chapter 5 on Contents and Third Party Rights and Chapter 6 on Performance; PECL, Chapter 6 on Contents and Effects and Chapter 7 on Performance, and DCFR Book II, Chapter 9 on Contents and effects of contracts and Book III, Chapter 2 on Performance.

117. Dicey, Morris & Collins, op. cit. *supra* note 59, 1265.

118. *Rome I*, Art. 12(1)(c).

119. *Giuliano* and *Lagarde*, 32.

120. Dicey, Morris & Collins, op. cit. *supra* note 59, 1264.

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or term were valid. The provision deals with all aspects of formation of the contract other than their general validity. It covers validity of the parties' consent to the contract, including their choice of applicable law. *Existence* refers to the rules on conclusion of contracts such as those treated in CISG, Articles 14–24. *Validity* refers to the rules on defects of consent that may make a contract null and void (mistake, fraud, coercion, undue influence) and, it is submitted, invalidity of a contract or contract term due to unfairness.[121]

In respect of consent, *Rome I*, Article 10(2) provides as an exception to paragraph (1) that "a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in Article 10(1)." This provision is intended to protect parties from being bound by passivity under a foreign law, when the party would not be bound under the law of his habitual residence. However, *conduct* also covers positive acts, and both the offeror and the offeree can rely on the provision.[122]

Article 10 does not cover illegality (general invalidity) due to violation of principles recognized as fundamental principles of law such as human rights and the infringement of other mandatory rules.[123] These matters are probably covered by the *lex causae* under Article 12. However, a contract may also be held invalid or illegal under Article 9(2) or (3) due to the application of internationally mandatory provisions in the *lex fori* or another law that is not the law applicable to the contract.[124] Consequently, *lex causae* or the law applicable under Article 9 governs whether an infringement has any effect on the contract, whether it has full effect, some effect, or no effect on it or whether it makes the contract subject to a modification.[125]

Consequences of nullity of the contract are governed by the applicable law in accordance with Article 12(1)(e). This rule also applies to contracts invalid under Article 10 and to the question of illegality of contracts. An important consequence of nullity is restitution, which under *Rome I* is contractual in nature. However, it is not clear whether Article 12(1)(e) also covers the consequence of a nullity under Article 9 on overriding mandatory provisions. It is submitted that these consequences are to be governed by the *lex fori* when the overriding mandatory rule is part of the law of the forum and applicable by virtue of Article 9(2) and by the rules of another law when that law applies

121. See on the substance of these provisions, Unidroit Principles, Chapter 3 and PECL, Chapter 4.

122. *Giuliano* and *Lagarde*, 27 f.

123. See PECL, Art. 15:101 and DCFR Book II, Art. 7:301.

124. Section 14.

125. See PECL, Art. 15:102 and DCFR Book II, Art. 7:302.

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under Article 9(3). It is also not clear which law is applicable to the consequences of the lack of consent when a party may rely on the law of his habitual residence to establish that he is not bound by his consent under Article 10(2). It would seem appropriate to let that law decide the consequences of his lack of consent.

12. Formal validity

Formal validity of contracts is regulated by *Rome I*, Article 11, which by and large is identical to the Rome Convention, Article 9. The provision takes a liberal approach in order to ensure that contracts are upheld as formally valid, provided they conform with the form requirements in either the law governing the contract, the law of the State where the contract was concluded or the law of the State where one of the parties had his habitual residence at the time of conclusion of the contract.[126] The Rome Convention did not refer to the law of the State where either of the parties had their habitual residence at the time of conclusion of the contract. This extension under *Rome I* is an improvement and in line with the purpose of the provision.

Formal requirements are not defined in *Rome I*, but they can be described as any external conduct required by a person stating his wish to be legally bound, without which conduct the declaration would not be given full legal effect.[127]

If a contract is concluded between persons, or whose agents, are in the same country at the time of its conclusion, it is formally valid if it satisfies the formal requirements of the law that governs it in substance under *Rome I* or of the law of the country where it is concluded.[128] However, if the contract is concluded between persons who, or whose agents, are in different countries at the time of its conclusion, it is formally valid if it satisfies the formal requirements of the law that governs it in substance *under Rome I*, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.[129]

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 that governs or would govern the contract in substance under *Rome I*, or of the law of the country where the act was done, or of the law of the coun-

126. *Giuliano* and *Lagarde*, 29.
127. *Giuliano* and *Lagarde*, 29.
128. *Rome I*, Art. 11(1).
129. *Rome I*, Art. 11(2).

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try where the person by whom it was done had his habitual residence at that time.[130] These provisions do not apply to consumer contracts that fall within the scope of Article 6. The form of such contracts is governed by the law of the country where the consumer has his habitual residence.[131]

The liberal approach of Article 11 does not apply to a contract the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property. Such contracts are subject to the requirements of form of the law of the country where the property is situated if by that law (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and (b) those requirements cannot be derogated from by agreement.[132]

13. Mandatory provisions

Rome I deals with mandatory provisions in Article 3(3) and (4) and in Articles 6–8. In the Regulation, these rules are called "provisions of the law of [a] country which cannot be derogated from by agreement". In the Convention, Article 3(3), they are also called mandatory rules, in French *dispositions impératives.*

Rome I, Article 3(3) deals with cases where the parties have chosen a law in accordance with Article 3(1) or (2) where all other elements relevant to the situation at the time of the choice are connected with another country than the country whose law has been chosen. In this "internal" situation, the choice of law of the parties cannot prejudice the application of the mandatory rules of the law of that other country. This provision is in substance identical to the Rome Convention, Article 3(3).[133]

It seems clear that Article 3(3) applies to mandatory provisions whether they come from national law or Community law. However, *Rome I,* Article 3(4) explicitly provides that where the parties choose the law of a non-Member State, that choice shall be without prejudice to the application of mandatory rules of Community law, where appropriate as implemented in the Member State of the forum, if all other elements relevant to the situation at the time of the choice are located in one or more Member States. The Rome Convention does not contain such a provision. Article 3(4) means that the mandatory rules

130. *Rome I,* Art. 11(3).
131. *Rome I,* Art. 11(4).
132. *Rome I,* Art. 11(5).
133. The provision of the Rome Convention also states that the provision will apply whether or not the choice of agreement is accompanied by the choice of a foreign court. These words have been deleted in *Rome I* as superfluous.

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of the forum Member State implementing a Directive must be applied where the contract has no important contacts to non-Member States.

14. Internationally mandatory provisions

Rome I, Article 9 deals with international mandatory provisions in the *lex fori* and in the law of another State that is neither the *lex cause* nor the *lex fori*. In the English version of *Rome I*, these rules are termed *overriding mandatory provisions*, in the French version *lois de police*. We will name them *internationally mandatory provisions*. Such rules are defined in *Rome I* as rules "respect for which is regarded as crucial by a country for safeguarding its political, social or economic organization to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation." This definition is from the *Arblade* judgment.[134]

Neither the Rome Convention nor *Rome I* contains a provision providing for the application of internationally mandatory rules of the *lex causae*. However, it seems obvious that such a provision is superfluous, as a reference to a national law under the ordinary choice of law rules refers to all rules of the *lex causae*, including the internationally mandatory provisions, which, by definition, are important parts of the *lex causae*. This follows logically from the nature of the ordinary choice of law rules, and the fact that neither Article 9 nor 12 *Rome I* excludes the application of the internationally mandatory provisions of the *lex causae*.[135]

Rome I, Article 9(2) provides that nothing in the Regulation shall restrict the application of the rules of the law of the forum in a situation where they are internationally mandatory. This means that whenever internationally mandatory rules of the forum country expressly or by implication claim to be applied to the contract, they will be applied by the court. This provision is identical to the Rome Convention, Article 7(2) and *Rome II*, Article 16.

Article 7(1) of the Rome Convention provides for an option for courts to give effect to the internationally mandatory rules of the law of another country than the forum 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

134. Joined Cases C-369/96 & C-374/96, *Jean-Claude Arblade and Arblade & Fils SARL* v. *Bernard Leloup, Serge Leloup and Sofrage SARL*, [1999] ECR I-8453. *The Proposal*, 7.

135. Cf. Editorial Comment, cited *supra* note 1, 921, which, on the contrary, finds the issue unclear.

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to the consequences of their application or non-application for the objective pursued by the relevant mandatory rules and for the parties.

In the old days before the Rome Convention, European courts were mostly concerned with the international mandatory provisions of their own country. In general, they did not give effect to internationally mandatory provisions of the law of another country that was not the law governing the contract. However, the drafters of the Rome Convention thought that rules dictated by a strong government interest might be of such importance for a country that the courts of other countries should take account of them. The growing trade and traffic had made States interdependent and solidarity between them necessary. A court should be able to give effect to mandatory rules other than those of the law applicable to the contract when provided by a foreign country with which the situation has a close connection.[136]

An example: A company X established in State A has promised a company Y in State B to abide by resale prices fixed by Y when selling its products in State A. Resale price maintenance clauses are illegal in State A, but they are, as far as this product is concerned, legal in State B. We assume that the law of the seller Y is the law governing the contract and that the resale price maintenance clause violates the international mandatory provisions of State A. Should a court in State B then refuse to enforce the clause against X? The conditions for giving effect to foreign law laid down in Article 7(1) of the Rome Convention appear to be fulfilled. The situation has a close connection with State A. That law claims application to the issue, whatever the law applicable to the contract. Considering the nature and purpose of the rule and the consequences of its application or non-application, the rule does not appear to be usurpatory or unreasonable in its claim for application. The prohibition of resale price maintenance clauses is not foreign to the legal thinking in State B. Therefore, the B court should give effect to the competition rule of State A.

Article 7(1) of the Rome Convention was – and still is – controversial. Therefore, the Convention provides for a reservation in respect of Article 7(1) in Article 22(1). Germany, Austria, Luxembourg, United Kingdom, Portugal, Latvia, Slovenia and Ireland have made use of the reservation. The United Kingdom delegation to the working group that drafted the Rome Convention found the wording of the provision obscure. In Article 7(1), the words *close connection* and *the situation* was regarded as "a recipe for confusion, uncer-

136. *Giuliano* and *Lagarde*, 26–27. For a analysis of the use of mandatory rules of third countries; see Chong, "The Public Policy and Mandatory Rules of Third Countries in International Contracts", (2006) *Journal of Private International Law,* 27, and Dickinson, "Third Country Mandatory Rules within the Law Applicable to Contractual Obligations", (2007) *Journal of Private International Law,* 51.

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tainty, expense and delay."[137] According to the United Kingdom, commercial certainty was to be given priority.

The transformation of the Rome Convention into a Regulation does away with reservations. Therefore, Member States that have made a reservation have to accept the new and similar provision in *Rome I*, Article 9(3). This also applies to the United Kingdom, as it has decided to opt in. At the outset of the negotiations on *the Proposal*, the United Kingdom informed the other Member States that it did not want to opt in to *the Proposal*, because it was still very sceptical towards *Rome I*, Article 9(3). The main reason was that it caused widespread concern in commercial circles, particularly in the City of London, given that the provision, as under the Rome Convention, creates significant legal uncertainty and undermines the key principle of party autonomy.[138] However, during the negotiations on *the Proposal*, it became clear that it would not be possible to secure sufficient agreement amongst the Member States to delete Article 9(3) as the majority of Member States were already bound by Article 7(1) of the Rome Convention. Discussions then focused on finding a generally acceptable compromise that would narrow the scope of the provision and keep any legal uncertainty to a minimum.[139]

The final result is *Rome I*, Article 9(3), which is – presumably – also satisfactory to the United Kingdom given its recent decision to opt in. According to this provision, effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application. This provision will by and large lead to the same results as Article 7(1) of the Rome Convention. However, the Convention's requirement of a *close connection* to the State whose international mandatory provisions may be applied has been substituted by the requirement that the internationally mandatory provisions considered to be applied shall render the performance of the contract unlawful and that the obligations arising out of the contract shall have to be performed or have been performed in that country.

In essence, the application of *Rome I*, Article 9(3) is still to be left to the discretion of the courts, but the discretion is now more limited. First, the connecting factor to the State whose internationally mandatory provisions are considered to be applied is not a close connection, but the fact that the

137. Dicey, Morris & Collins, op. cit. *supra* note 59, p. 1246.
138. *UK Consultation Paper*, 32.
139. *UK Consultation Paper*, 32.

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obligations under the contract have to be or have been performed in that country. Second, the internationally mandatory provisions considered to be applied must render the performance of the contract unlawful. These two guidelines for the discretion are precise, and they do provide more certainty than Article 7(1) of the Rome Convention. On the other hand, it is uncertain under which law the place of performance is determined; is it the law governing the contract or the law whose internationally mandatory provisions claim application?

The clarification of Article 9(3) of *Rome I* has to some extent been inspired by the English judgment in the *Ralli Bros* case.[140] In this case, an English contract for the carriage of jute by sea from Calcutta to Barcelona provided for the payment of freight by the defendant charterer to the ship owner at the rate of GBP 50 per ton on delivery of the cargo in Barcelona. The contract was governed by and valid under English law. However, after the date of the contract but prior to the arrival of the ship, a Spanish decree fixed the maximum freight on jute at GBP 10 a ton and made it illegal to pay more. The ship owner's action to recover the difference between GBP 10 and GBP 50 was dismissed. The English court declared the contract unenforceable under the doctrine of frustration of contracts.

In the *Ralli Bros* case, the contract was governed by English law, and there seems to be no conclusive English authority as to the situation where the contract is governed by a foreign law. However, in *Foster* v. *Driscoll*, illegality of contractual performance in terms of the breach of a foreign law may also prevent enforcement of the contract on the basis that to do so would be against the comity of nations and therefore contrary to English public policy.[141] In *Rome I*, however, it is beyond doubt that Article 9(3) applies regardless whether the contract is governed by the law of the forum or a foreign law, be it the law of a Member State or a non-Member State.

It should be noted that since the Rome Convention came into force, we have neither seen nor heard of a single reported case in which a European court has invoked Article 7(1) of the Rome Convention to give effect to a mandatory rule of a foreign country.[142] However, Article 7(1) may have been observed by contracting parties or applied by courts or arbitrators in unreported cases. In

140. *Ralli Bros.* v. *Compania Naviera Sota y. Aznar*, [1920] 2 K.B. 287 C.A. See also Dicey, Morris & Collins, op. cit. *supra* note 59, pp. 1594–7.

141. See *UK Consultation Paper*, 32, where *Foster* v. *Driscoll*, [1929] 1KB 470 is mentioned.

142. For an extensive analysis of German, Swiss, US and Swedish law in respect of mandatory and international mandatory provisions with regard to competition law in particular; see Hellner, *Internationell konkurrensrätt – om främmande konkurrensrätts tillämplighet i svensk domstol* (Iustus Förlag, Uppsala, 2000), ch. 5–8.

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Germany, the courts have treated foreign international mandatory provisions as impediments that relieve a party from performing an obligation under the applicable German law.[143] The question is whether the English and German decisions were so different from what would have followed under Article 7(1) of the Rome Convention that they had cogent reasons to make use of the reservation in the Convention.[144]

15. Consumer contracts and internationally mandatory provisions

Rome I, Article 6(4) puts some limitations on the application of Article 6(1) and (2). One of these restrictions is that Article 6(1) and (2) shall not apply to a contract for the supply of services where they are to be supplied to the consumer exclusively in a country other than the one in which he has his habitual residence.[145]

The question then arises whether a court can apply Article 9(2) or (3) of *Rome I* to a consumer contract not covered by Article 6. An example: Let us assume that the Swedish Consumer Services Act gives the consumer better protection than, say, Polish law.[146] Let us furthermore assume that a person D having his habitual residence in Germany hires a Polish contractor to repair his holiday home in Sweden. Since D does not live in Sweden, where the services are to be supplied, D will not be protected by the Swedish Consumer Services Act. Polish law will apply under *Rome I*, Article 4(1)(b). May a Swedish court then apply Article 9(2) or a German court Article 9(3) in order to apply the Swedish Consumer Services Act in a case between the parties? The situation has a strong connection to Sweden. Why should the fact that D lives in Germany deprive him of the protection offered by the Swedish Act?

The example illustrates whether Article 6 of *Rome I* settles all questions regarding consumer contracts with the effect that it excludes the application of Article 9. In favour of this solution, it may be argued that the limitations imposed by Article 6 become somewhat meaningless if a court can apply Article 9 where Article 6 does not apply. On the other hand, it may lead to hard cases like the one just mentioned if the limitations imposed by Article 6 are absolute.

143. Staudinger, *BGB EGBGB/IPR* 13. Bearbeitung, (Sellier-de Gruyter, Berlin 2002), Art. 34 EGBGB, Rn. 110.

144. Staudinger, *BGB EGBGB/IPR* 13. Bearbeitung, (Sellier-de Gruyter, Berlin 2002), Art. 34 EGBGB, Rn. 115–118 and 138.

145. *Rome I*, Art. 6(4)(a).

146. The Swedish Statute No. 1985, 716 (konsumenttjänstlag).

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Some cases decided by German courts in the 1980s and early 1990s may shed light on the problem. During their holiday in the Canary Islands, German tourists were contacted by Spanish salesmen and induced to buy expensive woollen bed linen, a purchase they soon regretted. The sellers had seen to it that the purchases were governed by Spanish law, which had not yet implemented the Doorstep Sales Directive and which did not give the purchasers the right to cancel the contract.[147] However, in almost all the German cases, the courts applied the law of Germany, which had implemented the rules of the Directive and thereby accepted that the buyers had called off the contract.

The ways in which this was done were not by the book.[148] The cases show that when courts felt a need to protect consumers in situations other than those covered by the Rome Convention, Article 5(2), they did so. The German courts held it more important to help German consumers than to administer the special kind of justice provided by the choice of law rules of the Rome Convention.

This issue was discussed during the negotiations, but no solution was found.[149] We see no other way to solve the problem than applying Article 9(2) and (3) to such situations.

16. Conclusion

The working party on *Rome I* managed to find workable solutions to the most problematic provisions of the Rome Convention. The "fine-tuning" of *Rome I*, Article 3 is well done. Although *Rome I*, Article 4 is radically different from the Rome Convention, Article 4, it will definitely satisfy the need for more predictability. The new provision on transports of carriage (Art. 5), which distinguishes between contracts for carriage of goods, where party autonomy is unrestricted, and contracts for carriage of passengers, where consumer protection comes into play, is also appropriate. The maintaining of limited party autonomy in certain consumer contracts (Art. 6) is a just and balanced solution,

147. See the decisions reported by Mankowski, "Zur Analogie im internationalen Schuldvertragsrecht", (1991) IPRax, at 305 et seq.

148. A.G. Lichtenfels 24 May 1989 invoked German public policy, OLG Frankfurt 1 Jun. 1989 held that Art. 5 was applicable as the seller, who was a German enterprise, "in reality" had received the order in Germany, see Art. 5(2) 2nd indent. The LG Hamburg 21 Feb. 1990 invoked the doctrine of abuse of right *(Rechtsmissbrauch)* in order to apply German law. See on these decisions reported in (1991) IPRax, 235, Mankowski, "Zur Analogie im internationalen Schuldvertragsrecht", (1991) IPRax, 305.

149. As *Rome I*, Art. 6 will be evaluated, in particular as regards the coherence of Community law in the field of consumer protection; see Art. 27 (1)(a), this issue is likely to be reconsidered.

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and the inclusion of all insurance contracts (Art. 7) makes *Rome I* more complete. We also believe that the limitations in Article 9(3) on the application of foreign international mandatory provisions are very useful improvements acknowledged by the opting in of the United Kingdom. However, we regret that the Member States are not ready to allow their courts to apply the *lex mercatoria* in international disputes on an equal footing with national law. This issue and the need for closing the choice-of-law gap for jurisdiction agreements are so important that they should be considered in a forthcoming revision of *Rome I* or *Brussels I*.[150]

150. See also the Editorial Comment, cited *supra* note 1, 914 and 922.

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