Max Planck Institute for Foreign Private and Private International Law*

Comments on the European Commission's Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization

Contents

* The Working Group on Rome I within the Max Planck Institute is composed of: Jürgen Basedow (coord.), Felix Blobel, Reinhard Ellger, Jan von Hein, Christian Heinze, Ina Maria Lindenberg, Tobias P. Maaß, Axel Metzger, Hans-Jürgen Puttfarken, Jürgen Samtleben, Joachim Schelm, Jens M. Scherpe, Judith Schnier, Simon Schwarz, Jan Erik Windthorst, Wolfgang Wurmnest.

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Introduction

In January 2003, the Commission of the European Communities published a "Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization";[1] hereinafter this document will be referred to as the "Green Paper" and the Convention as well as a future Community instrument as "Rome I". The publication of the Green Paper is another important step toward a homogenous codification of the private international law of obligations in the Community. The first initiative taken by the Commission in that area was the "Consultation on a Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations" initiated in May 2002. Having received a great number of comments, among others those of the Hamburg Group for Private International Law,[2] the Commission presented its Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (Rome II) in July 2003.[3] The following answers to the questions asked by the Commission in the Green Paper take into account the close link between contractual and non-contractual obligations and the existence of common issues which cannot reasonably be subject to different rules for both types of obligations. Moreover, the Institute has given particular consideration to the proposals made by the "Groupe européen de droit international privé" (GEDIP) for amendments to several articles of Rome I.[4]

When publishing the Green Paper, the Commission pursued the goal of launching a public debate on the conversion and modernization of Rome I. In fact, it has invited all interested parties to present their comments by September 15, 2003. The following observations are meant to contribute to that debate. The topics have essentially been determined by the Commission's questions, which will be answered in the order of the Green Paper. But the Institute has also seen the need to address some additional issues. Our comments are the result of intense – although not necessarily comprehensive or

[1] COM(2002)654 final of 14. 1. 2003.
[2] RabelsZ 67 (2003) 1 with a reprint of the Commission's Draft Proposal.
[3] COM(2003)427 final of 22. 7. 2003.
[4] The proposals are published at the website of GEDIP: <http://www.drt.ucl.ac.be/gedip>.

complete – discussions held from May to September 2003. We have tried to focus our comments as much as possible on legislative proposals, which will be reproduced in the annex in italicized print next to the provisions of the Rome Convention. While the proposals have undergone several discussion rounds and reflect the majority opinion in the group, not all of them have been approved unanimously.

Question 1:

Do you have information concerning economic actors' and legal practitioners' actual knowledge of the Rome Convention of 1980 and of its rules, in particular the rule allowing parties to freely choose the law applicable to their contract? If you consider that such knowledge is insufficient, do you think that this situation has a negative impact on the parties' conduct in their contractual relations or on court proceedings?

1. Knowledge of Rome I. – a) In general. – In Germany, the Rome Convention has not been given direct effect; it has been incorporated into the EGBGB.[5] Therefore, Rome I as such is almost unknown outside the group of academic experts. It follows that question 1 should be understood instead as referring to the knowledge of the implementing provisions of the Convention. Statistical evidence concerning the actual knowledge in this sense, i.e., especially freedom of choice (art. 3 Rome I) by economic actors and legal practitioners, is lacking at present.[6] The Institute looked at comments from bar associations and different industry and trade organizations[7] and compared them with the group's own experience as teachers and long-time experts for the courts in the field of private international law. From this we conclude that there is only a basic awareness of the provisions implementing Rome I among most eco-

[5] Einführungsgesetz zum Bürgerlichen Gesetzbuch, BGBl. 1994 I 2494 as amended by Gesetz vom 21. 5. 1999, BGBl. I 1026, vom 27. 6. 2000, BGBl. I 897, vom 26. 11. 2001, BGBl. I 3138.

[6] For a study concerning the knowledge and use of transnational commercial law, see *Berger et al.*, The Central Enquiry on the Use of Transnational Law in International Contract Law and Arbitration, in: The Practice of Transnational Law, ed. by *id.* (2001) 91–113. About one-third of those addressees who replied to the enquiry indicated that they were aware of the use of transnational commercial law in international contract negotiations and choice-of-law clauses. The result was higher (42%) in the context of international commercial arbitration.

[7] E.g., the comments prepared by the German Bar Association ("Deutscher Anwaltsverein"), the German Industry and Trade Associations ("Bundesverband der Industrie", "Bundesverband des Deutschen Groß- und Außenhandels", "Bundesverband des Einzelhandels", "Centralvereinigung Deutscher Wirtschaftsverbände für Handelsvermittlung"), the German Judges Association ("Deutscher Richterbund"), and by the Council of the Bars and Law Societies of the European Union (CCBE).

nomic actors and legal practitioners. This is partly due to the fact that traditionally, despite the constant increase of cross-border transactions, private international law has been a neglected subject among law students during law school; a large number of students leave law school without ever having had contact with the rules of private international law, including Rome I.[8] Such graduates are vulnerable to overlooking situations where the rules of Rome I are relevant or where a choice-of-law clause would be beneficial for their purpose.[9]

Otherwise, it can be assumed that legal practitioners and economic actors who have cross-border contacts on a nearly daily basis – which will be particularly true for large international companies and international law firms – will generally be more likely to be aware of Rome I. Such parties also have the advantage of being able to afford the necessary information costs. Small or medium-sized companies might lack such experience and the necessary resources to familiarize themselves with these rules.

With respect to national judges, more than a decade of interpretation of Rome I by the courts might have eased the interpretation and application of the rules of Rome I in court. On the other hand, the fact that interpretation of Rome I by national courts in different Member States has not been uniform in all aspects may actually have increased the information costs for practitioners who in certain scenarios not only have to know how their own courts operate but also how the courts of other countries interpret the rules of Rome I.[10] Additionally, based on the fact that some Member States such as Germany have not incorporated the provisions of Rome I word-for-word into national law but have changed the order and the numbering of the provisions, and in some cases also the internal structure of articles and their text,[11] the difficulty for foreign practitioners – including judges – to acquire information about the German courts' application of Rome I and its rules is increased.

b) Freedom of choice. – To a certain extent, the knowledge and use of the freedom of choice of law (art. 3 Rome I) can also be inferred from a closer look at

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[8] In Germany, the subject "private international law" does not form part of the mandatory core curriculum at law school. From our experience, less than 5% of students take international private law as their elective subject in the final exam ("Staatsexamen").

[9] See, e.g., *Schütze/Weipert(-Schütze)*, Münchener Vertragshandbuch[4] III/1(1998) 459 seqq. (bank guarantee, no. 14); *id.*, 478 seqq. (letter of comfort, no. 10); *id.*, III/2 (1997) 703 (letter of credit, no. 12). The author remarks that a choice-of-law clause is too often missing in these kinds of contracts.

[10] See *Schütze/Weipert(-Thümmel)*, Münchener Vertragshandbuch[5] IV (2002) 129 (Consignment Stock Agreement, no. 3). The manual remarks that it would be helpful for the user of the sample contract form to inform himself about the private international law in the forum state but does not offer any assistance for how this should be done.

[11] See the motivation given by the German government: "Gesetzentwurf der Bundesregierung, Entwurf eines Gesetzes zur Neuregelung des IPR" vom 20. 10. 1983, Begründung: BT-Drucks. 10/504 (1986) 20–108 (76).

contract manuals for legal practitioners, which indirectly provide information on the practice of contracting.[12] Most of the basic German manuals containing a collection of contract forms that are not particularly specialized in international business transactions cover the freedom of choice rather superficially,[13] if at all.[14] Typically only a few of the sample contract forms recommend a choice-of-law clause with some more or less superficial remarks about the clause, or often without any remark.[15] Only exceptionally is Rome I or its rules explained in more detail.[16] As a result, a choice-of-law clause might not be included in a contract, even though the parties would have wanted to include one if they had thought about it.[17] This will be different in some countries and for larger international transactions where the Anglo-American way of drafting extensive contracts is more common, including the integration of standardized text (boilerplate), which usually will also include a choice-of-law clause. The more extensive manuals dealing with these kinds of contracts provide several forms with choice-of-law clauses[18] and more detailed remarks

[12] For an evaluation of these publications under the aspect of competition between legal systems, see *Kieninger*, Wettbewerb der Privatrechtsordnungen im europäischen Binnenmarkt (2002) 286 seqq.

[13] Cf. *Graf v. Westphalen*, Beck'sche Musterverträge[4] IV (2002) 174 ; *Hoffman-Becking/Rawert(-Haag)*, Beck'sches Formularbuch[8] (2003) 634; *Wurm/Wagner/Zartmann(-Bethin)*, Das Rechtsformularbuch[14] (1998) 113, 178; *Nath/Schilling/Fingerhut*, Formularbuch für Verträge[9] (2001) no. 1005.

[14] Cf. *Herold/Romanowsky*, Vorteilhafte Vertragsgestaltung[8] (1988); this book does not contain a single sample contract form with a choice-of-law clause, but does include several sample contract forms with choice-of-jurisdiction clauses (cf. at 47, 59, 63, 166, 205, 343, 363, 369, 405, 407); see also *Kroiß*, Klauselbuch Schuldrecht (2002): the book does not mention the possibility of a choice-of-law clause but contains substantial information concerning the Reg. 44/2001 (at 769–770).

[15] See, e.g., *Nath/Schilling/Fingerhut* (supra n. 13) 707 (general terms and conditions); *id.*, 680 (license agreement); *id.* 694 (sponsor agreement); *id.* 639 (share deal); *Hoffman-Becking/Rawert(-Mielert)* (supra n. 13) 135 (business sales agreement); *id.* 152, 155 (general terms and conditions for business-to-business transactions); *id.(-Anschütz/Feick)* 1104 (franchise agreement).

[16] See, e.g., *Büchtling/Heussen(-Piltz)*, Beck'sches Anwaltshandbuch[7] (2001) B 20 no. 39 seqq.; *Pinnells/Eversberg*, Internationale Kaufverträge optimal gestalten[2] (2003) 15 seqq. Unfortunately neither manual gives any substantial advice as to which law the user should choose or how he should decide.

[17] See, e.g., *Hoffmann-Becking/Rawert* (supra n. 13) 634 (bank guarantee). The author remarks that though a choice-of-law clause is beneficial in such a bank guarantee, it is seldom found in practice.

[18] Cf., e.g., *Hopt(-Blesch)*, Vertrags- und Formularhandbuch zum Handels-, Gesellschafts-, Bank- und Transportrecht[2] (2000) 1122 (bank guarantee); *id.(-Graf v. Westphalen)* 605 (general terms and conditions); *id.(-Graf v. Westphalen)* 625 (agreement about the constructions of an industry facility); *id.(-Hess/Fabritius)* 649 (non-disclosure agreement); *id.(-Hess/Fabritius)* 656 (letter of intent); *id.(-Hess/Fabritius)* 653 (client agreement) etc.

about Rome I and its rules.[19] Readers of these books will be unlikely to omit a choice-of-law clause because they are unaware of the issue.

On the other hand, at first sight it is surprising that even these manuals generally advise that parties simply choose the national law of the author. There is no explanation of the substantive advantages or disadvantages of choosing this particular law.[20] A good example of such a recommendation can be found in the volumes of the "Münchener Vertragshandbuch", a renowned and extensive German manual for practitioners in this sector. In a nearly stereotypical manner it advises the contracting party to choose German law or, if that is not possible, the law of a "neutral state" as the applicable law, regardless of the type of contract.[21] In almost the same manner, English manuals advise choosing the law of England to govern the respective contracts.[22] Material criteria designed to bring the reader into the position of making an informed choice of law is also missing from manuals and guidebooks of other countries, including England and France.[23]

Of course, a law firm would presumably hesitate to advise a client to permit the law of another country to govern a contract, even if it knew that the law of another country would be favorable. In doing so, the law firm would run the risk that the client, in any subsequent litigation arising from that contract or in future transactions, would hire lawyers in that foreign country rather than themselves (principal-agent problem). Consequently, the contracting parties cannot be expected to be fully aware of the possibilities of the freedom to choose the law applicable to the contract. The *Alsthom Atlantique* case is a prominent example of insufficient information on this point. It was the Court

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[19] Cf. *Schütze/Weipert(-different authors)* (supra n. 10) 17, 29, 84, 141, 251–254, 438, 523, 710 etc.

[20] For detailed analysis and with references, see *Kieninger* (supra n. 12) 288 seqq.

[21] See, e.g., *Schütze/Weipert(-Thümmel)* (supra n. 10) 9, 17 (letter of intent); *id.*, 22 (non-disclosure agreement); *id.(-Graf v. Westphalen)* 67 (agency contract); *id.* 89 (distributor agreement); *id.(-Thümmel)* 126 (consignment stock agreement); *id.(-Graf v. Bernstorff)* 491 (standard terms and conditions for the sale of goods); *id.* 529 (standard terms and conditions for the purchase of goods); *id.(-Rosener)* 701 (external consortium with consortium leader); *id.(-Rosner)* II4 (1998) 342, 366 seq (construction agreement); *id.(-Schütze)* III/14 (1998) 422 (project-oriented combined transport) etc. Every displayed sample contract form includes a choice of law with Germany as a default choice. Exceptions can be found only in the area of international franchise contracts and for international swap-master agreements.

[22] See, e.g., *Schmitthoff*, Export Trade[9] (1990) 211 seqq.; *Campbell/Proksch(-Abell)*, International Business Transactions (Loose-leaf collection; 1997) ch.1 B. no. 61 (franchise agreement).

[23] See, e.g., *Chatillon*, Droit des Affaires Internationales (1994) 195 seqq.; *Day/Griffin*, The Law of International Trade[2] (1993) 174 seqq.; *Lew/Stanbrook*, International Trade, in: Law and Practice (1983) 6; *Campbell/Proksch(-Weinstock/Szafran)* (preceding note) ch. 2 A, 11 (Sole Distributorship Agreement); *id.(-Schwank)* ch. 3 A, 5 seqq. (International Bank Guarantees).

of Justice which had to remind the parties that they could have overcome the mandatory rules through an informed choice of a different legal system.[24]

2. Consequences. – The effects of this insufficient knowledge are difficult to assess. The fact that the actual choice of law is often not based on the substantive advantages of the respective legal system but rather on other considerations (such as familiarity with that law and convenience[25]) has the consequence that the true potential of the freedom of choice of the applicable law is not exploited to the full benefit of the parties. Competition between the different legal systems, which would have the positive effect of enhancing legal innovation, is impeded or simply does not occur at all. On the other hand, the current practice contributes to stable relations between clients and law firms. The latter, having advised the client on the contract including the choice of the national law, will be familiar with both the law and the client in subsequent litigation.

Question 2:
Do you believe the Rome Convention of 1980 should be converted into a Community instrument? What are your arguments for or against such a conversion?

1. The pros. – The Commission's Green Paper points out several advantages of a conversion of the Rome Convention into a Community instrument. First, national courts of the Member States will be able to refer preliminary questions concerning the interpretation of a Community instrument adopted on the basis of art. 65 EC to the European Court of Justice. At present it is still unclear which national courts below the highest courts are entitled to initiate the reference procedure under art. 68, and a Council decision to be taken under art. 67(2) 2nd indent EC should adapt the powers of the Court of Justice in the near future. But even without such an adjustment, the present situation would be improved. The fact that Belgium, as a Contracting State of the Rome Convention, has not ratified the two 1988 protocols on the interpretation of Rome I by the Court of Justice in 15 years indicates political resistance in that country and quashes the hope for authoritative court rulings on Rome I under the present conventional regime.

A uniform interpretation of Rome I by the national courts would further be supported by the enactment of one single instrument that is directly binding on the national judges. Under the dualistic approaches to public international law, the act of ratification of a convention by a state at the international

[24] ECJ 24. 1. 1991 – case C-339/89 *(Alsthom Atlantique SA* v. *Compagnie de construction Sulzer SA)*, E.C.R. 1991, I-107.

[25] *Schwenzer(-Herbel)*, Schuldrecht, Rechtsvergleichung und Rechtsvereinheitlichung an der Schwelle zum 21. Jahrhundert (1999) 9.

level does not necessarily entail the direct applicability of that convention within the internal legal system of that country. Accordingly, the *Giuliano/Lagarde* report points out that the implementation of the Rome I Convention is a matter to be decided by each Contracting State.[26] Some Member States such as Germany have given effect to the Convention by an internal statute which has changed the order and the numbers of the provisions and, in some cases, also the internal structure of articles and their text.[27] It follows that the difficulty for foreign judges to understand German court decisions on international contract law is enhanced. A common text contained in a regulation would help the court to comply with the call made by art. 18 to achieve a uniform interpretation. It follows from the same line of reasoning that a directive would not change the present situation, since Member States would still be free to implement the directive as they prefer.

Further advantages of a Community instrument as compared with an international convention are the acceleration of amendment procedures and, since it would be part of the acquis communautaire, the quicker extension to new Member States. In the past, slow ratification procedures within single Member States have sometimes unduly delayed the effect of accession conventions concluded for the extension of the Brussels Convention to new Member States.[28] As a consequence, the Commission has openly discussed sanctions for Member States which did not approve the amendments in time.[29] In a growing Community, such occurrences would become more frequent. The international treaty no longer appears to be an appropriate legal tool in a Community of 25 states.

Two other advantages of the conversion relate to the content of the instrument. A Community act would be less likely to allow reservations of Member States such as those contained in art. 22 or the protocol relating to the Scandinavian shipping laws; uniformity would thus be promoted. Moreover, the conversion would entirely shift responsibility for the consistency of conflict rules in the field of contracts to the Community. While inconsistencies in certain areas, e.g., insurance, may currently be explained by the lack of coordination between a diplomatic conference of the Member States on the one side and the Community institutions on the other, the Commission would remain as the single guard over the coherence of conflict rules. This increase in responsibility would hopefully improve the cooperation between the various departments involved.

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[26] *Giuliano/Lagarde*, Report on the Convention on the law applicable to contractual obligations: O.J. EC 1980 C 282, 41.

[27] See the motivation given by the German government in: BT-Drucks. 10/504 (supra n. 11) 76.

[28] See the Commission's critique in COM(1999)348 final of 14. 7. 1999 at 2.1, p. 4.

[29] See the answer of Commissioner Monti of 19. 11. 1996 to the European Parliament, O.J. EC 1997 C 83/85.

2. The cons. – A major argument against the conversion could be inferred from the competence of the Community under art. 65 EC. It is a matter of debate whether art. 65 is restricted to intra-Community fact situations[30] or whether it would permit the adoption of private international law acts of universal purview.[31] In its proposal for a Rome II regulation on the law applicable to non-contractual obligations, the Commission has taken a clear stand on this issue.[32] It has asserted art. 65(b) EC as the legal basis for the proposal and its own "discretion to determine whether a measure is necessary for the proper functioning of the internal market".[33] Although the Commission does not address possible restrictions of that legal basis in regard to extra-Community cases, it rejects the idea of having two separate bodies of conflict rules, one enacted by the Community for intra-Community relations, and another one adopted by the single Member States for extra-Community cases. The resulting complexity would contribute to confusion and imperil the operation of the conflict rules in legal practice.[34] These forceful arguments are fully approved by the Institute. It would follow that the enactment of a Rome I instrument could not be rejected on the grounds that it would create such a complex situation.[35]

A definite disadvantage of the conversion is the special status of Denmark under art. 69 EC and the respective protocol. Under these provisions, a Community Rome I instrument would not be binding for Denmark for the time being. The solution for this inconvenience should be found as quickly as possible by an amendment of the said protocol to the effect that Denmark – like the United Kingdom and Ireland – can declare its willingness to cooperate in the preparation of and be bound by single instruments adopted under title IV of the Treaty.

3. Conclusion. – The conclusion to be drawn from these arguments is clear: there is no viable alternative to the conversion of the Rome I Convention into a Community instrument. Given the direct application of regulations and the uniformity of their texts which, unlike directives, do not admit divergent national implementation measures, the instrument should be drafted as a regulation.

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[30] *Remien*, European Private International Law, the European Community and Its Emerging Area of Freedom, Security and Justice: C.M.L. Rev. 2001, 53–86 (at 75 seqq.).

[31] *Basedow*, The Communitarization of the Conflict of Laws under the Treaty of Amsterdam: C.M.L. Rev. 2000, 687 (at 701 seqq.).

[32] COM (2003)427 final of 22. 7. 2003.

[33] *Id.*, Explanatory Memorandum at 2.2, p. 6.

[34] *Id.*, Explanatory Memorandum at p. 10, comment on art. 2.

[35] The current proposals for a European Constitution would put an end to all doubts about Community competence. They provide that the Union will be competent to develop the judicial cooperation in civil matters having cross-border implications; as opposed to art. 64 EC, no linkage to the functioning of the internal market is required any more.

Question 3:
Are you aware of difficulties encountered because of the proliferation and dispersal of rules having an impact on the applicable law in several horizontal and sectoral instruments of secondary legislation? If so, what do you think is the best way of remedying them?

1. General considerations. – The third and the fourth question are closely related to each other: The third question refers to the relationship between Rome I and conflicts provisions contained in EU Directives that ensure the observation of the respective Directive in case of a close connection between the contract and the territory of the Member States.[36] The fourth question deals with the enforcement of a harmonized legal standard, notwithstanding the parties' choice of the law of a non-Member State, if all or the most significant elements of their contract are situated in the area of the Member States. Both the article proposed by the Commission under no. 3.1.2.2 and the conflicts rules in the Directives cited above share the common goal of protecting a substantive legal standard from being derogated from by a choice-of-law clause if the contract in question has an exclusive (question 4) or at least a close (question 3) connection with the Union territory. Consequently, a future Rome I Regulation should deal with these two aspects in a coherent and harmonious manner, although not necessarily in one and the same provision. For Directives not concerned with consumer protection, see section 4 below.
2. The current Directives. – Although the relevant consumer-protecting provisions of the Directives use basically the same technique, there are subtle terminological differences. Some provisions refer to a close connection or link with the "territory of *one or more* Member States".[37] Other provisions, though, focus on the "territory of *the Member States*".[38] The latter formulation

[36] The relevant provisions are art. 6(2) of the Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (O.J. EC 1993 L 95/29); art. 12(2) of the Directive 97/7/EC of the European Parliament and of the Council of 20 May 1997 on the protection of consumers in respect to distance contracts (O.J. EC 1997 L 144/19); art. 7(2) of the Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees (O.J. EC 1999 L 171/12); art. 12(2) of the Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC (O.J. EC 2002 L 271/16); a slightly different approach is followed by art. 9 of the Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect to certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis (O.J. EC 1994 L 280/83): "whatever the applicable law may be".

[37] Art. 12(2) Directive 97/7/EC (distance contracts); art. 12(2) Directive 2002/65/EC (financial services).

[38] Art. 6(2) Directive 93/13/EC (unfair terms); art. 7(2) Directive 1999/44/EC (consumer goods).

may give rise to doubts as to whether a close connection with the territory of just one Member State would be sufficient to trigger the rule's application. Apart from that, some provisions clearly relate to an agreement of the parties on the applicable law ("opting for the law of a non-Member State"),[39] while others simply talk of "choice of the law of a non-Member State",[40] which has been understood by some national legislators as comprising not only choice-of-law clauses, but also objective choice-of-law rules.[41] Even if these doubts could be dispelled, there is no convincing explanation for such terminological variations.

A further source of difficulty stems from the fact that the vague term "close connection" employed by the Directives has been implemented differently in the various Member States.[42] Moreover, the Directives fail to address the problem of which of the 15 or 25 domestic laws implementing the Directive's substantive rules shall be applicable: the lex causae that would govern the contract in the absence of a choice of law, as determined by the Rome Convention (arts. 4, 5), or the lex fori or a third law that is considered to be most closely connected with the contract under a specific conflicts rule implementing the Directive?

Finally, it is questionable that, according to some national conflict rules based upon the Directives, the judge may only apply the Directives' substantive provisions as implemented in the respective lex fori, even if the law chosen by the parties confers a higher degree of protection on the consumer. There is no denying the fact that such an approach avoids the difficulties inherent in ascertaining and comparing a foreign law to the lex fori, not to mention the trouble of applying it correctly. Since consumers usually sue the supplier in their home state pursuant to art. 15(1) Brussels I, they will mostly rely on their national law to substantiate their claim. Therefore, applying the lex fori will be sufficient to achieve justice in most cases. Nevertheless, one should grant the judge the option of applying a law that is more favorable to the consumer if the plaintiff insists on an application of the law chosen by the parties. The best solution seems to be a flexible wording of the relevant provision that, without mandating a comparison with regard to the favorableness of the involved laws in each case, avoids the risk of being paternalistic toward the consumer, e.g., that the consumer shall not be "deprived of" the protection of the Directives. See the answer to question 12 below for further comment.

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[39] Art. 7(2) Directive 1999/44/EC (consumer goods).

[40] E.g., art. 6(2) Directive 93/13/EC (unfair terms).

[41] E.g., the former § 12 of the German AGBG (Act on Standardized Contract Terms).

[42] For a detailed survey of the different implementations, see two recent German dissertations: *Bitterich*, Die Neuregelung des Internationalen Verbrauchervertragsrechts in Art. 29a EGBGB (2003) 522–533; *Klauer*, Das europäische Kollisionsrecht der Verbraucherverträge zwischen Römer EVÜ und EG-Richtlinien (2002) 267–330.

3. Reform of art. 5. – The obvious place for a re-codification of the consumer-protecting conflicts rules of the Directives is a reformed art. 5 of the Rome Convention. Extending the scope of art. 5 (e.g., to credit contracts) and replacing the rigid case-by-case approach of the current art. 5(2) with a more flexible term (the "direction" of the supplier's business activities, a connecting factor which is derived from art. 15[1][c] of the Brussels I Regulation) will significantly reduce the need for specific consumer-protecting conflicts rules such as those found in the current Directives. See the answer to question 12 below for further comment. Yet it has to be taken into account that the criterion of "direction" in art. 15(1)(c) of the Brussels I Regulation and the "close connection with the territory of one or more Member States" employed by the current Directives in order to trigger the mandatory application of European consumer-protecting rules are not completely synonymous. One could imagine cases in which a non-Member State supplier directs its business activities to a certain Member State (e.g., a company incorporated under Manx law and headquartered on the Isle of Man which sells merino plaids to German tourists vacationing in Spain), but not to the Member State where the consumer who purchased goods from this supplier has a habitual residence (e.g., a tourist from Sweden who just happens to join the German tourists). In that case, EC consumer protection standards would be applicable under the "close connection" standard, while they would arguably not apply under the "direction" test. It is questionable whether mobile consumers (the Swedish tourist in the example just given) should be bound by a choice-of-law clause in favor of a third-state law (e.g., Manx law) in such a case even if this would put them at a disadvantage compared to the standards achieved in Community legislation. Under art. 29a German EGBGB,[43] which codifies all consumer-protecting conflicts rules originating in EU Directives (except for art. 9 of the timesharing Directive, which is given special treatment) in a single article, a consumer contract shall be presumed to be closely connected with the territory of one or more Member States if

a) the contract is concluded following a public offer, public advertising, or similar business activities directed at the territory of one or more Member States, and

b) the consumer is habitually resident in a Member State at the time of their offer or their acceptance of the other party's offer.

Following this rule, it is not necessary that the third-state supplier directs its business activities specifically to the Member State where the consumer is habitually resident. Even in the example given here, the Swedish consumer could rely on the Directives' protection. Since the supplier's business activities are not directed toward Sweden in the given example – the Swedish tourist is merely an accidental target – transferring art. 15(1)(c) of the Brussels I Regu-

[43] See above at n. 5.

lation into the Rome I Regulation would not help the mobile consumer in such cases. In the same way, the introduction of a new rule for purely internal market cases (see question 4 below) would also not protect the consumer since the establishment of the supplier in a non-Member State creates a real foreign (non-Member State) element. However, it may be regarded as preferable to protect mobile consumers vis-à-vis third-state suppliers because they should not be penalized for exercising their right to travel within the EU by losing the protection of mandatory EU consumer-protecting standards. It may be argued that it is more in line with the spirit of the internal market that, e.g., a Swede traveling to Spain enjoys the same protection as a Spanish consumer vis-à-vis a third-state supplier even if this supplier does not target the Swedish market.

If it is considered appropriate by the Commission, a codification of this approach as a supplement to the new art. 5(2) proposed by the Institute (see question 12 below) could read as follows:

> "If a supplier residing in a non-Member State directs his business activities to one or more Member States, the choice of law of a non-Member State as the law applicable to a contract falling into the scope of such activities does not deprive a consumer who, at the time of the conclusion of the contract, is habitually resident in a Member State of the protection afforded by the relevant Directives; in this case, the provisions of the relevant Directives apply as implemented in the domestic law of the Member State in which the consumer concluded the contract."

It has to be admitted that such a rule would constitute a limited exception from the principle of bilateralism (see question 12 below). Just like the current Directives' conflicts provisions and the solution proposed by the Commission under no. 3.1.2.2 for purely internal market cases (see question 4 below), it aims at defining the scope of internally mandatory substantive law from a unilateral internal market perspective, whereas art. 5 of the Rome Convention is a multilateral conflicts rule related to the classic "inter-state" conflicts scenario. However, the specific conflicts problem raised by EU Directives – i.e., cases that are exclusively or significantly "internal" from a European perspective but "international" from a traditional conflicts perspective – has no parallels in other regionally integrated areas such as NAFTA or MERCOSUR, so that a strictly multilateral approach to this question does not seem to be warranted at the moment.

4. Directives envisaged by the new Regulation. – The Directives envisaged by the Rome I Regulation should not be enumerated because this would only lead to a frequent need for adaptation. Nor should the scope of an amended art. 5(2) be limited to those more recent Directives which include express conflicts rules; rather, the Regulation should also apply to older Directives such as those concerning sales at the doorstep or consumer credits. With regard to "unwritten" conflicts rules relating to older EU Directives, the avoid-

ance of an exhaustive "laundry list" will ensure that these Directives are treated in the same way as the new ones.

With regard to the protection of weaker parties other than consumers, the only practical example which comes to mind is the sales agent whose protection the European Court of Justice (ECJ) dealt with in its famous *Ingmar* decision.[44] The more appropriate approach to these cases seems to be an integration of commercial agents into a new art. 6(4) of the Rome I Regulation. See the answer to question 15 below for further comment. For other cases, the fundamental principle of party autonomy should only be restricted in purely domestic or internal market cases; see the answer to question 4 below for further comment. Although the Time-Sharing Directive's conflicts rule slightly differs from those found in the other Directives, a specific paragraph is not needed in a new art. 5 of the Rome I Regulation. On the insurance Directives, see the answer to question 7 below. With regard to other specific conflicts provisions contained in EU legislation, see the answer to question 5 below.

5. Proposal. – See the answer to question 12 and art. 5, below at p. 104; possibly as supplemented by the text proposed above, section 3 (see art. 5[2] 2nd phrase, below at p. 105).

Question 4:

Do you think a possible future instrument should contain a general clause guaranteeing the application of a Community minimum standard when all elements, or at least certain highly significant elements, of the contract are located within the Community? Does the wording proposed at 3.1.2.2 allow the objective pursued to be attained?

1. Purely domestic and internal market cases. – Under art. 3(3) of the Rome Convention, internally mandatory rules cannot be derogated from by a parties' choice of law if the contract to which they refer has no significant foreign element. The policy behind this approach is to prevent the parties from evading internally mandatory rules in what is for all practical purposes a purely domestic case. As the harmonization of private law has proceeded and created common minimum standards in the Community, a situation similar to that envisaged by art. 3(3) for purely domestic cases may occur where contracting parties established in different Member States choose the law of a third country, thereby evading a common EC standard. Such fact patterns are the object of the new article proposed by the Commission under no. 3.1.2.2 and

[44] ECJ 9.11. 2000, case C-381/98 *(Ingmar GB Ltd.* v. *Eaton Leonard Technologies)*, E.C.R. 2000, I-9305.

may be called purely internal market cases, i.e., cases lacking a significant connection with a non-Member State.

The rule currently found in art. 3(3) of the Rome Convention should be maintained. The Institute recommends that its technique be extended to purely internal market cases. Accordingly, the fact that the parties have chosen the law of a non-Member State, whether or not accompanied by the choice of a tribunal situated in this or another non-Member State, shall, where all the other elements relevant to the situation at the time of the choice are connected with one or more of the Member States, neither prejudice the application of internally mandatory rules contained in European Regulations nor the application of internally mandatory Member State rules insofar as they implement European Directives. In the latter case, the provisions of the relevant Directive shall apply as implemented in the domestic law of the Member State that would govern the contract in the absence of a choice-of-law clause. Although the European Union is not a state, the level of legal integration that the Member States have achieved today justifies this extension of a conflicts approach that was originally developed for purely domestic cases.

It has to be admitted that the Commission's proposal (no. 3.1.2.2 of the Green Paper) departs from the principle of bilateralism (see answer to question 12 below). Yet a strictly multilateral approach to this question does not seem to be warranted at the moment since there is no harmonization of mandatory minimum standards in other regional integration organizations such as Mercosur that could be compared to the approximation of laws under the EC Treaty.

2. Relation to consumer-protecting conflicts rules. – The protection of a binding Community standard in a purely internal market case should apply to all Regulations and Directives, not just to those protecting consumers. The rationale underlying art. 3(3) of the Rome Convention and the art. 3(4) Rome I Regulation proposed here consists in preventing the evasion of binding law in cases without a significant link to countries where that binding law is not in force; whether the party protected by a binding law in such a situation is a consumer or not is not decisive.

3. Proposal. – See art. 3(4), below at p. 101.

Question 5:
Do you have comments on the guidelines with regard to the relationship between a possible Rome instrument and existing international conventions?

1. Conflict with other conflicts conventions. – By its art. 21, the Rome I Convention "shall not prejudice the application of international conventions to which a Contracting State is a party". This article refers to international agreements that lay down rules of private international law concerning matters governed by Rome I. If it is incorporated in its present form in a future Regulation, it will be possible for Member States to continue applying conflict rules contained in international conventions to which they are parties. This would avoid conflicts between the rules in those conventions and the rules in the Community instrument. Furthermore, Member States would not have to denounce such conventions. This solution has been adopted by the Commission in art. 25 of the final proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations[45] (Rome II) and is also envisaged in the Green Paper for the Rome I Regulation.

The Institute deplores this decision and urges the Commission to reconsider it. The Commission's intention to unify the conflict of laws in the Union is in fact undermined if international conventions are given priority even in intra-Community relations. Member States that have ratified the Hague Convention on the Law Applicable to Traffic Accidents[46] may leave aside the Rome II Regulation as far as traffic accidents – in practice the most numerous cases of cross-border non-contractual liability – are concerned. Member States that are not party to that Convention will have to apply Rome II. Given the present wording of the proposal of art. 25 Rome II, they would not be allowed to switch to the Hague Accident Convention by a subsequent accession to that instrument. While intending to harmonize the conflict of laws, the Commission thus helps to perpetuate the existence of two distinct sets of conflict rules within the Community.

A similar dilemma would arise in the field of contracts if art. 25 of the Rome II proposal were to be adopted in Rome I. The most significant conflicts conventions in this field are the Hague Convention on the Law Applicable to Agency of 14 March 1978[47] (a) and the Hague Convention on the

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[45] See supra at n. 3.

[46] Convention on the Law Applicable to Traffic Accidents, Done at the Hague on 4 May 1971, in: Hague Conference on Private International Law, Collection of Conventions (1951–1980) 142.

[47] The text of the convention is published in English and French in: RabelsZ 43 (1979) 176 and available online under the following address: <http://www.hcch.net/e/conventions/text27e.html>; Member States of the Hague Conference which are Contracting States to or have signed this Convention are: Argentina, France, the Netherlands, and Por-

Law Applicable to International Sales of Goods, concluded on 15 June 1955;[48] these are in force in some Member States. Under the Hague Agency Convention, the law applicable to the contract between the agent and the principal is – in the absence of choice of law – the law of the agent's registered office or habitual residence. Thus, we find the same rule as in art. 4(2) Rome I. As to questions relating to the agent's authority, the rules of the Hague Agency Convention differ in certain points from the Proposal made in this paper (see additional comment 22 below). The basic conflict rules of the Hague Convention on the Law Applicable to International Sales of Goods and of Rome I are also the same. This is true for both the priority of choice of law[49] and the application of the seller's law in the absence of choice.[50] However, in contrast to Rome I (art. 4[2]), the law of the country applies where the buyer's habitual residence is situated if the buyer's order is given and received by the seller or the seller's agent in the buyer's country (see art. 3[2]). Furthermore, the Hague Convention does not offer the same consumer protection as Rome I by its art. 5. The application of mandatory consumer law is possible only as a matter of public policy. Under a Declaration of the 14th Session of the Hague Conference, the Hague Convention "does not prevent States Parties from applying special rules on the law applicable to consumer sales".[51] Yet that application is not ensured and it is unclear which conflict rules would refer to the provisions on consumer protection. The priority granted by Rome I to the Hague Convention thus amounts to both uncertainty and an intra-Community split of conflict rules.

Such an effect should be avoided by a rule which affirms the precedence of Community law over treaties concluded by the Member States inter se. Thus, the conventions should not be applicable in intra-Community cases. In relation to third states, however, the conventions would apply because the future regulation would not force the Member States to breach their agreements with third states.[52]

2. Conflicts with substantive law conventions. – Numerous international conventions in the field of contractual matters unify the substantive law; for example, the CISG[53] or the CMR[54] are both in force for many, if not all, Member

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tugal (a full status report is published on the homepage of the Hague Conference on Private International Law: <http://www.hcch.net/e/status/stat27e.html>).

[48] The text is available under the following address: <http://www.hcch.net/f/conventions/text03f.html>; Member States of the Hague Conference which are Contracting States to or have signed this Convention are: Belgium, Denmark, Finland, France, Italy, Luxembourg, the Netherlands, Norway, Spain, Sweden, and Switzerland, see <http://www.hcch.net/e/status/stat03e.html>.

[49] See art. 2 of the Hague Convention and art. 3 Rome I.

[50] See art. 3(1) of the Hague Convention and art. 4(2) Rome I.

[51] RabelsZ 46 (1982) 798.

[52] Solution of our Alternative Proposal as to Rome II, cf. RabelsZ 67 (2003) 55.

[53] Convention on the International Sale of Goods, done at Vienna on 11 April 1980

States. The Giuliano/Lagarde report does not clarify whether those conventions are within the scope of art. 21 Rome I. However, this question can be answered by applying common principles: The application of conflict rules depends on the existence of a conflict of laws ("Kein Kollisionsrecht ohne Rechtskollision").[55] Thus, the question of whether a convention on substantive law applies is not a problem at the level of the conflict of laws. Since international uniform law prevails over conflict rules, this question has to be answered before searching for the relevant conflict rule. It could, however, be argued that once Rome I is transformed into a regulation it would take priority, as part of Community law, over national law, including international conventions implemented in the national legal systems of the Member States but not in Community law. In this perspective, a Community instrument on the conflict of laws would supersede national rules (including those of substantive law originating in conventions) which deal with cross-border relations. The Institute takes the view that the latter approach is fallacious and should be excluded by a special rule that provides for the precedence of uniform law conventions that are applicable in the circumstances of the case.

A problem arises in relation to those conventions that predominantly contain substantive law but also some conflict rules (see, e.g., art. 29 CMR). According to the Institute's Proposal (above, section 1), it could be argued that such isolated conflict rules are inapplicable in intra-Community relations. However, the composition of a uniform law convention of substantive rules and conflict rules must be seen as a whole. Therefore, the general priority accorded by the Institute's Proposal, art. 21(1), to uniform law conventions should also extend to ancillary conflict rules of that convention.

It follows from our remarks to question 6 (see below) that arbitration in the first place will be governed by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, but in a subsidiary manner also by the Rome I Regulation. The proposed extension of the Regulation to arbitral matters makes it necessary to guarantee the priority of the New York Convention, art. 21(1)(b) of our Proposal.

3. Relation to conflict rules laid down in other Community law instruments. – Question 5 does not address another and related problem: the relationship between

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(available under: <http://www.uncitral.org/english/texts/sales/CISG.htm>) ratified by all the Member States except for Ireland, the United Kingdom, and Portugal (cf. <http://www.uncitral.org/english/status/status-e.htm>).

[54] Convention on the Contract for the International Carriage of Goods by Road, done at Geneva on 19 May 1956; see *Zweigert/Kropholler*, Sources of International Uniform Law II: Transport Law (1972) 524; ratified by all the Member States of the EU, see Münchener Kommentar zum HGB*(-Basedow)* VII (1997) CMR Art. 42 no.1.

[55] *Zweigert/Drobnig*, Einheitliches Kaufgesetz und internationales Privatrecht: RabelsZ 29 (1965) 147.

a future Rome I regulation and other instruments of secondary law that also contain conflict rules on contractual obligations.

Currently, according to art. 20(1) Rome I, choice-of-law provisions contained in acts of the European Communities relating to contractual obligations shall not be affected by the Convention. At present this rule only corroborates the precedence often affirmed by the Court of Justice of Community law (and the national laws enacted for its implementation) over the Convention, which is part of the national law of the Contracting States. If the Convention were transformed into a Regulation, the rule would lose its declaratory character and express the general principle of lex specialis derogat legi generali in relation to conflicting Community acts. The final Rome II proposal also adopts this approach in its art. 23(1) 1st indent. In addition, this rule deals with other aspects related to the priority of Community law. The second indent refers to the safeguard of similar minimums of Community law, including those mentioned by the Commission in question 4 of the Green Paper. The third indent underlines that Community law prevails over national law. On all three points the Institute proposes the same solution for a future Rome I Regulation.

Paragraph 2 of the final Rome II proposal excludes any interference with Community instruments that purport to guarantee the "country-of-origin" principle. This rule predominantly makes sense in non-contractual relations in which the suppliers of goods or services cannot influence the applicable law before the occurrence, giving rise to liability. This is different in contractual relations: Here, the choice of law permits the parties to escape from rules that hinder the free cross-border flow of resources and which might therefore come into conflict with the basic freedoms.[56] Nevertheless, the Institute recommends following art. 23(2) of the Rome II proposal in view of cases where the application of a mandatory contract law other than the one chosen by the parties is required (see, e.g., arts. 5 and 6 of Rome I). Moreover, the synchronization of the Rome I and II Regulations would facilitate their consolidation in one instrument at a later stage.

Both paras. of art. 23 Rome II Proposal refer to acts of the Community, including Directives that lack a direct horizontal effect. Thus, they are not applicable as such in private law litigation. The Commission should consider adding a reference to the national provisions adopted for the implementation of the Directives.

4. Proposal. – See art. 20, below at p. 95, and art. 21, below at p. 116.

[56] See ECJ 24. 1. 1991 (supra n. 24) n. Recital 15.

Question 6:
Do you think one should envisage conflict rules applicable to arbitration and choice of forum clauses?

"Arbitration agreements" and "agreements on the choice of court" are expressly excluded from the scope of the Rome Convention (art. 1[2][d]) because the matter was considered too complex to be regulated in this context. The main arguments for the exclusion were the difficulty of separating the contractual from the procedural aspects of those agreements and the existence of other international conventions on the matter.[57] However, in 1986 when the German legislators incorporated the Rome Convention into German law, no exception for arbitration and forum clauses was made. This was due to the fact that the German "Bundesgerichtshof" regarded such clauses as "substantive contracts on procedural matters" with the consequence that the ordinary choice-of-law rules were applied to discover the law applicable to those contracts.[58] This raises the question of whether the scope of the future Regulation should also be extended to those agreements.

1. Arbitral agreements. – As far as arbitration is concerned, the matter is regulated by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which today is in force in the overwhelming majority of states all over the world, having been ratified or adhered to by 133 countries. Contrary to its title, this Convention contains in its art. II a special rule about the formal validity of the arbitration agreement itself, which applies not only in the context of recognition and enforcement of the award, but similarly in all previous phases of arbitral or judicial proceedings. Likewise, the prevailing opinion infers from art. V(1)a of the Convention a general conflict rule regarding the law applicable to the arbitral agreement. Therefore, in the Contracting States of this convention, there is normally no need to recur in this respect to other conflict rules.[59] Only when the arbitral agreement does not comply with the formal requirements of art. II does the question remain as to whether it could be validated under the provisions of a more liberal national law, which then has to be determined.[60]

All Member States of the European Community have ratified or adhered to the New York Convention; the same is true for the states which will become members in the near future. Some of the states have made use of the reservations envisaged in art. I(3) of the Convention, i.e., they will apply the Convention only to litigation of a commercial nature or to arbitral proceedings

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[57] *Giuliano/Lagarde* (supra n. 26) 11–12.

[58] See the leading case BGH 29. 2. 1968, BGHZ 49, 384 = IPRspr. 1968–1969 no. 199 with further references.

[59] See *van den Berg*, The New York Arbitration Convention of 1958 (1981) 56 seq., 170 seq., 282 seq.

[60] See BGH 21. 9. 1993, IPRspr. 1993 no. 194 = WM 1993, 2121 (2122).

situated in the territory of another Contracting State. Thus, there might be a few remaining cases that are not covered by the scope of the Convention. To withdraw such reservations would be a better solution instead of creating new rules for that purpose in the Rome I Regulation. However, the gaps may be filled by submitting the arbitration agreement to the general conflict rules concerning contracts.[61] It could therefore prove useful to delete the exclusion contained in art. 1(2)(d) of the Rome I Convention as far as arbitration agreements are concerned, provided that the priority of the New York Convention is guaranteed (see question 5 above).

2. Choice-of-forum clauses. – Regarding choice-of-court agreements, the European Community has established its own material rules that are applicable when at least one of the parties is domiciled and the chosen court is situated in a Member State (see art. 23 of Reg. 44/2001). In the area where art. 23 applies, it determines not only the formal validity of the forum clause, but implicitly also such matters as consent, interpretation, submission to general conditions of contract, separability of the clause vis-à-vis the main contract, and control of abusive clauses.[62] Since art. 23 must be considered as an autonomous legal basis for choice-of-forum agreements,[63] there are only few matters left to the lex causae to be determined by the general conflict rules on contracts. This refers to capacity or mental defects in the formation of the agreement – such as mistake, deceit, or duress – although in practice these irregularities scarcely have any impact in this context. On the other hand, there are cases in which the binding force of a forum clause depends on the question of whether the basic contract that contains the forum clause has been validly renewed[64] or whether a third party has succeeded to the contractual rights and obligations of the original party.[65] Yet in such a constellation, the effect of the forum clause depends upon the effect of the main contract itself. Therefore, the general conflict rules directly apply to determine the respective law of obligations. This obviously includes the provisions of the Rome Convention (Regulation), whether forum clauses as such are excluded or not.

While there is some controversy about the actual scope of art. 23 of Reg. 44/2001, it is clear that it does not cover all forum agreements, in particular when the parties have chosen a court outside the Community. In these re-

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[61] For details, see *Basedow*, Vertragsstatut und Arbitrage nach neuem IPR: Jb. Prax.Schiedsg. 1 (1987) 3 seqq.

[62] In this respect, see also ECJ 27. 6. 2000 – joined cases C-240/98 to C-244/98 *(Océano Grupo Editorial SA* v. *Roció Murciano Quintero; Salvat Editores SA* v. *Jsé M. Sánchez Alcón Prades et al.)*, E.C.R. 2000, I-4941, applying the Directive 93/13 on unfair terms in consumer contracts to forum clauses.

[63] See *Kropholler*, Europäisches Zivilprozeßrecht[7] (2002) 280 seqq., 285.

[64] ECJ 11. 11. 1986 – case 313/85 *(IVECO Fiat SPA* v. *VAN HOOL SA)*, E.C.R. 1986, 3337.

[65] ECJ 9. 11. 2000 – case C-387/98 *(Coreck Maritime GmbH* v. *Handelsveem BV et al.)*, E.C.R. 2000, I-9337.

maining cases, national law applies to determine the validity of a specific forum clause. It would be of great value if national law in this area could be replaced by uniform rules at the European level, but the Rome I Regulation is not the appropriate place to develop such rules. Rather, that should be done in the context of Reg. 44/2001, e.g., by an appropriate extension or amendment of art. 23. It would be difficult to understand why the criteria set out in art. 23, which have already been extended to some non-Member States by art. 17 of the Lugano Convention, could not equally apply to the choice of fora located in other third states.[66] If this solution were adopted, there would be no need for a further conflicts rule. However, such reform must also take into consideration the actual work of the Hague Conference and must look in this context at the attitude of the states outside of the Community.

As long as art. 23 remains unchanged, the relation between the national provisions on forum clauses and the general conflict rules on contracts has to be defined. In Germany, the opinion of the Bundesgerichtshof that agreements on the choice of forum are subject to the conflict rules on contracts is a controversial issue. But it is unanimously held that in this context, priority must be given to the special provisions of the German legislation concerning forum clauses. In this respect, the Bundesgerichtshof has confirmed that the formal validity of the forum clause is to be judged in accordance with § 38 ZPO (German Code of Civil Procedure), regardless of the corresponding conflicts rule regarding the formal validity of contracts.[67] In the same way, the general provisions of the future Rome I Regulation should not apply to overrule the more specific regulations of national procedural law. On the other hand, as far as there is no such regulation, the general conflict rules have been extended to forum clauses, e.g., in matters of interpretation, where the law of the main contract applies.[68] There are some cases in which also the material validity of a forum clause has been judged by the lex contractus, regarding such indispensable requirements as the legibility of the clause[69] or the determination of a specific court.[70] But it can be doubtful whether the application of the lex contractus in such cases is really justified. The future Rome I Regulation should not prevent national law from developing more adequate solu-

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[66] See *Samtleben*, Europäische Gerichtsstandsvereinbarungen und Drittstaaten – viel Lärm um nichts?, Zum räumlichen Anwendungsbereich des Art. 17 I EuGVÜ/LugÜ: RabelsZ 59 (1995) 670 (710 seqq.) with further references.

[67] BGH 17. 5. 1972, BGHZ 59, 23 = IPRspr. 1972 no. 140; see also 24. 11. 1988, IPRspr. 1988 no. 165 = NJW 1989, 1431 (1432).

[68] See BGH 21. 11. 1996, IPRspr. 1996 no. 160 = NJW 1997, 397 (399) with further references.

[69] BGH 30. 5. 1983, IPRspr. 1983 no. 128b = NJW 1983, 2772 (2773); 15. 12. 1986, IPRspr. 1986 no. 128b = NJW 1987, 1145.

[70] BGH 24. 11. 1988, IPRspr. 1988 no. 165 = NJW 1989, 1431 (1432); 18. 3. 1997, IPRspr. 1997 no. 142 = NJW 1997, 2885 (2886).

tions. Therefore, the exclusion contained in art. 1(2)(d) of the Rome Convention should be maintained in respect to forum clauses.

3. Conclusion. – The possible scope of the future Regulation with regard to arbitration clauses is very limited. Arbitration is widely covered by the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the European arena, the application of the Convention is limited by some minor reservations in only a few states. In cases in which the Convention does not apply, the general conflict rules concerning contracts can serve as a guideline for arbitral agreements. Therefore, the exclusion of these agreements from the scope of the Regulation does not seem justified, notwithstanding the priority of the New York Convention.

Agreements on the choice of forum in the European arena are subject to Reg. 44/2001, which covers only part of them, while in the remaining cases national law applies. A comprehensive solution should be developed in the framework of Reg. 44/2001, in harmony with the corresponding work of the Hague Conference. Only beyond the scope of application of the Reg. 44/2001 may the general conflict rules on contracts have an impact on forum agreements. Yet since those rules were not especially shaped with a view to procedural matters, they should not overrule special provisions of the national law created for this purpose. Therefore, the exclusion of forum agreements should be upheld in the Rome I Regulation. Even so, its provisions might be applied per analogy where the relevant national law does not contain adequate solutions.[71]

4. Proposal. – See art. 1(2)(e) (art. 1(2)(d) of the Convention), below at p. 98.

Question 7:

How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?

1. Need for a coherent set of rules. – The current European conflict rules on insurance contracts are overly complex, inconsistent, and non-transparent. There is no other field of contract law where the national judge of a Member State has to apply three bodies of different conflict rules that form part of the private international law of the forum: Rome I if the risk is situated outside the European Union (hypothetical situation [a] indicated in the Com-

[71] Similarly, the Rome Convention has been applied as persuasive authority in cases which were not covered or even expressly excluded from its scope of application: ECJ 26. 5. 1982 – case 133/81 *(Roger Ivenel* v. *Helmut Schwab)*, E.C.R. 1982, 1891 (1900); BGH 15. 12. 1986, BGHZ 99, 207 (209 seq.) = IPRspr. 1986 no. 128b.

mission's Green Paper[72]); arts. 7 and 8 of the Second Non-Life Insurance Directive 88/357[73] and art. 32 of Directive 2002/83 on life assurance[74] if both the risk is situated and the insurer established within the EU (situation [b]); and national conflict rules if a risk situated within the EU is covered by an insurer established in a third country (situation [c]). In intra-Community cases (situation [b]), the ascertainment of the applicable law is further complicated by an incomplete harmonization: the Directives basically allow for a free choice of law only in large-risk insurance and refer to the law of the policyholder's habitual residence in small-risk and life insurance; however, if that law permits a free choice of law, the courts of other Member States have to respect that choice as well. The borderline between small and large risks is not identical with that between consumer and professional risks. Small risks include a great number of smaller commercial risks, while large risks also encompass certain consumer risks (e.g., the insurance of a sailing boat).[75] Reinsurance is subject to Rome I, regardless of where the risk and the re-insurer's establishment are situated.

There is no consistent rationale for this mess of conflict rules; it can only be explained from a historical perspective. When the Community started to implement the common insurance market, it focused on economic regulations of products, premiums, investment policies, etc., in regard to intra-Community fact situations; the proposal for a harmonization of substantive insurance contract law made in this context[76] entailed the exception of art. 1(3) Rome I. When the harmonization of substantive law turned out to be too difficult to be realized before the date fixed for the implementation of the internal market, the Commission switched in the mid-1980s to the harmonization of conflict rules with the same scope, i.e., in respect to intra-Community cases. At that time, the exception to art. 1(3) had already been approved; moreover, insurance policies of third-state insurers relating to risks situated in Member States did not interest the Commission in those years. The resulting variety of conflict rules thus partly follows from an outdated concept of the internal market confined to intra-Community cases, and partly from a lack of coordination between the Commission and the expert group that prepared the Rome I Convention.

The inconsistencies of the various conflicts regimes extend to the content of the rules. Thus, a British insurer may chose the applicable law in a hull insurance policy sold to the owner of a sailboat registered in Denmark under

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[72] COM(2002)654 final of 14. 1. 2003, p. 21.

[73] O.J. EC 1988 L 172/1 as amended.

[74] O.J. EC 2002 L 345/1 (consolidated version).

[75] See art. 7(1)(f) of Dir. 88/357, which refers to the enumeration of large risks in art. 5(d) of Dir. 73/239/EEC, O.J. EC 1973 L 228/3 as amended.

[76] See the proposal in O.J. EC 1979 C 190/2.

the conflict rules of Directive 88/357 relating to large risks.[77] If the boat were registered in Croatia, the case would concern a risk situated outside the Community[78] and therefore would fall outside the scope of the conflict rules of the Directives; it would be covered by the Rome I Convention, which does not distinguish small and large risks, but would protect the boat owner under the special conflicts rule for consumer contracts contained in art. 5. It is difficult to see why a consumer domiciled in a third state should be afforded a better protection than a consumer domiciled within the Union. Another inconsistency relates to the demarcation of the area where free choice of law is admitted. If a professional or small trader that is established in a Member State is protected under Directive 88/357 against the choice of the insurer's law in an intra-Community case, why should it make a difference for that insurance policy if the policyholder moves the business to Switzerland? Under the present complex regime, the applicable conflict rules would in fact change and would allow free choice. Such examples clearly show that the current situation is untenable. It would be outright contradictory and arbitrary if the Community were responsible for the various conflicts regimes, which it would be after the conversion of the Rome I Convention into a Community instrument. Therefore, the opportunity of that conversion must be seized to restore both consistency and transparency to the respective conflict rules.

2. Guidelines for a new conflict rule on insurance contracts. – It would be an oversimplification to only delete paras. 3 and 4 of art. 1. This would extend the structures and rules of Rome I to insurance contracts, although these have been subject to completely different rules and structures until now. First, Rome I is based on the priority of party autonomy, which is limited only by way of exception (see in particular arts. 5 and 6). There is an inverse relationship between the rule and the exception under the insurance Directives: their basic conflict rule is the application of the policyholder's law and the admission of the parties' free choice only in exceptional cases, viz. in respect to large risks and some other marginal situations. It makes sense that the free choice of law is much more restricted here than it is in consumer contracts, for example. Mandatory provisions affecting all stages of the contract are much more numerous in insurance law than in consumer law, where most of them only concern the stage of formation. Therefore, it is difficult to conceive the life of an insurance contract subject to a law other than that national law whose mandatory provisions would be applicable anyway under a contract rule tailored on the model of art. 5. The law mixture envisaged by art. 5 and art. 6 should a priori be excluded for insurance contracts.

[77] See the Danish Højesteret 31. 3. 1998, UfR 1998.723, where the choice-of-law clause was proposed by the English insurer only after the conclusion of the contract and therefore held to be invalid.

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

Another structural difference between Rome I and the Directives relates to the demarcation between the sectors eligible for free choice of law and the sectors subject to some kind of state intervention. Under art. 5 Rome I, the free choice of law – which in practice usually amounts to the application of the insurer's law – would be allowed for all policies contracted for non-private purposes, even if the policyholder runs a small or medium-sized enterprise. The Directives reduce this sphere of free choice by defining the so-called "large risks" in a more restrictive way, in particular by requirements as to the policyholder's balance-sheet total, its net turnover, and its average number of employees.[79] This divergent demarcation is the result of a long political debate and reflects a compromise that takes account of the particular non-transparency of insurance contracts. It should be respected in the conflict of laws as it was respected in the context of jurisdiction, where choice-of-forum clauses in insurance matters are equally limited to large risks (see art. 14 no. 5 Reg. 44/2001).

The structural differences suggest that a Rome I Regulation should contain a special conflicts rule on insurance contracts. Departing from the Directives, the Commission should aim at the consolidation, completion, simplification, and extension to extra-Community cases of the existing conflict rules. These are the objectives pursued by the Proposal of the Institute, while a reform of the main content of those rules appears less urgent. The Proposal affirms the free choice of law for re-insurance and large-risk insurance; the removal of the exception contained in art. 1(3) and the proposed art. 4a(4) in combination amount to the application of art. 3 Rome I; thus, art. 7(1)(f) Dir. 88/357 and art. 1(4) of the Rome Convention are preserved. In a similar way, art. 4a(3) regarding compulsory insurance essentially incorporates the present practice which the Member States have developed on the basis of art. 8(4)(c) Dir. 88/357.

3. Choice of law in small-risk and life insurance. – For small-risk insurance and life assurance, both Directives allow for a limited choice of certain national laws if the case presents particular aspects. These options have been consolidated in art. 4a(2) of the Max Planck Proposal. Thus, lett. a) allows the choice of the law of the country in which the risk or a part of the risk is situated; this rule is adapted from art. 7(1)(b) and (c) Dir. 88/357. Unlike the previous rule of art. 7(1)(c), the Proposal is not limited to the insurance of commercial, industrial, or professional activities; a consumer might also want to insure risks situated in several states under one policy, which would imply the admission of choosing one of the national laws involved. In accordance with art. 1(3) 2nd sentence, the situation of the risk should be determined on the basis of the lex fori, which must reflect art. 2(d) Dir. 88/357 in all Member States. The rule of lett. b) relates to the coverage of risks that materialize in a given state; it re-

[79] See art. 5(d)(iii) of Dir. 73/239/EEC, O.J. EC 1973 L 228/3 as amended.

produces art. 7(1)(e) Dir. 88/357. A choice limited to the policyholder's national law in life assurance is now laid down in art. 32(2) Dir. 2002/83 and should be incorporated in lett. c). Concerning travel or holiday risks of a short duration, the present definition of the situation of the risk contained in art. 2(d) 3rd indent amounts to the policyholder's right to choose the applicable law by taking out the policy in the respective country. It serves the interests of transparency to codify this rule as an explicit admission of a limited choice of law (see lett. d)). The period of four months of the Directive has been extended to six months in accordance with the period established for short-term tenancies in art. 22 no. 1, 2nd sentence Reg. 44/2001 and recommended in art. 4(3) of the Institute's Proposal.

As pointed out above (section 1), the insurance Directives have not fully harmonized the conflict rules relating to insurance contracts. In particular, no common rule on the extent of choice of law in small-risk and life insurance could be agreed upon. The compromise laid down in both Directives provides that all Member States have to respect a choice of law not covered by the conflict rules of the Directive if those conflict rules refer to the law of a Member State which allows the choice made by the parties in the case before the Court.[80] Some Member States such as Austria,[81] England,[82] and arguably Italy[83] do allow a wider choice of law than the Directives, while other Member States have been much more restrictive (see, e.g., the laws of Belgium,[84] Germany,[85] France,[86] or Spain[87]). The present system appears to be incompatible with the exclusion of renvoi in art. 15 Rome I. Moreover, its incorporation into a Community instrument based on art. 65 EC would not promote "the compatibility of the rules applicable in the Member States concerning the conflict of laws" as required by that Treaty provision, but would perpetuate existing differences. A future Rome I Regulation should therefore overcome the existing divergences.

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[80] See art. 7(1)(a) 2nd sentence and art. 7(1)(d) Dir: 88/357; art. 32(1) 2nd sentence Dir. 2002/83.

[81] §5 Bundesgesetz über internationales Versicherungsvertragsrecht für den Europäischen Wirtschaftraum, (österr.) BGBl. 1993/89.

[82] For the common law, see *Clarke(-Purves)*, The Law of Insurance Contracts[4] (2002) 60 at no. 7.

[83] See art. 122 of Decreto legislativo 17. 3. 1995 n. 175, Gazz. Uff. 18. 5. 1995 Suppl. ord. no 114 and – in respect to life insurance – art. 108 of Decreto legislativo 17. 3. 1995 no. 174, Gazz. Uff. 18. 5. 1995 Suppl. ord. no. 114. Both provisions allow the free choice of law for risks situated in Italy, but reserve the application of certain other legal norms. For non-Italian risks they simply refer to Rome I.

[84] See art. 28ter Wet betreffende de controle der verzekeringsondernemingen as amended by K.B. 22. 2. 1991, Belg. Staatsbl. of 11. 4. 1991.

[85] See art. 9 EGVVG (Introductory Act to the Act on Insurance Contracts).

[86] See art. L 181–1 Code des assurances.

[87] See arts. 107–108 Ley 50/1980 del Contrato de seguro.

The Institute, opting for the more restrictive alternative, recommends the abandonment of the indirect choice of law for two reasons. First, it has not contributed to the implementation of the internal market in the form of cross-border business. The insurance industry has not made use of the existing liberties. German insurers have not targeted customers domiciled in England or Austria, although the present legal framework would have enabled them to subject the ensuing contracts to German law. Apparently they are afraid of the mandatory provisions lurking everywhere in insurance contract law. It follows that the internal insurance market requires some kind of substantive harmonization and that choice of law will not do.[88] Second, given the jurisdiction vested in the courts of the policyholder's country under arts. 9 seqq. Reg. 44/2001, the choice of foreign law in a substantial number of contracts, even if amounting to only a few percent of the market, would seriously affect the judiciary and the legal services in the host country. Consumers would be deterred from the enforcement of their rights by the higher costs of advice on foreign law. In fact, the synchronization of jurisdiction and applicable law is indispensable for them and for the operation of the judicial system.

4. Proposal. – The Institute recommends the deletion of art. 1(3) and (4), and the inclusion of a new conflict rule on insurance contracts. It should be placed between the general rules of arts. 3 seq. and the conflict rule on consumer contracts in art. 5 in view of its scope, which would cover both consumer risks and some commercial risks. See art. 4a, below at p. 103.

Question 8:
Should the parties be allowed to directly choose an international convention, or even general principles of law? What are the arguments for or against this solution?

1. Complementary and substitutional choice of law. – The prevailing view accepts the choice of the applicable law by the contracting parties insofar as it refers to the law of a state. It is also generally acknowledged that they may choose a body of non-state law such as the Principles of European Contract Law (hereafter EP) or the UNIDROIT Principles of International Commercial Contracts (hereafter UP) *within the limits of the applicable law*, i.e., as a complement of its rules. But it is in dispute whether they can choose such Principles *instead* of the law of a state in proceedings to be conducted in state courts (see 3 below). A similar question relates to international conventions in certain circumstances. If they are binding on the court and are applicable to a case, there

[88] *Basedow*, The Case for a European Insurance Contract Code: J.Bus.L. 2001, 569 seq.; *id.*, Insurance contract law as part of an optional European Contract Act: ERA-Forum 2/2003, 56–65.

is no need for choice. But if a convention has not been ratified by the forum state and/or does not apply to a given case under its own rules, the parties may wish to agree on that convention as the applicable law. That agreement could be ineffective if it merely complements the state law that governs the contract and if that law contains (mandatory) provisions which do not admit derogation. To give an example: a ship-owner established in a Member State might wish to subject a cabotage transport between two parts of another Member State to the Hague Visby Rules, which may be irreconcilable with the cogent shipping law of the host Member State. Again, that problem could be overcome if the choice of the convention *replaces* the otherwise applicable law (see 2 below). The following remarks will only deal with the latter type of choice, which may be called a substitutional choice of law.

2. International conventions. – The parties' freedom to choose the law applicable to their contract is one of the guiding principles of international contract law and forms the basis of art. 3(1) Rome I. According to this principle, the parties of cross-border contracts may choose the law of any country. It is not required for the contract to have any relation to the law chosen. If the parties are allowed to select a national legal order, however distant, as binding law, why should they not be permitted, in place of a national law, to choose an international convention? In contrast to national laws whose regulations are designed for an internal market and which are not adapted to the particularities of cross-border transactions, international conventions are specifically tailored to the needs of international trade. Furthermore, they are negotiated under the auspices of international organizations with the participation of many states, resulting in a balance of interests. Moreover, difficult questions about which countries' national law would apply will no longer arise, and increasing predictability in international transactions will ensue. The recognition of the freedom to choose international conventions is an appropriate instrument to guarantee legal certainty in international trade. Finally, the choice of an international convention could provide further helpful options to the parties in situations where the parties are unable to agree on a specific national law to govern their contract.

A counter-argument frequently presented in this context is the reference to a state's express rejection of an international convention or a country's reservation on some of its provisions. However, this refusal normally only means that the state disapproves of the convention being applicable ipso iure, i.e., by virtue of it being the general rule for all cases within its scope of application. It normally does not imply a rejection of the convention being applicable by virtue of the parties' express will contained in a choice-of-law clause. A further concern brought forward against a parties' choice of conventions is the fragmentary character which conventions normally have as compared to the all-embracing national law. However, the technique of filling gaps in conventions should be familiar to judges from the application of other conventions

which their country has ratified; if judges cannot fill a gap by autonomous interpretation of the convention, they will resort to the national law applicable under art. 4. A final remark should address the application of conflict rules contained in conventions chosen by the parties. It might be argued that the exclusion of renvoi provided for in art. 15 might equally foreclose the application of conflict rules in international conventions. It appears, however, that if an international convention is chosen, the provision of art. 15 is not applicable. This results already from the wording of this provision that presupposes the application of "the law of any *country*". Moreover, the choice of an international convention refers to the instrument as a whole. In other words, the parties also choose all of its conflict-of-law provisions, which are specifically tailored to the subject matter and any remaining gaps. On these grounds, the Institute recommends granting the right to the contracting parties to choose international conventions as the applicable law.

3. General Principles of Law. – The reason underlying the principle of the parties' freedom to choose the applicable law also supports the possibility to choose General Principles of Law. If they are free under art. 3(1) to choose any national law, however distant it might be, they should also be allowed to choose a non-state law that in their view suits their economic or legal needs better than the otherwise applicable national law.

A strong objection often raised against such a choice of law concerns the uncertainty and incompleteness of the Principles. It is argued that only rules designed by national legislators are sufficiently certain and complete to satisfy constitutional demands. However, this argument does not apply to the European and the UNIDROIT Principles, because they embrace almost the entire field of contract law that forms the scope of the applicable contract law under art. 10. They contain a full-fledged and clear code of conduct and provide for a degree of density in the regulated areas that reaches farther than some European codifications of private law; even national legal systems do not always warrant completeness. If a question that is not envisaged in the Principles comes up, the judge has to fill the gap by interpretation of the Principles; otherwise art. 4 determines which national law is to be applied to fill the gap.

Furthermore, it is argued that the Principles cannot provide for a fair balancing of interests. But the European and the UNIDROIT Principles were not drafted by businessmen in order to further their own interests. On the contrary, they are the achievement of years of comparative work of judicial experts conducted in the framework of impartial organizations. In addition, the European and the UNIDROIT Principles even provide a set of mandatory rules, in particular the principle of good faith and fair dealing (art. 1.7 UP resp. art. 1:201 EP); the avoidance of contracts because of fraud (art. 3.8 UP resp. art. 4:107 EP), threat (art. 3.9. UP resp. art. 4:108 EP), or gross disparity (art. 3.10 UP resp. art. 4:109 EP); and the substitution of prices whose determination is manifestly unreasonable (art. 5.7[2] UP resp. art. 6:104 EP) or the

reduction of the agreed payment of a grossly excessive amount of money promised in case of non-performance (art. 7.4.13[2] UP resp. art. 9:509[2] EP). It is by no means clear that the protection granted by these provisions falls short of that accorded by national law. Whatever the level of protection may be, the safeguards contained in Rome I should not be forgotten: mandatory provisions which limit the parties' choice of law under art. 3(3), arts. 5, 6, or 7 will also be enforced against the choice of General Principles. Finally, as a further safeguard mechanism, according to art. 16, the application of a rule of the applicable law may be refused if such application is manifestly incompatible with the public policy (ordre public) of the forum. This implies the need for a slight change of art. 16.

On these grounds, the Institute recommends granting the right to choose General Principles as the applicable law. But as shown, they have to comply with certain requirements. The respective body of principles has to be created by an independent, impartial, and neutral body; its content has to be balanced and protected against evasion and abuses by certain mandatory rules; and it must regulate the rights and duties in a fairly comprehensive way. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law fulfill these conditions. It is therefore submitted to identify them as examples in the text of the Regulation. Where the Principles are amended, their choice may give rise to the question of which version has to be applied. This is a matter of contractual construction in the first place. Moreover, the drafters of such amendments are encouraged to take this issue into account and adopt appropriate inter-temporal provisions.

In the future, these considerations may also apply to a new optional instrument of European contract law which is envisaged by the Commission in the "Action Plan"[89] and which may eventually be created on the basis of a common frame of reference. In that case, the parties must be allowed to refer to this instrument as the applicable law regardless of the national laws of the Member States. A further possible choice could be made with reference to the lex mercatoria as the applicable law, but this option should be rejected because of its lack of clarity and little practicability. If the parties chose the lex mercatoria all the same, one would have to determine by interpretation whether they actually wanted to choose one of the codes of General Principles.

4. Proposal. – See art. 3(1) 2nd sentence, below at p. 100, as well as the consequential amendments of art. 3(3), below at p. 100, and of art. 16, below at p. 115.

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[89] Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan, 12. 2. 2003, COM(2003)68 final.

Question 9:
Do you think that a future Rome I instrument should contain more precise information regarding the definition of a tacit choice of applicable law or would conferring jurisdiction on the Court of Justice suffice to ensure certainty as to the law?

1. Preliminary remarks. – The alternative in question 9 – i.e., whether conferring jurisdiction upon the Court of Justice would suffice to ensure certainty as to the law – compares apples and pears. Issues of conflict of laws before the Court of Justice are rare, and may only be referred to the Court by few national courts (see art. 68 of the EC Treaty). No one knows when a case turning upon an implied choice of law will reach the Court and what coverage it will have. On the other hand, the creation of an instrument on choice of law is the prime occasion to find and to establish, or to refine, choice-of-law rules, and the legislators should not defer to the courts.

It appears from the Commission's introduction to this question that art. 3(1) 2nd sentence of the Rome Convention is found unsatisfactory in two points. First, under the present wording, courts in some countries, Germany and England being named in particular, seem to find an implied choice of law where, supposedly, there is nothing but a hypothetical choice, an inference from the circumstances as to which law the parties ought reasonably to have chosen, whereas the legislative intention was that a choice of law must actually have been made even if it need not be express. Second and somewhat to the contrary, it would seem that in some instances a choice of law, although not express, could almost automatically be inferred from the parties' utterances or other circumstances of the case. A third point of displeasure is the divergence of this provision in the different languages of the Convention.

Situations of arguably implied choice of law may be grouped in three broader areas: reference to a given law, related contracts, and jurisdiction clauses. A fourth area would be procedural conduct of the parties, but the bearing of acts of procedure is so much tied up with rules of procedure that it cannot be discussed within the framework of a uniform law instrument. Likewise, arbitration clauses shall be left aside here. Either they comprise an express choice of law (be it by prescribing a way to determine the applicable law), or they leave it to the arbitrators' choice to determine the applicable law.

Starting out from a case presently pending before the German courts, the panoply of – if not all – conceivable situations of arguably implied choice of law will be presented, showing that there is no quasi-automatic inference. As a result, the present system of art. 3(1) 2nd sentence will have to remain unchanged, but the definition of implied choice of law may still be improved in a way which at the same time takes care of its divergent texts.

2. Areas of typical implied choice. – a) Reference to a given law. – Whether or not reference to provisions of the French Civil Code necessarily was an implied

choice of French law was at issue – and still is, as the case has been remanded – in a recent German Bundesgerichtshof (Federal Supreme Court) decision.[90] An "accord" was to put an end to a distribution agreement between a French software producer and the German distributor. The original agreement comprised a choice-of-law clause calling for German law to apply, whereas the *accord* concluded by stating: "La présente constitue une transaction au sens des articles 2044 et suivants du Code civil" ("The present document forms a settlement within the meaning of article 2044 and the following articles of the Civil Code"). The Bundesgerichtshof thought that the quoted clause could not mean anything else but a choice of French law, and censured the Court of Appeal for not having examined whether it could mean anything different. The Court of Appeal, embarking upon that examination with expert help in French law, did find meanings other than choice of law. First, "transaction" is an unspecific term in French non-legal language with a broad meaning similar to that in English, and the very first purpose of the clause may have been to make it clear that the agreement was a transaction within the legal meaning. Second, the parties did not say that they wanted French law to apply; they brought their agreement within a French statutory definition. As the definition of "Vergleich" (settlement) in German law is virtually the same as that of "transaction" in French law, the agreement would also be "within the meaning" of arts. 2044 seqq. of the Civil Code if it were governed by German law, and the inference that French law should govern is inconclusive as a matter of simple logic. Third, and most important, there are a number of purposes other than choice of law which this clause might have. The Court of Appeal itself indicated that the lawyers who drafted the "accord" might have had their fees in mind; amicable settlement of a controversy brought about by lawyers earns them an additional – and in fact, augmented – fee under the German fees law, and possibly also under the French law, regardless of the law governing the settlement itself. More cogently, another purpose may have been to free the *accord* from the almost absolute confidentiality to which, as lawyers' correspondence, it would otherwise be subject under French legal ethics. Correspondence which establishes a settlement is exempted from this obligation, but it must be earmarked as such, and that is what the lawyers – apparently – did here. The defendant's lawyer then certified that the lawyers had no such idea whatever when making that "accord"; they just wanted to make it clear to the parties what type of agreement this was. With respect to the proper law, he said the lawyers just did not think of anything else but French law, which in fact meant they did not consider the conflicts question

[90] BGH 19. 1. 2000, IPRspr. 2000 no. 20 = IPRax 2002, 37; commented by *Hohloch/Kjelling*, Abändernde stillschweigende Rechtswahl und Rechtswahlbewusstsein: IPRax 2002, 30.

at all. This is the more remarkable because the primary agreement which the "accord" was to liquidate was expressly governed by German law.

Research into French practice and doctrine has yielded two other important points. First, it has been underlined in French conflicts doctrine that reference to specific provisions of foreign law – rather than to the foreign law as such – should only cautiously be found to determine the applicable law; it may just as well – or even more so – mean to substantively incorporate such specific provisions into the framework of the law applicable by virtue of the usual connecting factors.[91]

Second, under French Supreme Court case law, the reference to legal provisions is interpreted as a choice of law if the remedies at issue are available only under that law. More clearly: Parties to a contract (and to the breach of same) battled over repudiation plus damages which, added to each other, were only available under French law but would have been mutually exclusive under (then) German(-Alsatian) law, and this implied that French law was to govern the contract.[92]

Lesson to be drawn for this point: Reference to a given law may, as an implied choice of law, be corroborated or contradicted, as the case may be, by other factors. In short, it does imply choice of law only where such an intention can be established in addition to the mere fact of the reference.

b) Related contracts. – Failing choice of law by reference, the issue in the case discussed above will be choice of law for the "accord" - upon which the plaintiff sued – implied by virtue of the express choice-of-law clause in the original agreement. Here, the contract at issue is related to a principal contract. According to French practice and doctrine, the relation to the principal contract is regarded as a strong indication of the parties' intention to have the proper law of the principal contract govern the auxiliary contract.[93] Related, auxiliary, ancillary, or collateral contracts may be agreements to implement the principal contract, or to modify it, or to put an end to it, or to furnish additional security, or to settle controversies under the principal contract, and so on. Of course, this does not exclude agreements to the contrary, but such indications would have to be established on the individual facts.[94]

The rule is evidently sound and requires no further explanation. German practice and doctrine would seem to follow the same rule.[95] But a basic dis-

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[91] *Mayer/Heuzé*, Droit international privé[7] (2001) no. 718 (p. 487 at note 35 with further references).

[92] Cass. civ. 12. 5. 1930, Sirey 1931, 129 with annotation *Niboyet*.

[93] *Mayer/Heuzé* (supra n. 91) no. 721 (p. 487 with further references); in particular, note 39 to Cass.civ. 25. 5. 1992, Rev.crit.d.i.p. 1992, 689 with annotation *Jarrosson*.

[94] *Batiffol*, Les conflits de lois en matière de contrats (1938) no. 488 for agreements putting an end to principal contracts: these are governed in principle by their own law which is, however, presumed to be that of the principal contract.

[95] Cf. *Staudinger(-Magnus)*, Kommentar zum BGB[13], EGBGB/IPR (2001) Art. 27

tinction must be made and seems accepted in both French and German conflict of laws. The general rule is that the proper law must be determined for every contract separately, and related contracts make no exception. This rule prima facie applies to related contracts with a third party, i.e., contracts which are in fact related to a principal contract but which are made between one party to the principal contract and a party foreign to the principal contract. The prime example would be a contract of suretyship, or a guarantee, or a sub-contract for part of a party's performance, and the like. Here, the relation to the principal contract evidently is no prima facie ground to subject the third party to the law of the principal contract. On the other hand, it is almost natural for an auxiliary contract between the parties to the principal contract, e.g., modifying modalities of performance of the principal contract, to follow the proper law of the principal contract. This is as true in German law as it is in French law.

Inasmuch as the auxiliary contract discharges the principal contract, or obligations under that contract, it is governed by that contract's law under art. 10(1)(d) of the Rome Convention.

Lesson to be drawn: The law of the principal contract will usually govern the auxiliary contract if both contracts are between the same parties, but the parties may agree otherwise.

c) Jurisdiction Clauses. – The classics of choice of law by implication are jurisdiction clauses without accompanying proper law clauses. They need no further explanation. If parties call upon the courts of a specific country to decide their case if necessary, they regularly also call for that country's law to be applied. As discussed in the answer to question 1, German contract manuals normally recommend a jurisdiction clause in favor of German courts but sometimes omit including a choice-of-law clause upon the premise that a German jurisdiction clause will by itself entail the application of German law – which satisfies the German lawyers' interests in keeping the matter within their domain. Whether the application of German law is always to the benefit of the client remains unanswered. The aforementioned German case shakes that assumption, too.[96] The principal contract in that case – the distribution agreement – provided for German law to govern and for jurisdiction of the Paris courts. It is no argument that it was an express proper law clause which contradicted the jurisdiction clause, and that without such express clause the court's own law would have been applicable. This would be the practical rule, but the legal rule is that whatever can be agreed expressly can also be agreed by implication; this is the groundwork of art. 3(1). The choice of a law other

EGBGB no. 81; *Palandt(-Heldrich)*, BGB[62] (2003) Art. 27 EGBGB no. 7; both with further references.

[96] Cf. supra, at n. 90.

than the lex fori of the courts designated by the jurisdiction clause may be a rare exception, but it cannot be ruled out.

In fact, the principal contract's Paris jurisdiction clause had the added option for the producer to sue instead in the German courts (this is how the case came before the German courts in the first place). Leaving the choice-of-law clause aside, this setup hypothetically presents yet another issue of implied choice of law with two possible solutions. First, as the jurisdiction clause does not point to one definite law to apply, it means no implied choice of law at all. Second, under the rule that a choice of court does imply a choice of law, this jurisdiction clause results in an implied choice of law which precisely mirrors the choice of jurisdiction. I.e., if the case is brought before the French courts, they will have to apply French law; if at the producer's option, the case is brought before the German courts, they will have to apply German law. As choice of law may be agreed upon at any later stage and even after proceedings have started, and as a choice of law agreed upon at the beginning may later be changed by a new agreement, there is no cogent reason against such suspended, or conditional, choice of law. It may be objected that during the life of the contract and before it is submitted to a court, the parties are at a loss as to which law does govern their conduct under the contract. On the other hand, it may just as well be expected that this situation prompts them to conform to both laws as much as they can. However, such a type of choice of law certainly should not be encouraged.

Lesson to be drawn: A jurisdiction clause will usually imply choice of law, but not necessarily.

d) Result. – The result of our survey of potentially implied choice situations is that a variety of contract terms, of parties' agreements or utterances, or of other circumstances influenced by the parties, would normally imply choice of law. But with rare exceptions, this may always be otherwise if such is the intention of the parties. A statutory rule resulting from these findings could only be drafted as a set of rebuttable presumptions. This would seem odd (though not logically impossible) inasmuch as the objective connections under art. 4, with which art. 3 is mutually exclusive, are also shaped as a set of presumptions. Choice of law, be it express or implied, must be found rather than presumed.

3. Definition and determination of implied choice of law. – The assessment of implied choice of law calls for the finding of real consent of the parties. With due respect, it would seem that the drafters of art. 3 got this wrong from the beginning in putting the emphasis on the intensity of the finding rather than on its object which, for whatever reason, they omitted to even indicate. Choice of law need not be express but it must be real. The legislative problem was to exclude merely hypothetical choice of law, to exclude choice of law which the parties would reasonably have made if they had considered the matter, and to exclude any objective factor in the guise of choice. But inferring implied

choice of law from "the circumstances of the case" is an invitation to include all this. "Certainty" – with its different grades in the several Convention languages – is no remedy; it is the opposite. Certainty of circumstances would corroborate a hypothetical choice of law just as much as a real choice of law, and probably more so.

The solution is simple: drop any degree of certainty of the finding, and instead require real choice of law, i.e., actual consent of the parties on the applicable law which must result from the words employed or from the conduct of the parties. This is what the Proposal does.

4. Article 3(4) Rome Convention. – A final question needs to be addressed: the relation between art. 3(1) 2nd sentence and art. 3(4) of the Rome Convention (art. 3[1] 3rd sentence and art. 3[5] or our Proposal). Circumstances of the case, parties' conduct, and even terms of contracts quite often do have their legal meaning not by themselves but in conjunction with legal rules that attribute legal meaning to them. This is so, in particular, for conduct which, by itself, would prima facie seem to be non-conduct such as silence, e.g., not answering a commercial confirmation letter which, restating the parties' agreement, adds the writer's general conditions that comprise a choice-of-law clause. Under German law, this would result in a valid choice of law; under Austrian law, which is closely related, it would be corroborated by additional factors; under some other European laws, it would probably not be at all. Other instances would be the incidence of trade usages, the course of dealing between the parties, and form requirements. A twilight area exists between law and fact, and inasmuch as law determines the legal meaning of terms, conduct, or facts, art. 3(1) 2nd sentence provides no answer as to whether terms, conduct, or facts do constitute implied choice of law. This is a matter of existence and validity of the consent of the parties, which art. 3(4) subjects to the laws applicable under arts. 8, 9, and 11 – withdrawing a number of problems from art. 3(1) which that provision cannot solve anyway.

5. Proposal. – See art. 3(1) 3rd phrase, below at p. 100.

Question 10:

Do you believe that Article 4 should be redrafted to compel the court to begin by applying the presumption of paragraph 2 and to rule out the law thus obtained only if it is obviously unsuited to the instant case? If so, how do you think it would be best drafted?

The present wording of art. 4 has led to a considerable divergence in the courts' practice of the relationship between art. 4(2) and art. 4(5). On one end of the scale, the Dutch Hoge Raad allowed the presumption of para. 2 only to be overcome by para. 5 "if […] the place of business of the party who is to effect the characteristic performance has no real significance as a connecting

factor".[97] On the other end, English courts in particular have departed from art. 4(2) more readily by claiming that the language of the Convention does not suggest that art. 4(5) must be treated as an exception to art. 4(2).[98] Instead, they have noted that the presumption is displaced if the Court concludes that it is not appropriate in the circumstances of any given case which "makes the presumption very weak".[99] A narrower construction of para. 5 in recent English jurisprudence[100] is further evidence that uniformity in the interpretation and application of art. 4 (even within one jurisdiction) is not sufficiently achieved.

The Institute therefore welcomes a clarification of the wording of art. 4 in order to articulate more clearly the relationship of rule and exception between paras. 2 and 5. This clarification should implement a middle way between the two schools of thought described: while we believe that the English jurisprudence denying a relationship of rule and exception between para. 2 and para. 5 is wrong, we are also convinced that the narrow approach of the Hoge Raad would effectively deprive the exception clause of any practical value because the situations where the place of business of the party who is to effect the characteristic performance has no real significance will be very scarce. Consequently, we do not think that it is necessary to delete para. 1 and establish the presumption of para. 2 as the general rule, but we believe instead that it is sufficient to give the exception clause of para. 5 a stricter wording. This result is based on the following considerations:

1. Abolition of the present para. 1? – Concerning the proposal to delete para. 1,[101] such a change would mean a considerable departure from the present compromise solution between the flexibility of the general rule and the certainty of the presumptions. Instead, art. 4 would become a strict rule with a narrow exception clause. Such strictness is obviously favorable to promote legal certainty and the uniform application of the future Community instrument. On the other hand, it leaves judges very little space to balance commercial interests and flexibility to adopt the rule to the needs of commerce, and thereby departs from the practice of most European countries prior to the enactment

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[97] Hoge Raad, 25. 9. 1992, Ned.Jur. 1992, no. 750, translated into English by *Struycken*, Some Dutch Reflections on the Rome Convention, Art. 4(5): Lloyd's Marit.Com.L.Q. 1996, 18 (20).

[98] *Definitely Maybe (Touring) Ltd* v. *Marek Lieberberg Konzertagentur GmbH*, [2001] 1 W.L.R. 1745 (1749).

[99] *Crédit Lyonnais* v. *New Hampshire Insurance Co*, [1997] 2 Lloyd's Law Reports 1 (5) (C.A.).

[100] *Ennstone Building Products Ltd.* v. *Stanger Ltd.*, [2002] 2 All E.R. (Comm.) 479 (489) (C.A.). The question is left open in *Kenburn Waste Management Ltd.* v. *H. Bergmann*, [2002] I.L.Pr. 588 (594) (C.A.).

[101] As suggested by GEDIP, see <http://www.drt.ucl.ac.be/gedip/gedip-documents-16pe.html>.

of the Rome Convention.[102] Given the fact that a uniform interpretation of a future Community instrument would be ensured by the European Court of Justice and a very high degree of legal certainty can already be achieved by the parties' choice of law under art. 3, it seems advisable to keep the closest connection test as the general rule and draft only the exception clause more narrowly, thereby finding a compromise between retaining judicial flexibility and enhanced uniformity of application.

Such an approach would not only be in line with international practice outside the EU (e.g., Swiss art. 117 IPRG,[103] art. 3112 of the Code civil québecois,[104] art. 1211 of the recent Russian Civil Code part 3,[105] Australian proposals for the reform of contract choice-of-law rules,[106] art. 9 of the Inter-American Convention on the Law Applicable to International Contracts[107]), but it would also be preferable from a systematic point of view. Unlike the present para. 1, the present para. 2 is unsuited to constitute a general rule for all contracts falling within the ambit of art. 4. Whereas, for example, the country in which the damage arises or is likely to arise is identifiable in almost all delictual situations and this criterion is thus suitable to be used as a conflict rule for delictual obligations,[108] the criterion of "characteristic performance" is of no comparable generality for contractual obligations. This is recognized by the special rules in the present para. 3 that do not follow the "characteristic performance" approach. It is further underlined by the fact that for some contracts, no characteristic performance or no characteristic performer can be identified; they obviously have to follow the "closest connection" test. Thus, the general rule for all contracts in the ambit of art. 4 is a test of "closest connection". In our view, it seems better to place this general rule – even if it is a vague rule – at the beginning of the article, with its modifications in the following paragraphs, rather than "hiding" the most general rule as a subsidiary criterion only at the end of the provision in an exception clause.

It should also be remembered that the present para. 1 serves other functions which might be lost if the paragraph were deleted. First, it establishes that the applicable law in the absence of choice is state law and cannot be non-state

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[102] *Giuliano/Lagarde* (supra n. 26) 20.

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

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

[105] Sobranie zakonodatel'stva Rossijskoj Federacii 2001, Nr. 49, Pos. 4552, translated into German in: RabelsZ 67 (2003) 341 (347).

[106] Australian Law Reform Commission Report No 58 (1992) 97–98.

[107] <http://www.oas.org/juridico/english/Treaties/b-56.html>. This provision establishes a closest connection test without the use of presumptions.

[108] As in art. 3 of the most recent Commission's proposal for a regulation on the law applicable to non-contractual obligations where the Commission rejects a system of presumptions and proposes instead a rule-exception structure; see COM(2003)427 (supra n. 3) 12 (34).

law. Even though it should be possible to choose non-state law under art. 3,[109] the application of non-state law should not be possible without the parties' choice: given the competing models of non-state law, it seems impossible for the judge to determine which of these non-state laws is most closely connected with the contract. Second, the present para. 1, vague as it may be, nevertheless makes it clear that European law is based on the general principle of closest connection of the contract and does not follow any alternative (e.g., better-law approach, governmental interest analysis, priority of the lex fori) approach. Furthermore, para. 1 also serves as a last resort if none of the special presumptions applies and – in its second sentence – seeks to ensure that the courts have recourse to severance of the contract as seldom as possible.

Finally, it should be emphasized that the present divergence in the courts' practice of art. 4 is not caused by the courts disregarding the presumption of art. 4(2) (which would justify putting this paragraph in a more prominent position), but rather by displacing this presumption too readily with the means of a widely construed art. 4(5). Therefore, the key to resolving the uncertainty lies in a stricter wording of art. 4(5), which makes it clear to the judge that this paragraph is to be invoked in exceptional circumstances only. Limiting the changes to para. 5 would also make it clear to practitioners used to the structure of the present art. 4 that no change in the general structure of that article is intended, but only a more limited application of the exception clause.
2. Redrafting of the exception clause. – The Institute approves a change in the wording of the present para. 5 to make it clear that it is to be invoked in exceptional cases only. It should guarantee that the presumptions in paras. 2 and 3 are to be disregarded in *exceptional* cases only in order to prevent any further dispute about the relationship of rule and exception between art. 4(2) and 4(5). It also seems advisable to change the word *shall* into *may* to stress that the application of the exception clause leaves the judge a margin of discretion.[110] Apart from these two variations, which result from pre-existing case law, the exception clause ought to be modeled very closely on art. 3(3) of the recent Rome II Regulation proposal to foster the coherence of Community law.[111]

No viable alternative for the future exception clause in art. 4 can be seen in the two-pronged approach of art. 3(3) of the preliminary draft proposal for the Rome II Regulation.[112] Both its unhandy combination of a relative standard ("closer connection") with an absolute one ("no significant connection") and its hardly-ever-fulfilled requirement of "no significant connection" with the law designated by the presumptions make it impractical and a focal point of future judicial controversy. In its most recent proposal for a Regulation on the

[109] See question 8 above.
[110] *Giuliano/Lagarde* (supra n. 26) 22.
[111] COM(2003)427 (supra n. 3) 12 (34).
[112] Cf. our comment in: RabelsZ 67 (2003) 1 (37).

law applicable to non-contractual obligations (Rome II), the Commission has likewise abandoned the two-pronged exception clause in art. 3(3). Its perpetuation in a future Rome I Regulation would therefore also produce inconsistency of Community law.

3. Relocation and amendment of para. 5, first part. – The first part of the present para. 5 stipulates the non-application of the presumption in para. 2 if the characteristic performance of a contract cannot be determined. As this provision only relates to para. 2, it would be better positioned at the end of this paragraph than at the beginning of para. 5, which is the general exception clause for all the presumptions of art. 4. This clause should not only be amended to rule out the application of para. 2 if the characteristic performance of a contract cannot be determined, but also if the identity of the party effecting the characteristic performance (if there is more than one characteristic performer, e.g., a syndicate of banks from several different countries lending to a single borrower) cannot be determined. Even though these cases are already considered to be outside the scope of para. 2,[113] this insight should be reflected in the text of the future art. 4.

4. Art. 4(5) and the accessory choice of law. – The case law on art. 4 has revealed that the courts have in some cases made use of the exception clause in art. 4(5) in order to apply to a (presumably) "accessory" contract the law which governs the "main" contract. Examples include a contract of guarantee which was, on the basis of art. 4(5), subjected to the same law as the debts guaranteed,[114] and a contract between a beneficiary and an issuing bank in a letter of credit transaction which was subjected to the same law as the contract between the issuing and the advising bank.[115] The Institute believes that the law applicable to each contract must basically be determined on its own and an "accessory" determination of the applicable law should not be endorsed as a general principle.[116] If the parties wish to avoid a multiplicity of applicable laws, they should agree to a choice-of-law clause for the whole transaction. If they have not done so, the synchronization of the laws applicable to several contracts is but one possible argument when it comes to the application of art. 4(5). Its relative weight depends on other aspects of the case. There should thus be no special provision for an accessory determination of the applicable law in art. 4.

5. Examples of the characteristic performance? – The Institute deliberately abstained from including into art. 4 a list of examples of the characteristic performance for specific contracts. Normally such a list only covers contracts

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[113] *Dicey/Morris*, The Conflict of Laws[13] II (2000) n. 32–122; *Staudinger(-Magnus)* (supra n. 95) Art. 28 EGBGB no. 94.

[114] Cour d'Appel de Versailles 6.2. 1991; reported and commented by *Lagarde*, Rev.crit.d.i.p. 80 (1991) 745.

[115] *Bank of Baroda* v. *Vysya Bank Ltd.*, [1994] 2 Lloyd's Law Reports 87 (93).

[116] For a similar discussion in the context of art. 3, see question 9 above.

where the identification of the characteristic performance is beyond doubt (e.g., sale, lease, contract for services, bailment, guarantee in art. 117[3] of the Swiss IPRG) and is therefore dispensable. In hard cases (e.g., franchising contracts, publishing contracts, research cooperations), it should be left to the judges' appraisal of the circumstances of the case whether there is a characteristic performance and which party has promised it. In such contracts, the determination of the characteristic performance will very often depend on the individual form of the contractual rights and duties of each party and is therefore not amenable to any abstract form of statutory definition.

6. Deletion of para. 4. – A further suggestion is to give up the present para. 4, which establishes a special presumption for contracts relating to the carriage of goods. This provision was initially inserted with regard to the "peculiarities" of this type of transport.[117] It seems that these perceived "peculiarities" were, in particular, the concern that the general presumption of para. 2 would lead to the law of a remote country whose flag of convenience (e.g., Liberia, Panama) the ship flies.[118] A further argument against the extension of the general rule in para. 2 has been that the country in which the principal place of business of the carrier is situated may be wholly unconnected to the country or countries where the transport takes place (e.g., in the case of "cabotage" or "cross trade" transports).

However, these considerations are not convincing. Legal practice has shown that the companies owning ships that fly flags of convenience are in the majority of cases not the party to the contract for the carriage of goods.[119] Instead, these ships are time-chartered and operated by companies seated in industrialized countries that are party to the contract for the carriage of goods. Thus, the presumption of para. 2 normally does not point to the law of the country whose flag the ship flies, but rather to the law of the country where the company operating the ship has its principal place of business. The further concern that the law applicable under para. 2 is unconnected to the law of the place of the transport is not a problem that arises specifically in the context of transportation contracts. In all kinds of contracts it is possible that the place of performance is located in a country other than the principal place of business of the "characteristic performer". Nevertheless, the law of the place of business of the party effecting the characteristic performance was given preference by the drafters of the Rome Convention. It is hard to see why the place of performance in the case of transportation of goods merits a different treatment than in all other contracts, including the contract for the carriage of

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[117] *Giuliano/Lagarde* (supra n. 26) 21.

[118] Memorandum of the Federal (German) Government concerning the Rome Convention on the law applicable to contractual obligations, BT-Drucks. 10/503 21 (25).

[119] *Mankowski*, Kollisionsrechtsanwendung bei Güterbeförderungsverträgen: TransportR 1993, 213 (221); *Vischer/Huber/Oser*, Internationales Vertragsrecht[2] (2000) no. 462.

passengers. That is particularly true for transportation contracts that involve not only the execution of the transport itself but also logistic preparation and planning services, which will usually be provided from the principal place of business of the carrier. The peculiarity of the present rule in para. 4 is further demonstrated by the fact that countries such as Switzerland (art. 117 IPRG) and Russia (art. 1211 Civil Code part 3), which have rules very similar in structure to art. 4, do not have a special presumption for contracts for the carriage of goods, but rather submit these contracts to the general presumption of "characteristic performance".[120]

It cannot be denied that the general presumption in para. 2 will in some cases be inappropriate, especially if it points exceptionally to the law of a country of a flag of convenience wholly unconnected with the operation of the ship and the execution of the contract. The right place to deal with such problems, however, is not a special presumption but rather the exception clause which leads back to the broad concept of para. 1 and thereby leaves sufficient flexibility for the adaptation of the general presumption to the particular instances of the case. Thus, the exception clause and para. 1 may serve to subject cabotage transport effected by a foreign carrier between two domestic places to the law of the country where the carriage takes place; para. 4 is of no avail in these cases anyway.[121] Therefore, a future Community instrument should abandon the present para. 4 and submit all transportation contracts – if not governed by international conventions, which take precedence – to the general presumption of para. 2.

7. *Proposal*. – See art. 4(2) 2nd phrase, below at p. 102, and art. 4(4), below at p. 103.

Question 11:

Do you believe one should create a specific rule on short-term holiday tenancy, along the lines of the second subparagraph of Article 22 (1) of the Brussels I Regulation, or is the present solution satisfactory?

1. Practical applications of art. 4(3) to short-term tenancies. – The Institute does not consider the present form of art. 4(3) of the Rome Convention a satisfactory solution for short-term holiday tenancies, and therefore proposes amending art. 4 as set out below. As indicated in the Commission's Green Paper, the

[120] For Switzerland, see *Vischer/Huber/Oser* (preceding note) n. 457; in Russia the performance of the carrier is presumed to be characteristic in the sense of the general rule by art. 1211(3) no. 6 and 7.

[121] *Basedow*, Zulässigkeit und Vertragsstatut der Kabotagetransporte: ZHR 156 (1992) 413 (432 seq.).

courts in some Member States, most notably in Germany,[122] but also, for example, in Belgium,[123] have applied the "escape clause" in art. 4(5) in order to avoid the application of the lex situs in cases where both parties to the contract are habitually resident in the same country while the property itself is situated in another country. This is usually a sensible approach, since the connection of the contract with the country of common residence of the parties will be much closer than the connection with the country of the situs of the property, and therefore the presumption of art. 4(3) will be displaced. However, routinely applying art. 4(5) to a certain easily distinguishable category of contracts has the disadvantage of undermining the role of para. 5 as an escape clause that should be used only in exceptional cases. Otherwise, courts may be tempted to rely on para. 5 more frequently, even in other categories of cases where they regard the presumptions stated in the preceding paragraphs as not entirely convincing. This could lead to uncertainty as to the applicable law in the absence of choice, and reshape the structure of art. 4 in its entirety. Moreover, under the current art. 4(3), national courts, although reaching a convincing solution for the individual case, have sometimes had some technical difficulties with the interpretation of art. 4. In one decision, for example, a German court relied on an implied choice of law by the parties, which it deduced, inter alia, from their common habitual residence, in order to rebut the presumption of art. 4(3); this does not seem to be the correct approach within the ambit of art. 4.[124] Inserting a clear-cut, specific choice-of-law rule could, it is submitted, avoid such technical difficulties in the future. Finally, the application of such a rule should not cause further problems for national courts, since a similar rule is already known from the context of jurisdiction.[125] It appears advisable, therefore, to add a specific presumption to art. 4(3) so that the courts can achieve the desired result by applying the rule rather than the exception.

2. Synchronization with art. 22(1) Reg. 44/2001. – The proposed amendment has the further advantage of bringing art. 4(3) in line with art. 22(1) of the Brussels I Regulation. This provision excludes certain short-term tenancy contracts from the exclusive jurisdiction of the forum situs and thereby indirectly grants, under the same conditions as the proposed amendment to art. 4(3), additional jurisdiction to the courts of the Member State where both parties are domiciled. Thus, although it is still open to the claimant to sue in the courts of the Member State where the property is situated, cases relating

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[122] BGH 12. 10. 1989, IPRspr. 1989 no. 195 = IPRax 1990, 318; 9. 7. 1992, IPRspr. 1992 no. 192 = IPRax 1993, 244; OLG Köln 12. 9. 2000, IPRspr. 2000 no. 26 = OLG-Report Köln, 69.

[123] Tribunal civil de Marche-en-Famenne 26. 2. 1986, Ann.dr. Liège 33 (1988) 100.

[124] Cf. OLG Celle 26. 5. 1999, IPRspr. 1999 no. 31.

[125] Cf. art. 22(1) of the Brussels I Regulation, art. 16(1)(b) of the Brussels Convention and art. 16(1)(b) of the Lugano Convention.

to short-term holiday tenancies will usually be brought before the courts of the Member State where both parties are domiciled, and the proposed amendment enables these courts to decide the case according to their own law. This synchronization of forum and applicable law in cases where the issue of jurisdiction is governed by the Brussels I Regulation[126] is generally desirable, since it leads to a quicker and cheaper decision of the case, which arguably is also of a higher quality as to the application of substantive law than a decision based upon a foreign law.

3. Multi-contact cases. – The proposed amendment does not determine the law applicable to cases where the subject matter of the contract is a short-term tenancy, but where landlord and tenant are *not* habitually resident in the same country. An example for such a case would be a landlord resident in Germany who lets an Italian property to a tenant habitually resident in Austria. In the absence of a choice of law, this case can be solved in one of two conceivable ways. On the one hand, the special presumption of para. 3 could be regarded as not applicable at all and one could fall back on the more general presumption of para. 2; i.e., in the above example, apply German law, since the landlord owes the characteristic obligation under the contract. On the other hand, one could argue that such a case would still be within the general scope of art. 4(3) and apply the lex situs. The latter solution seems to be preferable, although the connection of the case with the lex situs may, due to the short-term nature of the contract, still be regarded as somewhat weaker than in the case of long-term agreements relating to immovable property. Yet, in the absence of a common habitual residence of the parties, the connection to the lex situs is still substantially stronger than to the law of any other country. Moreover, basic policy considerations supporting the application of the general presumption of para. 2 do not apply to contracts relating to immovables. Whereas sellers of movables will often manufacture or produce the goods in the state of their habitual residence and in compliance with the rules established by the law of that state, no such connection can be said to exist where a lessor domiciled in country A enters into a tenancy agreement relating to property situated in country B. Indeed, the application of the law of the country where the landlord is habitually resident might well come as a surprise to the tenant in a number of cases because the residence or domicile of the landlord will generally not be a decisive factor for the tenant when entering into the contract. In fact, the tenant may often not even know where the landlord's domicile is. Where landlord and tenant have their habitual residence in different countries, therefore, subject to the escape clause of

[126] As a basic rule, the Brussels I Regulation only applies where the defendant is domiciled in a Member State. However, as the introductory wording of art. 22 ("regardless of domicile") shows, the provisions of this article are also applicable where the defendant is domiciled in a non-Member State, as long as the relevant specific requirements of art. 22 are met, i.e., in the case of art. 22(1), the property itself is situated in a Member State.

art. 4(5), a short-term holiday tenancy will be governed by the law of the country where the property is situated.

4. Terminology. – Finally, the wording of the proposed amendment to art. 4(3) merits a few short remarks. The Proposal of the Institute is virtually identical with the wording suggested by GEDIP. Although the amended provision should be drafted to reflect art. 22 of the Brussels I Regulation as closely as possible, some minor adjustments appear unavoidable. First, "domicile", the term used throughout the Brussels I Regulation, should be replaced by "habitual residence", which is the connecting factor generally employed by the choice-of-law rules of the Rome Convention. Second, the phrase "contracts which have as their *object* […]", as suggested in the Commission's Green Paper, appears to be a literal translation from the French text, which, by using the term "objet du contrat", refers to a term of art of French contract law that is better translated by the term "subject matter" used in the first sentence of art. 4(3) of the Rome Convention.

5. Proposal. – See art. 4(3) 2nd phrase, below at. p. 102. If the eventual Community Act departs from the current system of presumptions in art. 4 – as suggested, for example, by GEDIP, by abolishing para. 1 – and directly determines the applicable law subject to an escape clause in what would then be para. 4, the words "presumed to be most closely connected with" will have to be replaced by the words "governed by the law of".

Question 12:

Evaluation of the Consumer Protection Rules:

A. How do you evaluate the current rules on consumer protection? Are they still appropriate, in particular in the light of the development of electronic commerce?

B. Do you have information on the impact of the current rule on a) companies in general; b) small and medium-sized enterprises; c) consumers?

C. Among the proposed solutions, which do you prefer, and why? Are other solutions possible?

D. In your view, what would be the impact of the various possible solutions on a) companies in general; b) small and medium-sized enterprises; c) consumers?

1. Evaluation of the present art. 5. – Article 5 has only had major significance in German courts. More than 90 percent of the published opinions originate in Germany.

a) Scope. – As to the substantive scope laid down in art. 5(1), they have essentially revealed the following gaps: independent loans that are not linked to the

purpose of financing the supply of goods or services,[127] timeshare agreements on immovable property,[128] and tenancies of holiday homes situated abroad but marketed in the country of the consumer's habitual residence by a branch or intermediaries of the owners established in the consumer's country.[129] As to the independent loans, the supply of services covered by art. 5(1) would arguably include financial services, but the explicit mentioning of the provision of credit for financing purposes might indicate the opposite. It follows from art. 1(2)(c) of Directive 87/102 on consumer credit, which includes independent loans, that a distinction between credit earmarked for financing purposes and other loans cannot be maintained under Community law in the future.[130] The exclusion of contracts on immovable property from art. 5(1) has not prevented the courts from subjecting the said short-term tenancies of holiday homes to the consumer's law, either on the assumption of a tacit choice of law or because the presumption in favor of the lex situs laid down in art. 4(3) was set aside in the circumstances of the case under art. 4(5).[131] Consumers were left unprotected by their own law only when signing timeshare agreements regarding apartments situated in Spain in very peculiar circumstances. In the meantime, the timeshare Directive 94/47[132] has been implemented, which provides for its own application regardless of the Rome Convention. However, the court practice has revealed that a special conflicts rule for consumer contracts that excludes a consumer transaction of major importance is fallacious and should be amended.

Two other potential gaps have not given rise to litigation so far but may do so in the future. While the Giuliano/Lagarde report has taken the view that the trade in securities is not covered by art. 5,[133] this does not follow from language versions such as the French, German, or Italian, which simply refer to the corporeal character of the trading object, and that may apply to securities as well. Contracts for the investment in futures were considered by German courts as relating to the supply of services, which equally entailed the application of art. 5.[134] Finally, the on-line delivery of software and possibly other information could be regarded as being outside the scope of art. 5. In view of its intangible character, it is not a supply of "bewegliche Sachen", "objets mobi-

[127] Cf. Cour d'appel Mulhouse, reported in: Cass. fr. 19.10. 1999, Rev.crit.d.i.p. 89 (2000) 29 with annotation *Lagarde*.

[128] BGH 19.3. 1997, IPRspr. 1997 no. 34; see also in French the report by *Lagarde* in: Rev.crit.d.i.p. 87 (1998) 610.

[129] BGH 12.10. 1989, IPRspr. 1989 no. 195.

[130] Directive 87/102/EEC, O.J. EC 1987 L 42/48 as amended.

[131] See BGH 12.10. 1989; 9.7. 1992 (both supra n. 122); LG Köln 22.1. 1992, IPRspr. 1992 no. 29; AG Hamburg 7.7. 1999, IPRspr. 1999 no. 121.

[132] Directive 94/47/EC, O.J. EC 1994 L 280/83.

[133] *Giuliano/Lagarde* (supra n. 26) 23 seq.

[134] OLG Düsseldorf 14.1. 1994, IPRspr. 1994 no. 23; 26.5. 1995, IPRspr. 1995 no. 145; 8.3. 1996, IPRspr. 1996 no. 144; OLG Köln 15.12. 1997, IPRspr. 1997 no. 44.

liers corporels", or "beni mobili materiali" (but perhaps of "goods"). And it is probably not a supply of services because there is no activity of the supplier except for the delivery; if the delivery itself were a service, the separate reference in art. 5(1) to the supply of goods that is nothing more than a delivery would be redundant.

The Institute takes the view that the enumeration technique employed in art. 5(1) should be abandoned. It should be replaced by a comprehensive regulation of the scope that only sets up requirements as to the persons involved. The wide scope should be narrowed by exceptions in para. 4 which relate to contracts of carriage, insurance contracts subject to a new conflicts rule (see question 7), and contracts dealing with real property except for timesharing agreements. Real property transactions are closely linked to the land register of the situs, the forms employed, and the practice of the land registrar and its administrative personnel. This is not the case in respect to timesharing agreements, which should therefore form a counter-exception.

b) The bargaining situations. – From the published opinions, it appears that the criteria set out in art. 5(2) are too wide in some cases and too narrow in others. Where the "special invitation" sent to the consumer's address is preceded by first business contacts in the supplier's country, the consumer would have to be regarded as "mobile"; according to the basic philosophy of art. 5, but not to its words, such consumers would not deserve the protection of their own law.[135] On the other hand, the so-called Grand Canary cases clearly show that consumers' mobility is not equivalent to their business skills and does not necessarily do away with the need for protection. In these cases, German companies had set up a Spanish subsidiary whose employees addressed German tourists in Spanish resorts and invited them to visit sales exhibitions where they were offered goods to be delivered and paid for in Germany at a later stage. The contracts were concluded in German, but subject to Spanish law which, at the material time, had not yet implemented the relevant EC Directives on consumer protection. It was usually provided that all rights and obligations arising under those contracts were immediately transferred to the German business. The criteria set forth in art. 5(2) were clearly not met. Nevertheless, many courts felt the need to apply the mandatory consumer protection rules of German law until the Bundesgerichtshof finally rejected those attempts.[136]

The conclusion to be drawn from the court practice is not to elaborate further on the precision of the description of the passive consumer. The problem of art. 5(2) appears to be that it is *too precise* and not apt to cope with complicated bargaining situations and new business strategies directed at consumer

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[135] Rb. Leeuwarden 20. 10. 1992, Ned. IPR 1992 no. 271 in respect to art. 13(1) no. 3 of the Brussels Convention, but referring also to art. 5 Rome I.

[136] See above at n. 128.

markets. This is affirmed by a look at electronic commerce. Since the websites of suppliers are accessible worldwide and the offers made on these sites can be regarded as advertisements for the purposes of art. 5(2) 1st indent, the suppliers would be exposed to the consumer laws of all the world even if they are not aware of the consumers' habitual residence, e.g., for a supply of software or services through the Internet. In these cases, too, a new approach is required.

2. The impact on traders. – It can be inferred from the *Grand Canary* cases and similar situations that holiday sales are becoming an interesting field for marketing activities. Apparently the suppliers are not discouraged by the existing consumer legislation, and some of them even try to evade that legislation by innovative strategies. On the other hand, consumers appear to be responsive to such marketing activities. But the available data do not allow an assessment of the impact of the present rules on companies in general and on small and medium-sized companies in particular.

3. Future solutions. – The solutions contemplated for a conflicts rule on consumer contracts are listed in the Commission's Green Paper in a rather unsystematic way.[137] Since the scope of a future conflicts rule has already been outlined above in section 1(a), the following comments will focus on bargaining situations that may trigger the application of the mandatory rules of the consumer's habitual residence. As a starting point, it must be acknowledged that the protective rules of the consumer's law should be applied in some, but cannot be applied in all, cases. Owners of stationery shops, supermarkets, or department stores cannot be expected to check the origin of their customers, and therefore need not take into account the consumer protection laws of other countries. A systematic application of the consumer's law (solution v.) must therefore be rejected lest consumer markets in general be seriously affected. The same applies to the extension of the existing rules in art. 5(2) to "mobile consumers", which would also amount to the systematic application of the mandatory provisions of the consumer's law. A more balanced approach would (1) extend the list of bargaining situations contained in art. 5(2) to further cases; or (2) departing from the general application of the consumer's law, exclude the enforcement of its mandatory provisions in certain bargaining situations (see solution (iii) proposed by GEDIP); or (3) admit, under certain conditions, a choice of law which would include the mandatory provisions on consumer protection (see solutions (iv) and (viii)). Both approaches (1) and (2) have to be rejected on the basis of past experience. What is needed is not more but less precision in the various bargaining situations: a flexible rule allowing the court to take account of the circumstances of the case. Nor can a choice of law including the consumer protection rules be supported. Given the jurisdiction vested in the courts of the consumer's country under arts. 15

[137] COM(2002)654 final of 14. 1. 2003, p. 30 seqq.

seqq. Reg. 44/2001,[138] such a choice would invariably amount to the application of a foreign law by those courts. The split of jurisdiction and applicable law should be avoided in consumer litigation (see below).

Some solutions which provide for a wide application of the consumer's law try to protect the supplier against the application of an unforeseen law. To this effect, GEDIP proposes an awareness test: suppliers can escape the application of the consumers' law if they establish that, due to the consumers' conduct, they were not aware of the country in which they had their habitual residence (see solution (vii)). The Institute is afraid that the awareness test will produce much litigation because the criteria are totally unclear. Would the foreign accent of the customers, the color of their skin, the mode of their dress, the registration number of their car parked before the shop, etc., suffice to make a supplier aware of the foreign habitual residence? And who would be the relevant person to become aware of that? The employee serving the customer, or should it be the manager in view of the legal consequences of that awareness? In some sectors where home delivery is common (e.g., furniture or electric appliances), the seller would always ask for the delivery address and therefore be aware of the customer's habitual residence; in other sectors, it would be an accidental exception.

4. Synchronization with art. 15 Reg. 44/2001. – The solution recommended by the Institute is based upon two principles: (1) the synchronization of jurisdiction and applicable law in consumer litigation, and (2) bilateralism in the conflict of laws. In international litigation, consumer protection is dependent upon the availability of a forum close to the consumer's habitual residence. The need to litigate in a foreign court would often deter consumers from enforcing their rights. But they would be equally discouraged if they had to assert their rights, although in their own court, under a foreign law, viz. the supplier's law. They would rightly anticipate that the supplier and its lawyers are much more familiar with that law than their own lawyer could ever be. Moreover, they would presume that the court itself would give credit to the supplier's assertions since they relate to legal provisions which the supplier's lawyer should know much better than the judge, who would have to rely on expert witnesses and opinions. Consequently, proceedings conducted under foreign law would be costly and inefficient in view of the small claims at stake. It has to be noted in this context that among the forty or so published opinions on art. 5, there is not a single decision based upon a foreign law. As a consequence of such considerations, the synchronization of jurisdiction and applicable law which existed at the time of art. 13 of the Brussels Convention should essentially be restored after the overhaul of that provision in art. 15 Reg. 44/2001. The Max Planck Proposal comes close to this goal (see below). The concept of commercial activities pursued in or directed toward

[138] O.J. EC 2001 L 12/1.

another state not only accommodates the needs of electronic commerce by allowing suppliers to limit their offers to certain states by means of appropriate website announcements. It also includes the cases covered by the criteria set forth in art. 5(2), although with more flexibility. For example, it could be argued that the marketing strategy pursued in the *Grand Canary* cases was directed toward Germany, where performance under the contracts was due.

Although art. 5 has never served to enforce a foreign law, its bilateral drafting has a beneficial effect: it indicates that all consumers – whether domiciled abroad or in the forum state – are treated alike in relation to a supplier established in the forum state, provided that they have contracted in similar situations. The basic idea of private international law – that the judge is not the agent of the party established in the forum state – is best served and expressed by bilateral conflict rules. They are non-discriminatory. Community legislation in the field of substantive consumer protection does not take this principle into account. Various measures mandate their application if certain minimum contacts of the case with the Community are established, but they do not provide for the application of mandatory provisions of a third state granting a better protection mutatis mutandis.[139] In other words, Community legislation discriminates against the party originating in a non-Member State. Such a policy cannot serve as the basis for contractual justice in an international civil society and should be abandoned. The Proposal of the Institute would dispense with the various unilateral conflict rules of secondary legislation. It is difficult to see how a close connection between the contract and the territory of a Member State, as required by those acts, can exist if there is no commercial activity on the supplier's side pursued in or directed toward a Member State. The Institute therefore suggests deleting the respective unilateral conflict rules; see, however, the comments on question 3.

5. Proposal. – See art. 5, below at p. 104.

Question 13:
Should a Future Rome I instrument specify the meaning of "mandatory provisions" in Articles 3, 5, 6 and 9 and in Article 7?

1. Theoretical framework. – The traditional private international law of the EC Member States is founded on multilateral conflict-of-law rules, which in turn presuppose the mutual recognition by the states that their private law systems are fundamentally equivalent.

The political neutrality of private law was the basis for the traditional system of private international law founded on bilateral rules of conflicts of law.

[139] See the Explanatory Memorandum attached to the Proposal which was conducive to Reg. 44/2001, COM(1999)348 final, p. 155.

However, in the first half of the 20th century, the basis for that neutrality began to fade away due to two developments that gave rise to what are called internationally mandatory rules. First, states increasingly exploited private law for the pursuit of purposes of public policy, thereby creating mandatory minimum standards for contractual relations. This development might be exemplified by the efforts of governments against housing shortages by introducing rent control regulations and by measures against unfair labor conditions that touched upon labor contracts.

Second, governments adopted an increasing number of measures of public law which – in order to be enforced – touched upon the validity of contracts concluded between private parties. As an example for this type of mandatory rules, one may hint at the laws against restraint of trade for the protection of competition or exchange control regulations for the protection of domestic currency interests.

States do not allow private parties to evade cogent regulatory restrictions that were adopted to protect important political and/or economic interests of the legislating state by choosing a foreign contract law to govern their contract which does not provide similar restrictions. In the field of conflict-of-law rules for contracts, such internationally mandatory rules ("Eingriffsnormen" in German terminology, "lois de police" in French, "overriding statutes" in English, "legge di applicazione necessaria" in Italian) claim application independently from the proper law of contract, whether chosen by the parties or determined by objective, bilateral rules of private international law.

As shown by art. 7 of the Rome Convention, internationally mandatory provisions not only restrain the freedom of the parties to freely choose the applicable law in contracts with transborder elements, but they also limit the scope of the law applicable to the contract altogether, whether it is determined by agreement or by objective choice-of-law rules.

Apart from the internationally mandatory rules that take precedence over the law governing the contract, each legal system provides for cogent internal rules that do not aim at the safeguarding of fundamental political, economic, and social institutions; instead, these pursue the protection of certain interests of the parties to the contract. For instance, certain provisions on the form of contracts for the sale of land serve the purpose of giving a proper warning to the parties concluding an economically important contract and easing questions of evidence that might arise in connection with the transaction. Other merely internally cogent provisions are statutes of limitation and certain provisions concerning the breach of contract.

If the parties choose a foreign legal system to govern their contract, the internally mandatory rules of the legal system that would govern the contract in the absence of a choice of law do not apply any more. The contract is subject to the internally mandatory rules of the law chosen by the parties. Thus, the

scope of freedom of contract in international private law (party autonomy) is larger than the area of freedom of contract in the internal law (private autonomy). The internally cogent provisions form an integral part of the proper law of contract. If the parties choose a law other than the law which would apply without a choice, the internally mandatory rules of the latter law are replaced by the internally cogent provisions of the chosen law.

If these two groups of mandatory provisions form the respective extreme positions on a spectrum, a third group of cogent rules is situated in the middle. Those rules are not merely cogent on the level of the internal domestic law, but – by virtue of their purpose and in most cases by express legislative provision – are also partially mandatory on the level of private international law. However, their mandatory character does not reach as far as that of the internationally binding rules of the first group, because such rules only put limits on the capacity of the parties to reduce the level of protection provided for by the relevant legal system, whereas the provisions of the latter group apply independently from the proper law of the contract, even if the proper law has not been determined by agreement but by objective criteria. Unlike the internationally mandatory rules that apply under the unilateral conflict rules of art. 7 paras. 1 and 2 Rome Convention, the mandatory rules of the third group are referred to by bilateral conflict rules which, for limited areas (consumer protection and labor law), set forth the same criteria for the cogent provisions of the lex fori and foreign legal systems. Examples of this third kind of rules are consumer and employee protection rules as provided for in arts. 5 and 6 of the Rome Convention.

2. Terminology. – The concept of "mandatory rules (or: provisions)" is used in several articles of the Convention. In art. 3(3), the Convention sets out a statutory definition of the concept: mandatory provisions within the scope of the Convention are to be understood as rules of law "which cannot be derogated from by contract, hereinafter called 'mandatory rules'". This definition clearly encompasses merely internally mandatory rules that can be removed by choice of law, if the contract bears a relevant international element additional to the choice, as well as internationally mandatory provisions that claim application independently from the proper law of contract, whether determined by choice of law or by objective criteria.

Article 7, however, concerns internationally mandatory rules that claim application regardless of the law governing the contract, but it does not deal with internally mandatory rules. The statutory definition of the term "mandatory rules" in art. 3(3) includes internally *and* internationally mandatory provisions. According to its wording, this definition is not confined to art. 3, but seems to cover the whole Convention, including art. 7. However, the latter provision refers only to internationally mandatory rules. Therefore, the scope of the statutory definition in art. 3(3) of the Convention is too broad and should be narrowed down. By the same token, the wording of art. 7

should clearly express that this provision applies to internationally mandatory rules only.

3. Redundancy of art. 3(3) with regard to internationally mandatory rules. – As already mentioned, art. 3(3) covers internally as well as internationally mandatory rules. Internationally mandatory rules, however, are treated in detail in art. 7 of the Convention, and internally mandatory rules that have been internationalized are covered by arts. 5 and 6 of the Convention. These articles provide legal requirements that determine the applicability of internationally mandatory rules (namely: close connection between the contract and the legal system claiming to be applied). In a situation in which all relevant elements of a contract except the choice of law of the parties are located in one country, arts. 5, 6, and 7 lead to the application of its internationally mandatory rules because the contract clearly bears a sufficiently close connection to that country as provided for by these articles. In such a situation, the application of art. 3(3) and art. 7 Rome Convention with regard to internationally mandatory rules does not lead to divergent results.

It could be argued that the requirements under which arts. 3(3) and 7 Rome Convention are applied differ with respect to an important aspect: art. 7(1) grants the court broad discretion to decide under which circumstances a foreign mandatory provision might be "given effect". The court is not obliged under art. 7(1) to "apply" foreign internationally mandatory rules because this would mean accepting foreign public policy as normatively binding upon the courts of another state. The term "give effect" enables courts to take into consideration provisions pursuing public policy purposes of a foreign country without granting those rules the recognition as normatively binding upon the domestic courts by, e.g., observing such foreign rules on the level of domestic substantive law. It should be noted, however, that art. 3(3) does not bluntly render mandatory rules of a country applicable when all relevant elements of a contract are located in that country, but merely declares that in such a situation a choice of the law of another country "shall not […] prejudice the application" of the rules of the former country. It is suggested that this means that mandatory rules of a country to which a contract is solely connected are not applicable if under the law of that country such rules are inapplicable in case the parties have chosen another law.[140] As many mandatory rules do not contain an express determination of whether they intend to be applied if the parties to the contract have chosen another law, such determination has to be made by the court in interpreting the relevant provision. This brings an element of uncertainty to art. 3(3), which is also characteristic of the application of art. 7(1).

In situations where – apart from the choice of law – all relevant elements of a contract are related solely to one country, there is no pertinent reason why

[140] *Dicey/Morris* (supra n. 113) 1220.

foreign internationally mandatory rules should be treated any differently from cases in which those elements are located in at least two countries.

The rule in art. 3(3) of the Convention, as far as it encompasses internationally mandatory rules, is therefore redundant because the application of such rules – with the same result as brought about by art. 3(3) – is already taken care of by arts. 5, 6, and 7 of the Convention.

Conclusion: the scope of the definition of the term "mandatory rules" in art. 3(3) should be narrowed down to cover only internally mandatory rules, whereas art. 7(1) should clarify that this article refers to internationally mandatory rules only. A tentative wording is suggested in the Proposals for arts. 3(3) and 7 attached to this paper.

4. "Mandatory rules" in art. 5 Rome I. – Article 5 of the Convention stipulates a restriction of the principle of free choice of law. This restriction is justified through divergences in negotiating power and informational asymmetries between suppliers and consumers. On the level of private international law, it must be made sure that the protection which consumers are granted by their domestic substantive consumer law is not set aside by a choice of a law which provides a lesser standard of consumer protection. This consideration, however, is only valid if the contract is a contract between a consumer and a supplier and not – for instance – a contract between two consumers (or two suppliers).

Before Rome I, the consumer protection provisions in the Member States of the EC were characterized as being of an internally but not internationally mandatory nature. Consequently, consumers could be deprived of the protective measures of their domestic law by the choice of another law with a lesser degree of consumer protection. In order to close this loophole and to improve consumer protection on the international level, art. 5 Rome Convention restricts the ambit of choice of law and guarantees consumers the application of the mandatory rules of the country in which they have their habitual residence, provided that the contract was concluded in that country or the supplier performs specific business activities in that country. It cannot be excluded, however, that certain provisions of consumer protection law will be classified as internationally mandatory because a Member State considers such rules as fundamental principles of the social and economic order of the respective country. The applicability of such rules is governed by art. 7 Rome I. For the sake of clarity, it seems appropriate to insert the word "internally" before "mandatory rules" in art. 5(2) of the Proposal. The proposed wording determines the delineation of the respective scopes of application of arts. 5 and 7 of the Proposal.

5. The relationship between arts. 5 and 7 Rome Convention. – In its account of problems regarding the application of art. 5 Rome Convention, the Green Paper raises the question of the relationship between arts. 5 and 7 Rome Convention. As far as the substantive scope of both provisions is concerned, it

is important to recall the differences explained above in section 1. Article 5 Rome Convention appears to be too narrow and does not cover some situations in which consumers with a habitual residence within the Community territory should be protected – for instance, in the case of "mobile consumers",[141] it is necessary give the scope of application of art. 5 an adequate shape. The Proposal of the Institute for art. 5 tries to do this (see question 12 and the Proposal for art. 5).

Because consumer protection law predominantly tries to balance the interests between the parties to consumer contracts (and therefore mainly pursues private interests), it should be dealt with on the level of private international law within the ambit of art. 5. As art. 7 covers the international reach of public policy rules, it will apply to consumer protection law only in extreme circumstances.

6. "Mandatory rules" in art. 6 Rome I. – Article 6 of the Convention sets out a restriction of the principle of free choice of law for individual employment contracts. By a choice of law, employees shall not be deprived of the protection offered by the mandatory rules of the law which would be applicable to the contract absent a choice of law.

The term "mandatory rules" in art. 6(1) Rome Convention encompasses such provisions of labor law in a Member State that cannot be derogated from by contractual stipulation. In French as well as in German labor law, for example, the rules on dismissal are cogent law that cannot be set aside by contractual agreements of the parties to a labor contract which is governed by French or German law. Traditionally, those rules were only internally, but not internationally, mandatory. This characterization led to the result that important provisions for the protection of employees in the case of dismissal, etc., could be set aside by the choice of the law of a country with a lesser degree of protection. Article 6(1) improves the protection of employees by internationalizing what previously were internally mandatory rules of the country in which the employee habitually works.

As far as the mandatory rules of labor law aim at the protection of private interests between the parties to an employment contract, those rules are covered by art. 6 of the Rome Convention. There are, however, provisions in the field of labor law that have to be classified as norms which pursue public policy purposes and are therefore internationally mandatory. Those rules are covered by art. 7 Rome Convention. An example of internationally mandatory rules of labor law is the § 1 of the German Statute on mandatory conditions of labor for transborder services (Statute Concerning the Posting of Workers).[142] According to § 1 of this statute, certain provisions of collective

[141] Green Paper (supra n. 1) no. 3.2.8.2; see also question 3.

[142] Gesetz über zwingende Arbeitsbedingungen bei grenzüberschreitenden Dienstleistungen (Arbeitnehmer-Entsendegesetz) vom 26. 2. 1996, BGBl. I 227.

bargaining agreements of the construction industry that regulate minimum wages and questions related to leave and payments during leave are internationally mandatory rules within the scope of application of art. 7(2) Rome Convention (which has been transformed into art. 34 German EGBGB[143]). These rules do not (predominantly) further the balancing of private interests within the contractual relationship, but intend to create equal conditions of competition for German and foreign construction enterprises which offer their services and compete in the German market. This intention is part of German public policy; its purpose is not in the first instance to balance the interests of the parties to the employment contract. Consequently, these provisions have to be characterized as internationally mandatory rules, which are covered by art. 7 Rome Convention and not by art. 6.

Articles 6 and 7 Rome Convention both use the term "mandatory rules" by referring to two different types of rules. Therefore, it seems appropriate to specify the meaning of the term in art. 6(1) Rome I by inserting the word "internally" before "mandatory rules". If a cogent provision of labor law qualifies as internationally mandatory, it is covered by art. 7 Rome I.

7. *"Mandatory requirements of form" under art. 9(6) Rome I.* – Article 9(1) Rome Convention submits the formal validity of a contract to the lex loci celebrationis or the lex contractus. Article 9(6) Rome Convention, however, makes an exception to this general rule for contracts concerning rights in immovable property or rights to use immovable property. Under this provision, such contracts shall be subject to "the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract".

The wording of art. 9(6) makes it perfectly clear that it covers exclusively formal requirements of the lex rei sitae which qualify as internationally mandatory rules ("irrespective of the law governing the contract"). Requirements of form that are to be characterized as internally cogent rules are not within the ambit of art. 9(6).

The term "mandatory requirements of form" as used in art. 9(6) Rome Convention does not call for specification.

8. *Proposal.* – See art. 3(3), below at p. 100, art. 5(2), below at p. 105, art. 6(1), below at p. 106, and art. 7(1), below at p. 108.

[143] See supra at n. 5.

Question 14:
Should Article 6 be clarified as regards the definition of "temporary employment"? If so, how?

Question 15:
Do you think that Article 6 should be amended on other points?

1. Postings. – Companies often assign workers to a foreign branch or subsidiary within the same group. Sometimes these assignments are effected by a decision of the group's management and the worker is sent to work in another country without alteration in the employment contract. Article 6(2)(a) points out that this does not change the habitual residence for the purpose of determining the applicable law. More often, the companies within a group enjoy a certain autonomy and it seems to be common practice to conclude two contracts. The first contract is concluded between the posted worker and the previous employer. It usually contains a clause that the worker will be (re-)employed upon his or her return by this employer, and stipulations regarding special social benefits, e.g., staff pension funds. The second contract is concluded between the worker and the new employer, usually another company of the same group. The second contract is limited in time. In many cases, the second contract is necessary to obtain a working permit from local authorities in the country where the employee will be working. It is doubtful whether the employee can be regarded as being "temporarily employed" by the same employer "in another country" for the purposes of art. 6(2)(a) or whether there is a change of employment. The mandatory provisions of the law governing the previous employment contract would remain applicable only in the former case.

GEDIP has proposed adding the clarification to art. 6(2)(a) that the conclusion of a contract of employment with an employer belonging to the same group as the original employer shall not exclude a finding that a posting has taken place. The Institute welcomes this proposal. GEDIP's draft proposal gives courts enough leeway to assess the case. It is important to take into account all relevant circumstances, since postings within the same group are often borderline cases. In some cases one can argue that both contracts shall be governed by the law of the posting country according to art. 6(2)(a): the first contract because it is the basis for the posting; and, the second, because it only shapes the conditions of the posting. However, in other cases it is reasonable to apply the law of the country to which the employee moves since the circumstances of the case suggest that a new employment has been taken up.

These difficulties are illustrated by a case decided by the Cour d'Appel de Paris:[144] A Russian employee working in Moscow concluded a contract with

[144] Cour d'Appel de Paris 7. 6. 1996, Rev.crit.d.i.p. 1997, 55.

a Russian company in Russia. Later, he concluded a contract with an English subsidiary of the Russian parent company in London to become the subsidiary's representative in France. The management of the Russian parent company approved this new contract after having changed it to an employment of indeterminate duration. However, the management also concluded a second contract with the employee which contained a re-employment clause with a salary not inferior to the salary he received for his work in France. The employee worked for three years in France. There was no choice-of-law clause within the contracts. The Cour d'Appel classified the assignment as non-temporary since the employee concluded a new contract of indeterminate duration with his London-based employer and habitually carried out his work in France. Thus, the law applicable to the contract was French law. However, it might also be argued that a combined assessment of both contracts concluded with the employee shows that his attachment was temporary.

2. Reshaping the term "temporarily employed". – The Convention leaves it to the courts to determine the duration beyond which employment ceases to be temporary. The Institute basically approves of this concept. It ensures the necessary flexibility. The competent courts shall take all relevant facts into account and are free to adopt a solution according to the specific circumstances of the case. Courts and academic opinion use two major concepts to define a posting as temporary: the (objective) duration of the contract or the (subjective) will of the parties that the assigned worker will return.

a) Subjective approach. – The Institute favors the subjective approach, which is also pursued by GEDIP. Although the introduction of an (objective) time period beyond which an employment could not be regarded as temporary would serve the aim of foreseeability, it will lead inevitably to arbitrary results, while a subjective determination ensures the necessary flexibility. Thus, the ideas voiced in academic opinions to introduce such time limits should be rejected. The impossibility of finding a reasonable time limit covering all cases becomes evident when one takes a closer look at the time periods proposed. While some suggest fixed time periods varying from one to five years, others point out that the duration should be in line with the periods set out in Reg. 1408/71 (EEC)[145] on the application of social security schemes. According to art. 14(1)(a) of this Regulation, workers employed in the territory of a Member State by an undertaking to which they are normally attached, who are posted by that undertaking to the territory of another Member State to perform work there for that undertaking, shall continue to be subject to the social security legislation of the first Member State, provided that the anticipated duration of that work does not exceed twelve months.

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[145] Regulation (EEC) no. 1408/71 of the Council of 14 June 1971 on the application of social security schemes to employed persons and their families moving within the Community, O.J. EC 1971 L 149/2.

None of the proposals voiced in academic opinions is particularly convincing. Any given period from one to six years will be arbitrary and might prove to be too rigid to cover the various situations of modern employment contracts. While a period of one or two years might be adequate in one case, in other situations three or more years seem more convincing. Neither can the idea to interpret the Convention in the light of the time periods set out in Reg. 1408/71 (EEC) be followed. The periods in this Regulation are to ensure that the balance of social security systems funded by regular payments from employees and/or employers is not impaired. The determination of a temporary assignment depends to a much greater extent on the parties' freedom of contract.

Further, there is no basis for a fixed time span in the existing case law. Most cases brought before the courts concerned shorter employment periods with durations of three to six months or less, where it is convincing to assume that they concern temporary employment. This was often the case in Germany, where workers from Eastern European countries carried out work on construction sites.[146] Also, in a case where the Rome Convention was not applicable, the Corte di Cassazione held that under Italian law a posting of up to three months must be regarded as temporary employment.[147] However, one can find some cases concerning longer periods. The Kantongerecht Rotterdam has argued that after a period of five years an employment cannot be seen as temporary,[148] and the Cour de Cassation has held – although in a case where the Convention was not yet applicable – that the law of the receiving country shall apply in a case where an employee works for more than twelve years in this country.[149]

It might be worth considering the introduction of a presumption beyond which an employment shall be deemed to be habitual. At first sight this solution has the advantage of providing foreseeability by giving a clear indication of when an employment is presumed to be habitual, but at the same time ensures the necessary flexibility by allowing the parties to prove that employment beyond the limit can be regarded as temporary. Even such a presumption, however, would not solve the difficulty of determining a time span. Again, any general time span would be arbitrary in the view of the different requirements of the various sectors and jobs. Moreover, one should not underestimate the prejudicial effect of a presumption which might lead courts to schematically qualify every case below the given time period as temporary instead of assessing every employment contract according to the circumstances.

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[146] Cf. LAG Frankfurt 10. 4. 2000, IPRspr. 2000 no. 38.
[147] Corte Cass. 13. 2. 1989, no. 881, Riv.int.priv.proc. 26 (1990) 370 seqq.
[148] Ktg. Rotterdam 18. 11. 1996, Ned. IPR 1997, 346, no. 270.
[149] Cass.Soc. 17. 12. 1997, Droit Social 1998, 185 – *Air Maroc ./. Jalal.*

b) Limited period. – GEDIP has proposed changing the notion "temporary employment" to "limited period". A limited period would, however, cover a very long time period. Even an assignment of 20 years is of limited time. It is doubtful whether the contract should still be governed by the law of the "home country" if the employee works for such a long period abroad. In general, a posting limited in time will be a posting where the parties agree on the return of the employee. But this is not the only situation where a posting is limited in time. One could also think of a posting that sends workers abroad for some time and after this period their contracts terminate. In this case, there would be no will of return. However, the posting would be limited in time and it seems reasonable to apply the law of the posting state. To ensure a flexible handling by the courts, the Institute does not recommend a legal definition of the term "posting limited in time".

3. Directive 96/71/EC concerning the posting of workers. – The Institute supports the proposal of GEDIP that art. 6 should refer to the provisions of Dir. 96/71/EC concerning the posting of workers.[150] The purpose of the Directive is to guarantee, in intra-Community cases, the application of certain mandatory provisions of the host Member State even if the employee works in that country only temporarily. So far, the Directive has taken precedence over the Convention under its art. 20. The relation between a future Rome I Regulation and the Directive concerns two Community instruments; it is different and less clear. Although the provisions of Dir. 96/71/EC concerning the posting of workers will prevail according to the new art. 20(1)(b) Rome I Regulation (see comments to question 5), we think that art. 6 should make reference to the aforementioned Directive for the sake of clarity.

4. Employment of seamen. – According to the Giuliano/Lagarde report, the working group did not seek a special rule for the work of members of the crew on board of a ship.[151] While the application of the choice-of-law rule set forth in art. 6(1) is uncontested, the determination of the proper law, in the absence of an express choice of law, is heavily disputed. Some courts apply the law of the country of the ship's flag. It is argued that the ship is the place where a seaman habitually carries out his work according to art. 6(2)(a) and that the flag determines the nationality of the ship. However, if the ship flies a flag of convenience which is the only connection with the law of the flag state, the law of the country with the closest connection to the case is applicable according to art. 6(2) in fine. This seems to be the view of the majority of academic opinions in Germany, France, and Belgium; in Great Britain, on the other hand, the view prevails that the law of the country shall be applicable in which the place of business is situated through which the seaman was engaged in accordance with art. 6(2)(b). The latter opinion is founded mainly on the

[150] O.J. EC 1997 L 18/1.

[151] *Giuliano/Largarde* (supra n. 26) 26.

argument that ships are constantly moving through waters belonging to different countries so that there is no habitual place of work in one country.

The court practice in Europe is not unambiguous either. The German Bundesarbeitsgericht[152] left the connecting factor open and made reference to the law of the country with the closest connection to the case in accordance with art. 6(2) in fine. In the Netherlands one can find judgments applying the law of the country whose flag the ship flies[153] as well as judgments applying the law of the country in which the place of business is situated through which the seafarer was engaged,[154] while in France art. 5 Code du travail maritime[155] and in Italy art. 9 Codice della Navigazione[156] are based on the flag-state principle.

b) Second ship register. – Many countries have created special ship registers for merchant ships to offer ship owners an alternative to flagging out. Some states, such as the Netherlands, Great Britain, and France, have established this register in their overseas territories which have their own labor law with a lower standard of protection than the "mother country". However, the ships registered in these registers fly the relevant country's flag. This type of second ship register has no impact on the operation of the conflict-of-law rules. If art. 6(2)(b) refers to the place of business through which the crew member was engaged, the law of the overseas territory applies since the ship owner(s) or its relevant branch will usually be established there. If courts apply the law of the country whose flag the ship flies, the law of the overseas territory will also apply. Article 19 provides that where a state comprises several territorial units, each of which has its own rules of law in respect to contractual obligations, each territorial unit shall be regarded as a country and the national conflict-of-law rules shall be applied to identify the law applicable. The national law leads to an application of the law of the overseas territories.

Germany created an international ship register which is not an alternative register but an additional list next to the German ship register in order to enable ship owners to employ seamen domiciled outside the EC at conditions below German standards. § 21(4) FlaggRG,[157] which is considered to be a

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[152] BAG 3. 5. 1996, IPRax 1996, 416 (418); cf. also LAG Hamburg 19. 10. 1995, IPRspr. 1996 no. 50a).

[153] Pres. Rb. Rotterdam 5. 10. 1995, Ned. IPR 1996, 123, no. 94; Hof Arnheim 8. 4. 1997, Ned. IPR 1998, 112, no. 100.

[154] Rb. Rotterdam 8. 3. 1996, Ned. IPR 1996, 584, no. 445.

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

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

[157] § 21(4) was inserted into the "Gesetz über das Flaggenrecht der Seeschiffe und die

statutory interpretation of art. 30 EGBGB – the German incorporation of art. 6 Rome I – states that the law applicable to employment contracts of seamen without domicile or permanent residence in Europe on ships registered in the International Ship Register cannot simply be determined by applying the law of the flag. Thus, courts determine the applicable law by applying the law of the country which has the closest connection to the case.[158]

c) Law of the flag. – The foregoing survey shows that there is a need to introduce a special conflicts rule for maritime employment contracts in order to enhance legal certainty. It is clear that both criteria used in art. 6(2) and European court practice can be used to establish artificial links. If the law of the flag state is applied as the general rule, ship owners can choose a flag of convenience for their vessels. If it is the law of the business through which the seaman was engaged, employment agencies – so-called manning companies – can be deliberately incorporated in countries with lower protection standards to engage crew members there. Still, the Institute favors the flag-state rule. This connection best serves the needs of legal certainty. It has the important advantage of being unambiguous, since the flying of two different flags is proscribed. Furthermore, many courts in Europe apply this traditional rule. In a comparative perspective, the flag is the most widely used connecting factor in maritime private international law. Finally, the structure of art. 6 supports this choice. Under art. 6(2), priority is given to the habitual place of work, i.e., to a connecting factor related to the employee and the factual environment of his work, whereas the place where the contract is made is only of subsidiary significance. Since the ship can be considered as the place where crew members habitually carry out their work, a connecting factor such as the flag that is related to the ship should be relevant in accordance with art. 6(2)(a). Despite the fact that a ship crosses waters belonging to many different countries, it can be connected with the country whose flag the ship flies. Therefore, a subsection (c) should be added making the application of the law of the flag state the general rule. This rule shall be applied in principle also to flags of convenience. If, however, the flag is the only connection to the flag state, there may be a closer link to another state. In that case, the applicable law shall be identified in accordance with art. 6(2) in fine.[159] Courts then have to apply the law

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Flaggenführung der Binnenschiffe" (FlaggRG) by art. 1 no. 2 of the "Gesetz zur Einführung eines zusätzlichen Registers für Seeschiffe unter der Bundesflagge im internationalen Verkehr (Internationales Seeschiffahrtsregister – ISR)" of 23. 3. 1989 (BGBl. I 550). A revised version of the FlaggRG (as announced on 4. 7. 1990) can be found in: BGBl. 1990 I 1342.

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

[159] See LAG Baden-Württemberg 17. 7. 1980, IPRspr. 1980 no. 51: The German nationality of the economic ship-owner and the seaman prevail over the law of Cyprus as the flag state.

of the country which has the closest connections to the employment contract. The criteria to find the closest connection can be, inter alia, the nationality of the parties, the seat of the employer, or the place where the contract was concluded.

There should be no special rules for second ship registers. Again, the law of the flag state should be applicable unless the circumstances of the case show that the contract as a whole is more closely connected with the law of another country. This means that for the special ship registers created in overseas territory, the law of this territorial unit of the country is applicable (see above [b]).

5. Flying personnel on international flights. – Many international airlines conclude their employment contracts at their headquarters in country A and then transfer the employees to a base in country B where they receive their work instructions.

a) Connecting factors. - With regard to the applicable law of the personnel on board international flights, three major connecting factors can be found in academic opinions: the law of the country (i) where the plane is registered, (ii) where the business is seated through which the personnel were engaged, or (iii) the law of the base from where the personnel board the plane and where they return to.

Few court cases dealing with flying personnel under the Rome Convention can be found. The German Bundesarbeitsgericht[160] recently decided that the law applicable to an employment contract of a flight attendant is the law of the place of business through which the personnel were engaged. It left open whether this means the law of the country in which the contract was concluded or the law of the country where the flight attendant was "integrated" into the business, i.e., where she received her instructions ("the base"). In France, in a case preceding the Rome Convention's entry into force, the Cour de Cassation[161] decided that, as a general rule, the law of the country where the aircraft is registered shall be applied. French academic opinion favors the application of the law of the country where the engaging business is seated.

b) Law of the country where the engaging business is seated. – The Institute proposes choosing the seat of the engaging business as the connecting factor. First, it is difficult to argue that flying personnel have a habitual working place. Unlike seamen, the members of the crew of an aircraft also have considerable work to do on the ground, such as security checks on the plane, assisting with passenger check-in, or doing paper work. Furthermore, some airlines man their aircraft by using employment agencies that can send temporary personnel on a short-notice basis to work for different airlines. Thus, on the very same day

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[160] BAG 12. 12. 2001, IPRax 2003, 258.

[161] Cass. mixte 28. 2. 1986, Droit social 1986, 411 seqq. – *Noireaux et SNPL ./. Air Afrique*.

the personnel might possibly work on aircraft registered in different countries. To connect such employment contracts to the registration would lead to arbitrary results. The seat of the engaging business ensures the necessary flexibility. For clarification, we propose that personnel of international flights should be mentioned as an example in art. 6(2)(b).

6. Telework. – Telework occurs when information and communications technologies are applied to enable work to be carried out at a distance from the place where the work product is needed or where the work would conventionally have been done. It includes, inter alia, home-based telework, where an employee works partly or full-time at home and not on the premises of the employer, or a telecenter, which is set up and equipped by an employer in the neighborhood of a group of workers. It seems to be common sense that the law applicable to transborder employment contracts of this kind is the law of the country where the computer workplace of the teleworker is situated. This is the place where teleworkers habitually carry out their work according to art. 6(1)(a).

7. *Commercial agents: codifying "Ingmar".* – The integration of the European Court of Justice's ruling in *Ingmar v. Eaton*[162] in the Rome Convention is without any doubt one of the most difficult challenges posed by the Convention's modernization.

a) General. – The European Court of Justice decided in *Ingmar* that arts. 17 and 18 of Council Directive 86/653/EEC on the coordination of the laws of the Member States relating to self-employed commercial agents, which guarantee a post-contractual indemnity to commercial agents, must be applied where the commercial agents carried out their activity in a Member State, even though the principal is established in a non-Member country and a clause of the contract stipulates that the contract is to be governed by the law of that country – in the case at hand, the law of California. Directive 86/653/EEC does not contain any conflict rules. However, the Court decided that (internally) mandatory rules contained in Community law must also apply with regard to third countries if there is a close connection with the European Community, in particular when commercial agents carry out their activity within the EC. This judgment interferes with traditional private international law rules. It blurs the traditional distinction between internally and internationally mandatory rules (see also the comments made to questions 13) for the sake of protecting the commercial agent and to ensure undistorted competition in the internal market. The precise impact of the *Ingmar* case cannot be predicted in detail. In particular, it remains to be seen whether this judgment applies to all mandatory provisions in EC Directives lacking a conflict rule or must be restricted to the mandatory provisions laid down in Dir. 86/653/EEC.

[162] ECJ 9.11. 2000 (supra n. 44).

b) Confining Ingmar to contracts of commercial agents. – The Institute is convinced that the legislature should solve the problems caused by *Ingmar* by restraining its scope of application to commercial agents and their rights under Dir. 86/653/EEC. It would go too far to extend this jurisprudence to all cases concerning internally mandatory provisions contained in Directives. One should bear in mind that the historical background of internationally mandatory rules was the intention of states to ensure the application of those provisions that protect important state interests, e.g., embargo rules or currency provisions, also vis-à-vis the law of third countries (see also the comments on question 16). The basic rule in private international law is the principle of party autonomy. Thus, it should be left to the parties to choose the law applicable to their contract except where strong reasons justify a limitation of the parties' freedom. Applying *Ingmar* to all (internally) mandatory provisions merely because they are rooted in EC Directives would turn the rule into an exception.

One could even think of reducing the scope of protection only to those commercial agents who have only one principal, and, therefore, are in a similar dependency as employees. Today in international practice, commercial agents often have more than one principal and are frequently organized as corporate bodies. Thus, their need for protection is far lower. However, the group decided not to propose this limitation because it might be arbitrary to deprive agents of their rights only because they also have additional – and perhaps less lucrative – contracts with other principals.

c) Commercial agents and art. 6. – There are various different possibilities for integrating *Ingmar* into the Rome Convention. One possibility would be to alter art. 7; another way would be to add a paragraph to art. 3. The latter solution is proposed by GEDIP. For systematic reasons, we are of the opinion that it is advisable to adjust art. 6. Basically, the ECJ decided to declare the provisions in the said Directive to be internationally mandatory in order to protect the commercial agent against a principal who might be in a stronger position. The same reasoning underlies art. 6. This provision aims at protecting an employee who should not be deprived of mandatory rights of the law of the country which would be applicable without choice of law.

d) Bilateralization of Ingmar. – In *Ingmar*, the European Court of Justice restricted *Ingmar* to agents having a close connection with the Community, in particular where the agents carry out their activity in the territory of a Member State. This close connection can also be assumed if agents have their principal place of business in the EU, although they carry out their activities outside the EU. In these cases, one can infer from *Ingmar* that agents cannot be deprived of the protection afforded to them by the mandatory rules of the applicable law under art. 4. However, the Institute takes the view that the protection of commercial agents should not be restricted to such cases having a close connection with the Community. The protection of commercial agents

established in *Ingmar* should not be codified as a unilateral reservation of EC standards vis-à-vis the law of a non-Member State, but as a bilateral conflicts rule which would also safeguard the protection agents enjoy under the law of their place of business in a third state as against the choice of a different law by the parties. This bilateralization is required by the principles of symmetry and reciprocity in international trade. At present, this bilateralization is not ensured, as a recent case decided by the Oberlandesgericht (court of appeal) München[163] illustrates: A commercial agent carrying out his activities in Colombia demanded an indemnity from his German principal after the termination of their agency contract. A clause in this contract submitted the contract to the law of Germany and another clause precluded the payment of an indemnity after the termination of the contract. Under German law, the latter is legal with regard to commercial agents carrying out their activities outside the EU or the EEA. The Oberlandesgericht München found that the commercial agent had no claim for an indemnity. The fact that the law of Colombia provides for an (internally) mandatory claim for an indemnity after the termination of the contract is irrelevant since the applicable German law allowed the exclusion regardless of the (internally) mandatory rules of the law of the country that would govern the contract in the absence of an express choice of law.

8. Proposal. – See art. 6, below p. 106.

Question 16:

Do you believe there should be rules concerning foreign mandatory rules in the meaning of Article 7? Would it be desirable for the future instrument to be more precise on the conditions for applying such rules?

1. Categories. – The internationally mandatory rules as covered by art. 7 of the Rome Convention can be distinguished by their origin:

a) Internationally mandatory rules of the proper law of contract. – The mandatory rules can be part of the proper law of contract which might be determined by choice of law by the parties or by objective criteria provided by the conflict-of-law rules of the forum. The Rome Convention does not contain an express reference to the territorial reach of mandatory rules of the proper law of the contract. The prevailing view is that such mandatory rules take effect within the proper law of the contract as far as such rules themselves demand their application (by express wording or by interpretation).

b) Internationally mandatory rules of the forum. – The application of this type of mandatory provision is taken care of by art. 7(2). This provision cannot be

[163] OLG München 11. 1. 2002, RIW 2002, 305.

characterized as a true conflict rule. It merely makes it clear that the convention rules in no way restrain the judge from applying the internationally mandatory rules of the forum independently from the law applicable to the contract. It does not state, however, what the requirements for and the limits of such application of mandatory rules of the forum are.

c) Internationally mandatory rules of a third country. – The most disputed and problematic case with regard to mandatory provisions is covered by art. 7(1) of the Convention. This paragraph deals with mandatory provisions which form neither part of proper law of contract (whether determined by choice of law or by objective criteria in the absence of choice) nor of the law of the forum. Article 7(1) of the Convention does not render these rules "applicable", but merely states that "effect may be given" to such provisions, provided that the contract has a close connection to the legal system.

2. The need for a provision on foreign mandatory rules. – At the time when the Convention was drafted, art. 7(1) was a relatively novel kind of provision; there were only few models for dealing with the difficult problem of whether and under which requirements internationally mandatory rules of a law which neither originate from the law of the forum nor from the proper law of contract should be taken into account by a court in adjudicating a contract with transborder elements.

The question of under which circumstances foreign (and domestic) internationally mandatory rules will be applied or – as expressed by art. 7(1) Rome Convention – be "given effect" is an issue of practical importance.[164] A provision covering this issue within the framework of a future EC regulation seems to be indispensable. Internationally mandatory rules emanating from foreign legal systems may lead to the result that a party to a private contract is not in a position to perform the contract because the foreign rules concerning currency controls, in- and export restrictions, embargoes, etc., prevent it or render the performance of the contract an illegal act under the laws of the country where the performance takes place. In such a situation, a court in another country cannot but take notice of such restrictive rules in order to do justice to the private parties involved.

On the other hand, certain countries might attempt to pursue their public policy purposes by extending the territorial scope of application of their laws in an exorbitant way. In order to limit such tendencies, the wording of a provision on internationally mandatory rules should be flexible enough to enable the court to set appropriate restrictions to exorbitant claims of application of foreign internationally mandatory rules.

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[164] For a recent example of the practical importance of art. 7, see the judgment of the Tribunal de commerce de Mons 2. 11. 2000, Rev.dr.com. belge 2001, 617 (at 619 seqq.): In a litigation arising from a franchising contract governed by Belgian law, the court refused to apply, under art. 7 Rome I, the Tunisian competition act.

Therefore, the inclusion of a provision on foreign internationally mandatory rules in a future EC regulation is strongly recommended.

However, restricting such a provision to foreign internationally mandatory rules would be incomplete, because it would not deal with internationally mandatory rules of the forum and of the proper law of contract. A clearly structured and comprehensive provision on internationally mandatory rules in a future EC regulation would improve the harmonization of the private international law of contracts within the Community. Therefore, it is suggested that the proposed rule should contain provisions on

– the definition of the term "internationally mandatory rules" (Proposal art. 7[1]);
– the applicability of internationally mandatory rules of the forum (Proposal art. 7[2]);
– the applicability of internationally mandatory rules of the proper law of contract (Proposal art. 7(3)); and, finally,
– the giving effect to internationally mandatory rules of a country, the law of which is neither the law of the forum nor the proper law of contract (Proposal art. 7[4]).

3. Reservation. – The provision of art. 7(1) of the Convention was not accepted by all signatories. Germany, Ireland, Luxembourg, Portugal, and the United Kingdom filed a reservation under art. 22(1)(a) of the Convention and did not transpose art. 7(1) of the Convention into their private international law rules. With regard to a future Community instrument, the question arises of whether such an instrument should include an opt-out clause for Member States that wish not to apply art. 7(1) Rome Convention (art. 7[4] Proposal).

The German Bundesrat (second parliamentary chamber) recommended the filing of a reservation on the following grounds: Article 7(1) of the Convention would lead to uncertainty because of the vague and unclear wording of the provision and because the application of foreign mandatory rules was left to the discretion of the court so that it was not foreseeable for the parties to a contract which mandatory rules were relevant for the contract. Moreover, the provision would lead to a heavy burden for the courts because they would be charged to a large extent with the difficult question as to which rules of a foreign legal system were of a mandatory nature. Finally, art. 7(1) of the Convention would lead to the enforcement of foreign ordre public, which was considered unacceptable.[165]

A similar opposition against art. 7(1) of the Convention was voiced in the United Kingdom. The provision was described by the United Kingdom dele-

[165] Stellungnahme des Bundesrats zum Entwurf eines Gesetzes zur Neuregelung des Internationalen Privatrechts, BT-Drucks. 10/504 (supra n. 11) 100. Art. 7(1) Rome I, which initially was transposed as art. 34(1) of the German Draft EGBGB, was deleted. The Federal Government consequently lodged a reservation under art. 22(1)(a).

gation to the group of experts drafting the Convention as "a recipe for confusion, […] for uncertainty […] for expense and for delay […]".[166]

Notwithstanding the non-transformation of art. 7(1) of the Convention, both German and British judges take into account foreign internationally mandatory rules under certain circumstances.[167] They do so on the basis of their autonomous private international law. The results reached in the relevant cases are probably no different from the results that would be reached under art. 7(1) of the Convention if that provision were applicable. Neither in Germany nor in the United Kingdom does the autonomous private international law contain express provisions covering the applicability of foreign internationally mandatory rules. The judge-made rules covering this field create not less but rather more uncertainty for the parties to a contract who want to know which rules are pertinent to their contract. Moreover, there are no reports from those countries that did not file a reservation against art. 7(1) of the Convention that it created insurmountable problems through uncertainty, costs, or workload for the courts.

Finally, the wording of art. 7(1) Rome Convention and art. 7(4) of the Proposal is flexible enough to allow the courts in the Member States to reject foreign internationally mandatory rules which claim an exorbitant and unjustifiable scope of application.

In all, the concerns that have lead to the reservation against art. 7(1) seem without substance.

4. Definition of the term "internationally mandatory rules". – In the Member States, it is highly disputed which types of statutes qualify as internationally mandatory rules. Some statutes contain a determination of their territorial reach. Other legislation fails to define its own territorial scope of application. Then it is the task of the court to determine that scope by way of interpretation.

a) Practical experience. – Nevertheless, it seems fair to say that it is recognized within the legal systems of the Member States that a certain "hard core" of statutes are to be classified as internationally mandatory rules. For example, internationally mandatory rules are norms for the protection of competition, or a country's currency, embargoes, and rules for the restriction of exports of art objects to protect the national heritage of a country. Such rules which protect fundamental institutions of the political and economic order of a country are to be recognized as internationally mandatory.

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[166] *Dicey/Morris* (supra n. 113) 1246.

[167] For the United Kingdom, see: *Ralli Bros.* v. *Compania Naviera Sota y Aznar*, [1920] 1 K.B. 287, 291, 300 (C.A.); *Foster* v. *Driscoll*, [1929] 1 K.B. 470, 520 (C.A.) *Kleinwort, Sons & Co.* v. *Ungarische Baumwolle A.G.*, [1939] 2 K.B. 678 (C.A.); *De Beéche* v. *South American Stores Ltd.*, [1935] A.C. 148, 156; *Kahler* v. *Midland Bank Ltd.*, [1950] A.C. 25, 36 (H.L.). Cf. for Germany: BGH 22. 6. 1972, BGHZ 59, 82; 8. 2. 1984, IPRax 1986, 154 = IPRspr. 1984, p. 65 (reference only); 8. 5. 1985, BGHZ 94, 268 = IPRspr. 1985 no. 4.

As opposed to internationally mandatory rules, provisions of private law which predominantly aim at balancing interests only between the parties of a contract are internally mandatory. They form part of the proper law of the contract, and in the absence of specific conflict rules are removed by the choice of a foreign law by the parties. Doubts arise, however, with regard to cogent private law rules that pursue purposes of social policy, like workers protection, the claim of indemnification for commercial agents, and the law of landlord and tenant. In Germany, for instance, the cogent rules of the law of landlord and tenant are considered to be internationally mandatory, if the dwelling is situated in Germany;[168] although they form part of private law, they are looked upon as taking the place of the former rules of public law that governed public housing management during the period of housing shortage following World War II.[169]

Courts of different jurisdictions reach divergent conclusions as to the *internationally* mandatory nature of the same provisions. The ECJ held in its *Ingmar* decision that the provisions of the EC-Dir. 86/653[170] concerning compensation or indemnification upon termination of the commercial agency contract are internationally mandatory.[171] This led to the result that the choice of law of a non-Member State in which the principal has established a place of business and which does not provide for an indemnification, is superseded by the internationally mandatory indemnification or compensation rules of Community law, if the commercial agent performs business activity within Community territory. With regard to the same question, the French Cour de Cassation[172] in a recent decision and the German Bundesgerichtshof[173] as well as a Dutch court[174] in older judgments decided that the indemnification provisions of the French and German law of the commercial agent were to be considered as *internally* mandatory rules only and were *not applicable* if the proper law of contract did not provide for an indemnification for the commercial agent upon termination of the contract.

In view of these divergences and in order to give the courts an orientation of what is meant by the term "internationally mandatory provision", a definition should be included in the article. As a matter of necessity, such a defini-

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[168] *Staudinger(-Magnus)* (supra n. 95) Art. 34 EGBGB no. 88; Münchener Kommentar zum BGB[3]*(-Martiny)* X (1998) Art. 28 no. 122 (hereinafter cited as: Münch.Komm.*[-author]*); *Kropholler*, Internationales Privatrecht[4] (2001) 478.

[169] Münch.Komm.*(-Sonnenberger)* (preceding note) Einl. IPR no. 50.

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

[171] See supra at n. 44; the same result was reached by the Italian Corte di Cassazione in its judgment of 30. 1. 1999, Riv.dir.int.priv.proc. 89 (2000) 741 (at 743 seqq.).

[172] Cour de Cassation 28. 11. 2000, Bull., IV no. 183, 160.

[173] BGH 30. 1. 1961, IPRspr. 1960/61 no. 39b) = NJW 1961, 1062.

[174] Rb. Arnhem 11. 7. 1991, Ned. IPR 1992, 151, no. 100.

tion will have to be shaped in very general terms in order to encompass the very wide range of purposes which are pursued by existing and future public policy legislation that touches upon contracts concluded between private parties. Therefore, a definition will be helpful to give general guidance for the interpretation of the term "internationally mandatory rules", but it will not remove all uncertainties and doubts when it comes to the characterization of a specific statute.

b) The Arblade opinion as a point of reference. – The definition proposed by the Institute – basically going along with the suggestion of the Green Paper[175] – is based on the definition developed by the ECJ in its *Arblade* judgment.[176] In this case, the ECJ was confronted with the question of whether and to what extent mandatory rules of labor and social security law of a Member State (Belgium), which qualified as public order legislation ("lois de police") under Belgian law, could lawfully restrict the free movement of services under art. 49 EC-Treaty. Two French construction companies were engaged in the building of a complex of silos for the storage of sugar in Belgium. To this end, the companies deployed a number of their workers temporarily on the site in Belgium. The companies were prosecuted by the Belgian authorities for the violation of a number of provisions of Belgian labor and social security law, especially for failing to pay minimum wages to the workers, to pay premiums in favor of their workers for the insurance of bad weather payments, and to draw-up and keep certain documentation. All these obligations were characterized as public order legislation under Belgian law. The Belgian court assigned to the criminal proceedings submitted the matter to the ECJ for a preliminary ruling on the compatibility of the Belgian public order provisions with the right to free movement of services according to arts. 49 seqq. EC. The ECJ decided that public order legislation of a Member State is not exempt from compliance with the provisions of the EC Treaty. Otherwise, primacy and uniform application of Community law would be jeopardized. Only if the considerations underlying the public order legislation constitute overriding reasons relating to the public interest may such legislation qualify for an exception to Community freedoms like the free movement of services. In its decision, the Court holds that public order legislation – as understood by Community law – relates "to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State".[177] The reference to all per-

[175] Green Paper, no. 3.2.8.3.

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

[177] ECJ 23. 11. 1999 (preceding note) no. 30.

sons present in the state and to all legal relationships within the state has been omitted in the Max Planck Proposal; the point of contact in art. 7 is the "close connection" of the contract to the concerned state; a close connection may well be established by the presence of a person in the territory of a state or the location of a contractual relationship, but also by other circumstances of the case before the court.

The reference to the fundamental importance of such provisions for the political, social, and economic order makes it clear that cogent rules of private law – which at the first instance aim at the balancing of interests between the parties of the contract – are not internationally mandatory. The taking into account of foreign mandatory rules is an exception to the rule that a contract is governed by the law determined by the parties through a choice of law or – absent such a choice – by objective criteria. Rules of a legal system that is not the proper law of the contract can only be of relevance to the contract under special and narrowly defined circumstances. The definition as proposed in this paper intends to give the court charged with the classification of a provision of an internationally mandatory rule a yardstick for this determination. It is clear, however, that given the multiplicity and range of public policy interests that are pursued by provisions of private law, the proposed wording of art. 7(1) is not suited to furnish a final and conclusive definition of all internationally mandatory rules. If a dispute arises under an EC instrument, whether a foreign provision is to be given effect or not, the ECJ will finally have to decide the question as a court of last resort and will thereby make sure that art. 7 of the instrument will be construed equally throughout the Member States of the Community.

5. Internationally mandatory rules of the lex fori and the lex causae. – Article 7(2) of the Proposal replaces art. 7(2) of the Convention. Article 7(3) of the Proposal has no predecessor in the Convention. The Convention does not expressly deal with the application of internationally mandatory rules of the proper law of contract. Apparently, the drafters of the Convention implicitly proceeded on the assumption that the internationally mandatory rules of the law governing the contract, whether chosen by the parties or determined by objective criteria, are applicable as part of the proper law of contract. It seems open to doubt, however, whether the scope of the proper law of contract stretches to provisions that are not part of contract law, such as statutes against restraint of competition,[178] embargo provisions, or export restrictions. As the Convention (and also the Proposal) contain particular conflict-of-law provisions for internationally mandatory rules of third countries and of the forum, it seems consequent and desirable for the sake of a comprehensive coverage of the

[178] In BGH 27. 2. 2003, NJW 2003, 2020 (at 2021) the application of the German statute on fees of engineers and architects as part of the proper law of the contract was rejected. However, the court applied the statute under art. 7(2).

question of internationally mandatory rules to also include a rule on internationally mandatory provisions of the proper law of contract.

6. Internationally mandatory rules of third states. – The application of internationally mandatory rules of a third country to a contract constitutes an exception to the regular, bilateral provisions of private international law under which the proper law of contract is determined. Therefore, in considering (a) whether a provision of a third country (the law of which is neither the proper law of contract nor the law of the forum) qualifies as an internationally mandatory rule and (b) whether this rule shall be given effect, the court has to move along with great care, restraint, and caution. As an exception in relation to the proper law of contract, the requirements under which foreign mandatory rules are to be given effect have to be interpreted narrowly. An overextended application of such rules would marginalize the scope of application of the rules for the determination of the proper law of contract, especially the parties' freedom of choice of law. Moreover, it is not the function of the courts in civil matters of one country to primarily enforce public policy rules of another country in cases concerning the adjudication of claims arising under contracts between private parties.

In order to facilitate the task of the courts and to clarify as far as possible the criteria under which foreign internationally mandatory provisions are to be given effect, art. 7(2) has been supplemented. The court – in considering whether to give effect to such a rule – shall regard the consequences of an application or non-application for the *purposes of the foreign rules* and for the *parties* concerned. The "giving effect" to a foreign internationally mandatory rule is easier for a court if the *purposes* pursued by the rule are recognized on the international level and are also to be found in the legal systems of its own state and other countries or international conventions. Internationally recognized purposes are, for instance, restrictions on exporting art objects based on the protection of the national cultural heritage or prohibitions on forming cartels or abusing positions of market strength for the protection of competition. Internationally mandatory rules that are singular and unprecedented in other legal systems are likely to be refused by a court, even if there is a considerably close connection to the country which has adopted the internationally mandatory rule. The Tribunal de Commerce in Mons,[179] Belgium, recently decided a case in which a corporation situated in Belgium concluded an agreement concerning an exclusive distributorship for Tunisia with a company that was registered in Tunisia. Under Tunisian competition law, exclusive distribution agreements were prohibited. The Belgian court had to decide under art. 7(1) Rome Convention whether to give effect to the Tunisian rule of non-exclusivity in the Belgian proceeding and with respect to a contract which apparently was subject to Belgian law. The Court rejected the ap-

[179] Tribunal de commerce de Mons 2. 11. 2000, Rev.dr.com. belge 2001, 617.

plication of the Tunisian statute because – inter alia – the prohibition of exclusive distribution agreements seemed to be a singular feature of Tunisian law, unparalleled in other jurisdictions.[180]

Internationally mandatory rules are frequently supplemented by criminal sanctions. When deciding whether or not to apply a foreign internationally mandatory rule, a judge has to consider which consequences the decision will have for the parties involved. If one of the possible options leads to the result that a party has to commit a criminal or illegal act in the foreign country which adopted the internationally mandatory rule, e.g., by performing the contract, the court might prefer to solve the case by choosing another option in order not to force a party to act illegally or even criminally in the foreign country.

7. *Internationally mandatory rules of other EC Member States.* – GEDIP proposes the amendment of art. 7 by adding para. 3, according to which effect may be given to mandatory rules of Member States of the EC only if these rules do not constitute an unjustified restriction on the principles of free movement guaranteed in the EC Treaty. Article 20(1)(c) of the Max Planck Proposal states that the future EC instrument will not prejudice the application of EC Treaty provisions which prevent the application of a provision of the law of the forum. This rule excludes an internationally mandatory rule of a Member State that does not comply with the principles of free movement contained in the EC Treaty. Therefore, an amendment to art. 7 Rome I such as the one proposed by GEDIP does not seem necessary.

8. *Proposal.* – See art. 7, below at p. 108.

Question 17:
Do you think that the conflict rule on form should be modernized?

1. *Rationale of the present art. 9.* – For determining whether a contract is valid on formal grounds, art. 9 currently refers to the proper law of the contract or, alternatively, to the lex loci contractus and – with regard to contracts made inter absentes – the respective laws of the countries in which either party is present at the time of conclusion,[181] thus enhancing the chances of validating the contract. The rationale underlying this rule is the principle of favor negotii or of favor gerentis[182] and the need for legal certainty. A contract

[180] Tribunal de commerce de Mons (preceding note) 620.

[181] In order to avoid reiterations, for the purpose of this section with regard to contracts made inter absentes, the expression lex loci contractus shall also refer to the respective laws of the countries in which either party is present at the time of conclusion.

[182] Most authors seem to emphasize the favor negotii. On the other hand, Zweigert comes to the conclusion that the favor gerentis is the main rationale behind the rule of al-

that is sound and valid on its merits shall not be held invalid only because of formal requirements – as long as the application of alternative formal requirements might be justified as well.

2. Need for an extension. – With regard to modern means of communication, the range of laws that may have such alternatively validating effect should be extended. Because of modern communication facilities, the question of where the respective parties are – or were – present at the time of contracting is becoming less and less important. In fact, their presence at the place of conclusion of the contract often is purely accidental, and thus their connection to the local law is decreasing.

At the same time, both business and personal travel are increasing and – especially with regard to business travel – the time intervals that are being spent in foreign jurisdictions are becoming increasingly shorter. In the past, one might have been able to argue that a businessman who traveled to Paris in order to negotiate a contract there might be considered to have established some relation to the local law. However, in the case of a person who – on a trip from France to Italy by car, train, or plane – sends a contractual offer via email or accepts a contractual offer by mobile phone, the justification for applying the law of the country where this person was present at the relevant point in time seems to be much less convincing. Furthermore, under similar circumstances, the other party will probably not have any knowledge as to the whereabouts of the party concerned. Where such parties need advice on the form of the contract to be observed, they will not ask for it in the country in which they are present at the relevant point in time. Given the possibilities of fax and email exchange, it is much more likely that they will seek advice from legal counsel based in their respective countries of habitual residence. The principle of legal certainty, too, calls for an extension of the range of applicable laws. Where a contract is made inter absentes – e.g., via email, phone, or fax – the recipient of a declaration will often have no reliable knowledge as to where the other contracting party is staying, and if litigation turns on the form of contract years later, the parties may even have forgotten where they were staying at the time the contract was finalized. Finally, the rule that a cross-border contract which is sound on its merits should not be invalidated on formal grounds equally supports the reference to validating laws other than those currently allowed by art. 9, in particular to the laws of the respective habitual residences.[183]

By such extension, no party will be deprived of indispensable protection. One might argue, of course, that the parties should not be deprived of the

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ternative validation. See *Zweigert*, Zum Abschluß schuldrechtlicher Distanzverträge, in: FS Rabel (1954) 631 (636).

[183] A rather similar proposal has also been made by GEDIP; see <http://www.drt.ucl.ac.be/gedip/gedip-documents-16pe.html>.

protection afforded to them by form-related provisions of the proper law of the contract. This would also be an argument against the validating effect of the lex loci contractus, but it is agreed that the favor negotii and the favor gerentis shall prevail.[184] It is difficult to see why the protective rules of the lex contractus should have a greater weight if validation results from the application of the law of the habitual residence of either party. Furthermore, in cases involving consumers, i.e., where the weaker party should not be deprived of the protection of the form provisions of the proper law of the contract (which in these cases are often inseparable from other requirements), no changes of art. 9(5) providing for the exclusive application of the law of the consumer's habitual residence are recommended.

In line with the GEDIP proposal, the Institute suggests a consolidation of paras. 1 to 3 of art. 9, which would be possible if the extension is approved.
3. Proposal. – See art. 9, below at p. 110.

Question 18:
Do you believe that a future instrument should specify the law applicable to the conditions under which the assignment may be invoked against third parties? If so, what conflict rule do you recommend?

The Hamburg Group for Private International Law addressed this question in its comments on the Commission's Draft Proposal for a Rome II Regulation, which suggested a conflict rule on voluntary assignment of claims arising from non-contractual liability.[185] That Proposal subjects the validity and effects of the assignment with regard to third parties to the law of the assignor's habitual residence. As compared with all other solutions discussed in the Green Paper,[186] the advantage of that rule is that the assignor's habitual residence is perceptible to all other parties involved, whether the creditors of the assignor or of the assignee. Both the law applicable under art. 12(1) and (2), i.e., the solutions (i.) and (ii.) indicated by the Commission, are susceptible of being established or subsequently changed by a choice of law unknown to third parties. Solution (iii.), i.e., the application of the law of the debtor's habitual residence, would equally allow all parties involved to perceive the applicable law. On the other hand, this law will come on top of the legal systems involved and will therefore complicate matters in most relevant cases. In practice, assignment mainly concerns two types of claims: claims for

[184] See *Lando*, On the Form of Contracts, Law and International Trade, in: FS Clive M. Schmitthoff (1973) 253–263, for a discussion.
[185] RabelsZ 67 (2003) 1 (45 seqq.).
[186] Green Paper (supra n. 1) at no. 3.2.13.3, p. 40 seqq.

remuneration flowing from a contract, which will usually be governed by the creditor's law under art. 3 or art. 4(2); and compensation claims resulting from non-contractual liability, which will equally be subject to the creditor's law under art. 3 seqq. Rome II in most cases. Thus, the debtor's law would provide for additional complexity, which would also be unnecessary since the assignor's law guarantees the same protection of all third parties involved. Since the claim is a marketable asset for the creditor, it should be his or her law, i.e., the assignor's law, that determines the priority of several pretenders in cases of multiple assignment. It is true that inconveniences resulting from conflicts between the assignor's law and the law applicable under art. 12(2) for the protection of the debtor cannot be excluded. But such situations rarely occur since the law applicable under art. 12(2) will in most cases be the assignor's law (see above). In the very few remaining cases, a rush to the courts will inevitably occur. This follows from the rules on lis pendens in art. 27 seqq. Reg. 44/2001 and needs no additional encouragement by a material rule such as solution (v.) giving priority to whoever brings the first action. The Institute therefore affirms the Proposal made by the Hamburg Group of Private International Law (see art. 12[3], below at p. 113).

Question 19:
Would it be useful to specify the respective scope of Articles 12 and 13? Do you believe that there should be a conflict rule for subrogation payments made in the absence of an obligation?

Article 13 served as a model for art. 15 of the Commission's draft proposal for a Rome II Regulation. The comments made by the Hamburg Group for Private International Law on that rule have suggested some amendments that should equally be taken into consideration when the Commission contemplates a reform of art. 13 Rome I.[187]

The Institute does not propose any further amendments of art. 13 that would go beyond those suggested in the context of Rome II. At the present state of comparative research, it appears doubtful whether a comprehensive and satisfactory conflict rule on all aspects of subrogation can be conceived which would not overlap with other conflict rules of Rome I or Rome II. The theoretical construction of subrogation and of its functional equivalent, i.e., the assignment by operation of law (cessio legis), is different and may entail divergent practical results. A cessio legis is, by definition, limited to cases of subrogation by operation of law. A conventional subrogation presupposes some kind of consent between the subrogee and the creditor that the former

[187] RabelsZ 67 (2003) 1 (46 seqq.).

shall step into the shoes of the latter; it is difficult to see how this fact pattern can be separated from a voluntary assignment governed by art. 12. The limitation of art. 13 to cases of legal subrogation could be made explicit by a corresponding amendment of the title of the provision. For the rest, the demarcation of arts. 12 and 13 should be left to the Court of Justice.

Nor does the Institute perceive a need to extend the scope of art. 13 to liberalities. If someone pays the debts of a debtor to the creditor of that person without being under an obligation to do so, he may do that in turn for the creditor's claim against the debtor; this case would be governed by art. 12. If he pays the debt without such a covenant, he may either do that by way of donation to the debtor or he may assume that he will be entitled to some kind of recourse against the debtor under the relevant provisions of law. It is only in the latter context that the question of the applicable law arises. But the matter would certainly not be characterized as a case of subrogation in all Member States. Depending on the particular aspects of the case, some Member States may instead consider the issue as one of unjust enrichment as regulated by art. 9(2) and (3) Rome II or of negotiorum gestio for the purposes of art. 9(4) Rome II. An extension of art. 13 Rome I to liberalities should not be proposed unless a comprehensive comparative investigation has prepared the terrain. For a proposal, see art. 13, below at p. 113.

Question 20:
In your view, would it be useful to specify the law applicable to legal compensation? If so, what conflict rule do you recommend?

1. Practical need for a conflict-of-laws rule for set-off. – The Rome Convention does not contain a general conflict-of-laws rule for set-off. Although it is true that set-off can be qualified as a way of extinguishing the obligation, art. 10(1)(d) does not reflect the difficulties inherent in the set-off mechanism applied to two obligations subject to different laws. Hence, the Convention should specify the law applicable to set-off.

Set-off is not only relevant to contractual obligations but also for non-contractual obligations. Therefore, the solution advocated here should be introduced as a homologous rule both in the future Rome I Community instrument and the Rome II Regulation.

2. Types of set-off. – The Green Paper mentions under 3.2.15.1 different offsetting mechanisms: "legal offsetting", or a set-off mechanism operating automatically, and "contractual offsetting". Both mechanisms concern set-off as an extrajudicial device. The Green Paper indicates also set-off in insolvency. Another type of set-off not expressly mentioned in the Green Paper is set-off as a defense to be pleaded in court.

3. Differing substantial law rules. – Regarding extrajudicial set-off, it is uncontroversial that all Member States allow set-off by agreement.[188] Two parties may agree to discharge their mutual obligations by setting off one against the other. They may either agree that a set-off is to occur immediately or at a later date at the option of one of the parties.

Regarding other extrajudicial set-off mechanisms, especially "legal set-off" ("compensation legale"), the substantive laws of the Member States differ considerably. In some countries the set-off mechanism operates at first glance automatically. This was the initial situation in France (art. 1290 Code civil) and Italy (art. 1241 Codice civile). However, French courts have not found it practical to apply this approach literally.[189] In fact, today set-off is only held to be effective if the defendant invokes it in court. The Italian Codice civile of 1942 codified this rule in art. 1242.[190] Although set-off has to be pleaded in court, it is regarded as a matter of substantive law in these countries.[191] As a consequence, the effect of set-off is given as soon as the two obligations confront each other, provided that it is invoked.

In other countries, set-off has to be asserted by a unilateral declaration to the other party ("Gestaltungsrecht"). This is the situation in Germany (§ 388 BGB) and the Netherlands (art. 6:127 NBW). The declaration of set-off has an ex tunc effect in these countries.[192] The obligations are therefore discharged from the moment when they first confront each other.

Set-off as a defense to be pleaded in court appears to be allowed in all Member States, wherever the conditions for such a defense are met.[193] In some Member States, this declaration has an ex tunc effect (Germany, Netherlands) and can therefore be seen as an ordinary set-off by notice declared in court. By contrast, the French compensation judiciare (art. 564 Nouveau code de la procédure) is not retroactive to the time when the defendant's claim accrued.[194] This type of set-off is needed in cases in which the conditions for legal set-off are not given before the judgment. One of the conditions for legal set-off in French law is that both claims in question must be certain. If the claim of the defendant is not certain until the judgment, the only relief for set-off is the compensation judiciare.

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[188] *Lando/Clive/Prüm/Zimmermann*, Principles of European Contract Law III (2002) 149.

[189] Cour de Cassation Civ. 24. 6. 1976, Bull.civ. V. n° 396.

[190] Art. 1242 Codice civile: "Il giudice non può rilevarla d'ufficio."

[191] *Zimmermann*, Comparative foundations of a European law of set-off and prescription (2002) 22.

[192] *Zimmermann* (preceding note) 36.

[193] *P.R. Wood*, English and International Set-Off (1989) no. 1–94 seqq.

[194] *Marty/Raynaud/Jestaz*, Droit civil: Les obligations[2] II (1989) no. 263 seqq.

In English law, set-off was traditionally regarded as a purely procedural device.[195] It is true that modern English scholars now favor a more substantive nature of equitable[196] set-off.[197] Regarding this new approach, it is unclear whether the effect of set-off nowadays depends on the procedural plea or can be regarded in certain circumstances as an extrajudicial self-help remedy.[198]

With regard to set-off in insolvency, two remarks can be made. First, most Member States recognize that type of set-off.[199] Second, the Insolvency Regulation[200] has not unified the right of creditors to demand the set-off of their claims.

4. Differing conflict rules. – In view of the substantial law, it is not surprising that conflict rules differ for some types of set-off, while some similarities can be found for other types.

To start with the similarities, three remarks can be made. First, all procedural questions with regard to set-off are governed by the lex fori. These questions are outside the scope of Rome I. Second, set-off by agreement is subject to the conflict rules for contracts, i.e., to Rome I (France,[201] England,[202] Italy,[203] Germany[204]). Third, the Insolvency Regulation provides conflict rules for set-off in insolvency. Although art. 4(2)(d) declares that it is primarily for the lex concursus to determine whether set-off may be invoked in insolvency proceedings, art. 6 supplies an additional rule to allow set-off to be claimed by creditors if the requirements for set-off were met before the opening of the insolvency proceeding. Article 6 allows creditors to set off those claims, "where such a set-off is permitted by the law applicable to the insolvent debtor's claim". Hence, the law applicable to those cases of set-off in insolvency is the law of the claim against the person declaring set-off (here: the creditor).

Apart from these similarities, choice-of-law rules differ. Where set-off can be effected by an extrajudicial unilateral declaration, the law of the claim against the person declaring set-off is applicable (Germany,[205] Netherlands[206]).

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[195] *Zimmermann* (supra n. 191) 22 seqq. Still in this sense *O'Hare/Hill*, Civil Litigation[10](2001) no. 12.049 seqq.

[196] Set-off in equity is the most important relief for setting off, see *Zimmermann* (supra n. 191) 28.

[197] *Derham*, Law of set-off[3] (2003) no. 4.29 seqq.; *Wood* (supra n. 193) no. 4–1 seqq.; *Goode*, Commercial law[2] (1995) 671.

[198] *Wood* (supra n. 193) no. 4–12; *Derham* no. 4.30; *Goode* 671 (both preceding note).

[199] *Zimmermann* (supra n. 191) 43.

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

[201] *Audit*, Droit international privé[3] (2000) no. 832.

[202] *Wood* (supra n. 193) no. 23–27.

[203] *Vitta*, Diritto internazionale privato III (1975) no. 304.

[204] *Reithmann/Martiny*, Internationales Vertragsrecht[5] (1996) no. 285; *K.P. Berger*, Der Aufrechnungsvertrag (1996) 447 seqq.

[205] BGH 25. 11. 1993, IPRspr. 1993 no. 180 = NJW 1994, 1413 (1416).

The main reason for this rule is that the other party, receiving the declaration of set-off, cannot defend itself against the extinction of its own claim. Therefore, it should enjoy the benefit of the protective rules of the law applicable to this claim.

Where set-off is in principle effective ipso iure, the conflict-of-laws rules provide a cumulative application of the laws of both claims (France,[207] Italy[208]). If no declaration is needed, no party has a better right to enjoy the protective rules of the law of its claim.

Where set-off is traditionally characterized as a procedural relief, the lex fori governs set-off. This still seems to be the case in English private international law.[209] The lex fori applies also in French private international law for set-off as a defense in court (compensation judiciaire).[210]

To strengthen transparency in European private international law, the Institute recommends that the Community instrument specify the applicable law for all types of extrajudicial set-off and for the substantive effects of set-off invoked as a defense in court, whereas art. 6 Insolvency Regulation seems to be a satisfactory conflict rule for this type of set-off.

5. Lex fori approach. – Although the lex fori approach has some advantages, these are outweighed by the disadvantages. The main advantage of this rule is the clarity of the solution. The applicable law can easily be determined by the judge. However, the lex fori rule supports forum shopping. If there is more than one jurisdiction for a claim, plaintiffs can choose the jurisdiction whose law is most favorable to their own legal interests, in particular the jurisdiction of the country where the defendant for one reason or another cannot set off its claim against that of the plaintiff. The goal of a Community instrument on the conflict of laws is to discourage forum shopping. Another disadvantage is that the party who is the addressee by the invocation of set-off is deprived of the protective provisions of the law of its own claim. This result is inequitable: Being exposed to the set-off, the addressee should be able to defend itself against the effects. Therefore, it should enjoy the law governing its own claim.

6. Cumulative application of the two laws involved. – A cumulative application of both laws has two disadvantages. First, applying two laws pushes up the legal costs. In the worst case, a plaintiff could need three lawyers: one advising on the lex fori, two on the applicable substantive laws. Second, applying two laws cumulatively multiplies the restrictions for set-off. Set-off is a very cheap and effective way of liquidating claims. From an economic point of view, multiplying the restrictions is not desirable.

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[206] Hof Amsterdam 16. 2. 1989, Ned. IPR 1989, 250.

[207] Cour de Cassation 5. 12. 1933, D. 1934.1.26.

[208] *Vitta* (supra n. 203) no. 305.

[209] *Meyer* v. *Dresser* (1864), 16 C.B. (N.S.) 646; see also *Derham* (supra n. 197) note 2.37 and *Wood* (supra n. 193) nos. 23–1 and 23–3.

[210] *Batiffol/Lagarde*, Droit international privé[7] II (1983) no. 614.

The ECJ has nevertheless applied this approach in a recent judgment.[211] However, the decision should not be understood as stating a general principle. In that case, the Commission had a contractual claim subject to Belgian law against an association which had a claim governed by Community law against the Commission. The Commission declared set-off. First, it seems that the court applied the cumulative rule because both parties pleaded in this sense; apparently no intense discussion took place. Second, if the court had applied a solution other than the cumulative approach, it would have had to define the general conditions for set-off under Community law. These conditions are neither treated in the Community legislation nor determined by the case law of the court. By cumulating both laws, the court could avoid the legal vacuum and take recourse to Belgian law that did not allow set-off in this case. It is not clear whether the court would apply another solution if it had the choice between two national rules on set-off or if the plans for a future European Contract Law[212] comprising a European rule for set-off were realized.

7. *Application of the law of the principal claim*. – The most appropriate conflict rule is applying the law of the principal claim (i.e., the claim against which set-off is invoked).[213]

This approach is simple to apply in countries where set-off has to be declared to be effective. It is also easy to handle in those countries where the defendant must plead set-off in court, even though, in principle, the set-off operates ipso iure. The proposed criterion produces clear results, as long as set-off cannot occur without an extrajudicial or procedural declaration. Moreover, the rule allows the court to apply the same law to the plaintiff's claim and to the set-off, although the defendant's claim is governed by another law. In typical cases, set-off is declared by the defendant. As a result of the proposed rule, the laws governing the principal claim and set-off are thus synchronized. Furthermore, the proposed conflict-of-laws rule is fair. It protects the party facing set-off. This party is exposed to the consequences of set-off invoked by the other party. Therefore, it should enjoy the protection of the law applicable to its own claim being at least foreseeable. Finally, the Pro-

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[211] ECJ 10.7. 2003 – case-87/01 P *(Commission of the European Communities* v. *Conseil des communes et régions d'Europe)* (not yet published).

[212] Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law, An Action Plan, COM(2003)68 final of 12.2. 2003.

[213] This approach is also supported by the German industry and trade associations ("Bundesverband der Industrie", "Bundesverband des Deutschen Groß- und Außenhandels", "Bundesverband des Einzelhandels", "Centralvereinigung Deutscher Wirtschaftsverbände für Handelsvermittlung") according to their comments on the Commission's Green Paper.

posal is in line with art. 6 of the Insolvency Regulation. This provision confirms the application of the law of the claim against which set-off is invoked.
8. Proposal. – The Community instrument should provide its own rule for set-off. This rule should be introduced as a new art. 11a. Like the following arts. 12 and 13, it concerns a general question of the law of obligations. The wording of the advocated rule ("invoked") shall make it clear that the law of the claim against which set-off is invoked should be applied, regardless of whether an extrajudicial declaration or a plea in court in case of a legal set-off or a judicial declaration in case of set-off as a defense was required. Rome I is applicable anyway (see section 4 above, in particular art. 3 and – in absence of a characteristic performance – art. 4[5]). For the Proposal, see art. 11a, below at p. 113.

21: Additional comment on the law applicable to pre-contractual liability

In the context of jurisdiction, the recent decision of the ECJ in *Tacconi*[214] has highlighted the issue of whether pre-contractual liability constitutes a "matter relating to a contract" in the sense of the Brussels Convention. The same problem arises at the level of the applicable law, where it has to be decided which set of rules – those for contractual or for non-contractual obligations – shall determine the connecting factor.
1. Diversity in substance among the Member States. – Pre-contractual liability encompasses a wide range of situations. A non-exhaustive list of examples includes liability for disclosure of confidential information acquired during negotiations, for breaking-off negotiations contrary to good faith, liability of third parties participating in negotiations,[215] liability for harm caused in the pre-contractual context, and for incorrect statements in a prospectus. The substantive rules on pre-contractual liability still differ considerably in Europe. Likewise, different opinions are held as to whether pre-contractual liability rests on a (quasi-) contractual, delictual, or even restitutionary basis.[216] Predominantly, however, remedies for pre-contractual liability are seen as non-contractual,[217] except for the cases where a "contract to enter into a contract" exists. The diversity in substance has necessarily also had its impact on

[214] ECJ 17. 9. 2002 – case C-334/00 *(Fonderie Officine Meccaniche Sacconi SpA* v. *Heinrich Wagner Sinto Maschinenfabrik GmbH [HWS])*, E.C.R. 2002, I-7357.
[215] However, this does not include liability of an agent who acts without authority (falsus procurator); see additional comment on the law applicable to agency below.
[216] Cf. *Lando/Beale*, Principles of European Contract Law I/II (1999) Arts. 2:301 and 2:302 and their comparative notes.
[217] *v. Bar*, The Common European Law of Torts I (1998) no. 472–477.

the interpretation of the Rome Convention in the Member States, which seems to be far from uniform.[218]

2. Need for foreseeability and possible options. – Due to the existing variations in the substantive laws, predictability as to which of the different standards prevails is of great importance to anyone contemplating engaging in business with non-domestic partners. Mere reliance upon further development of the ECJ's case law[219] would perpetuate uncertainty. The Institute therefore recommends that this opportunity be taken to clarify the issue of the law applicable to pre-contractual liability.

As a bottom-line, it should be emphasized that Rome I and Rome II are comprehensive and leave no room for pre-contractual obligations not covered by any of the two instruments. Recourse to national choice-of-law rules in such an integral part of private law would mean a significant step backwards.

In search of a solution within the framework of Rome I and Rome II, two questions have to be answered: Where and how should such a clarification be implemented in order to be successful? With respect to the first issue, the Institute favors a solution that gives some attention to the problem of pre-contractual liability in the Community instrument discussed here (Rome I), for two reasons. First, the key role for drawing the line between contractual and all other obligations remains with the terms "contract" and "contractual" respectively. The proposed Rome II Regulation defines its material scope in art. 1 by using the words "non-contractual obligations",[220] and thus leaves it to Rome I to be more specific as to the question of what is contractual and what is not. Second, the Court of Justice considers non-contractual obligations to be subsidiary to contractual obligations.[221] It is therefore systematically coherent to give judges an answer at the contractual level (Rome I) rather than at the non-contractual level.

The second issue, as to the way in which more certainty can be accomplished, is more complicated. One admittedly difficult way is to further define the term "contractual" in the opening article of the new instrument for contractual obligations. A less ambitious approach would add an express reference to pre-contractual liability in art. 1 and either include it in, or exclude it from, this Regulation's material scope. Ultimately, specific choice-of-law rules for

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[218] An overview was recently given by *Mankowski*, Die Qualifikation der culpa in contrahendo – Nagelprobe für den Vertragsbegriff des europäischen IZPR und IPR: IPRax 2003, 127 (at 132 seqq.).

[219] This seems to be the position of the Commission; see Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Non-Contractual Obligations (supra n. 3) p. 8.

[220] See art. 1(1) of the proposed Rome II Regulation (supra n. 3).

[221] ECJ 27. 9. 1988 – case C-189/87 *(Athanasios Kalfelis* v. *Bankhaus Schröder, Münchmeyer, Hengst and Co. and others)*, E.C.R. 1988, 5565.

certain groups of cases concerning pre-contractual liability could be formulated and implemented in the Regulation.

3. Attempts of definition: The Tacconi and Handte criteria. – In *Tacconi*, the Court answered a request for a preliminary ruling on the interpretation of the Brussels Convention. As previously decided in *Handte*,[222] the Court held that only liabilities deriving from *obligations freely assumed* could constitute a matter relating to a contract. In the absence of such freely assumed obligations, it considered violations of rules of law requiring parties to negotiate in good faith as a matter of tort, delict, or quasi-delict.

The relevance of this decision for the present context rests upon the fact that consistency on the jurisdictional level and the level of the applicable law is – to a certain extent – desirable. After the said judgments and in light of the predominant view in the Member States, a non-contractual characterization of pre-contractual liability should become the rule and contractual characterization the exception.

The definition of "matters relating to contracts" in the sense of the Brussels Convention was a first step. However, the case law on the question of which obligations are freely assumed still needs to develop further before it can provide an effective tool for drawing the line between contractual and non-contractual obligations. In addition, the efficacy of transplanting reasoning in jurisdictional matters to reasoning on the applicable law is not unlimited. Questions of jurisdiction and of the law applicable do not always follow the same policy considerations and parallel answers may not be given at all times. For example, art. 5 no. 1 of Reg. 44/2001[223] confers jurisdiction upon the courts at the place of performance of the contractual obligation in question, whereas the law applicable to the same contract will (in the absence of a choice by the parties) not be the law of that place but the law at the seat of the party which is to effect the contract's characteristic performance (art. 4 Rome I).

Such a split of law and forum should also be accepted where a party sues on the grounds of unfair breaking-off of negotiations. At least from the perspective of private international law, these cases are more closely connected to the law of the contemplated contract (and should be resolved by applying that law) than to the law of the place where the harm occurred (the traditional consequence of a delictual characterization).[224] For this reason, a specific rule in the present regulation on contractual obligations should deal with breaking-off of negotiations and thereby characterize the issue as contractual, just as the Principles of European Contract Law (art. 2:301) and the UNIDROIT

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[222] ECJ 17. 6. 1992 – case C-26/91 *(Jakob Handte & Co. GmbH and Traitements Mécano-chimiques des Surfaces SA [TMCS])*, E.C.R. 1992, I-3967, Recital 15.

[223] Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, O.J. EC 2001 L 12/1.

[224] See art. 3 Rome II, supra at n. 3.

Principles of International Commercial Contracts[225] (art. 2:15) did by each devoting a provision to this problem, indicating its close connection to the realm of contract. A delictual characterization would regularly result in each negotiating party being subjected to the other party's domestic standard. It is already doubtful whether it is sound to subject negotiating parties to different standards. It certainly seems odd to require more from the party coming from the country with lower requirements and less from the party that is used to the higher standard.

In all other cases of pre-contractual liability, the future Rome II Regulation should designate the applicable law. This straightforward approach is not only justified by the majority view in the Member States and in line with the trend set by the *Handte* and *Tacconi* decisions. It will also lead to adequate results because the provisions of Rome II are flexible enough to accommodate the different groups of cases. It goes beyond the scope of these comments to deal with possible solutions under the Rome II instrument in detail. One comment, however, should be made: When – after the event giving rise to pre-contractual liability – a contract is concluded between the same parties, a manifestly closer connection to the law applicable to that contract might be worth considering.[226]

4. Consequences and implementation. – For the reasons given above, the Institute favors a specific rule in the present Rome I Regulation only for the breaking-off of negotiations. In addition, a general provision should be added, referring the remainder of cases of pre-contractual liability to the scope of Rome II.

The solution proposed here for the breaking-off of negotiations is realized in art. 8. This is preferable to a solution in art. 10 because the latter provision relates to the content of the contract. In contrast, art. 8 already deals with consent[227] and thus is the natural place to cover possible claims based on the refusal to consent. In order to implement the new rule, a new paragraph is inserted in art. 8 between the existing two, whereby the former art. 8(2) becomes art. 8(3). The proposed new art. 8(2) stipulates that legal consequences resulting from a breaking-off of negotiations are governed by the law applicable to the contemplated contract. This will be, as a rule, the law identified by art. 4. In exceptional cases, however, a judge may become convinced that the parties

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[225] *Bonell*, An International Restatement of Contract Law (1994).

[226] The position of the Commission's proposal for a Rome II Regulation (supra n. 3) on this idea is somewhat unclear, because the English and the French text refer in their arts. 3(3) and 9(1) to a "pre-existing" contract, whereas the German version refers to a "bestehenden" (existing) contract. The official comments to art. 3 (p. 13) seems to allow an extensive interpretation.

[227] The title of art. 8 in the English version of the convention does not reflect this as accurately as, for example, the French ("Consentement et validité au fond"), Spanish ("Consentimiento y validez de fondo"), or German version ("Einigung und materielle Wirksamkeit").

would have concluded the contract only with a specific choice of law under art. 3(1) or not at all. An example would be public procurement cases where the public entity is bound to contract under its domestic law and the other party was aware of this situation when it started negotiating. The same applies in cases where both parties agree that they would have chosen a specific national law. In such cases, nothing in the wording of the proposed provision prevents the judge from applying this law. In addition, the protection of the former art. 8(2) is extended to parties unaware of duties (e.g., to negotiate in good faith) imposed on them by virtue of the law applicable to the contemplated contract. If the circumstances justify such an exceptional step, the application of the newly proposed art. 8(3)(b) can result in a decision releasing a party who would otherwise have been liable under the terms of the proposed art. 8(2). Having said that, art. 8 (3)(b) can never produce the opposite effect of imposing a liability which does not exist under the law applicable to the contemplated contract.

For all other cases of pre-contractual liability, Rome I does *not* determine the applicable law, which should instead be identified using the provisions of Rome II. In order to make this as clear as possible, the Institute proposes a new art. 1(2)(c), which (except for the rule on breaking-off of negotiations) expressly excludes pre-contractual liability from the scope of Rome I. It should be noted that this exclusion also covers claims for damages based on nullity of a contract attributable to one party, in spite of the somewhat ambiguous language used in art. 10 (1)(e).[228] In effect, the solution proposed here means pre-contractual liability will be governed by Rome II except for those cases falling under the new art. 8.

5. Proposal. – See art. 1(2)(c), below at p. 98, and art. 8(2) and (3), below at p. 109.

22: Additional comment on the law applicable to agency

1. The exclusion contained in art. 1(2)(f). – Questions relating to an agent's authority represent a basic problem of market transactions and contract law. Nevertheless, "the question whether an agent is able to bind a principal […] to a third party" is excluded from the scope of the Rome Convention by virtue of art. 1(2)(f) 1st alternative. This was explained by the fact that in the

[228] Art. 10(1)(e) was drafted in order to apply to restitutionary claims, not to claims for damages. This is reflected by the relevant passage of the *Giuliano/Lagarde* Report (supra n. 26) "The working party's principal objective in introducing this provision was to make the refunds which the parties have to pay each other subsequent to a finding of nullity of the contract subject to the applicable law." Article 10(1)(e) has been criticized from the beginning and is subject to reservations under art. 22(1)(b) by the UK and Italy and should therefore not be construed extensively.

complex tripartite setting of agency, it would be difficult to accept the principle of freedom of contract.[229] A second reason might have been that the problem of defining an appropriate connecting factor for the authorization is commonly regarded as a highly disputed question that is far from being solved in a uniform way throughout Europe.[230]

However, a great number of more recent codifications deal with the problem of agency in international cases. As a result, there are specific conflict rules adopted in the statutory provisions of Austria (§ 49 IPRG[231]), Italy (art. 60 legge 31.5.95, n. 218[232]), Spain (art. 10[11] C.c.), Portugal (art. 39 C.c.), Switzerland (art. 126 IPRG[233]), Romania (arts. 95–100 legea 105/92[234]), Lithuania (art. 1.40 C.k.p.[235]) and the former German Democratic Republic (§ 15 RAG[236]), as well as in the Proposal on a Belgian Act on Private International Law (art. 108[237]). In France, the Netherlands, and Portugal, the Hague Convention on the Law Applicable to Agency of 1978 (Hague Agency Convention, HAC) applies since 1992 as a uniform law, i.e., also in cases involving non-Contracting States and their law (art. 4 HAC).[238] Although not identical, the cited provisions do not fundamentally differ from each other as to the basic connecting factors. In fact, it is possible to identify a common core from these various national solutions.

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[229] *Giuliano/Lagarde* (supra n. 26) 13.

[230] Cf., e.g., *Verhagen*, Agency in Private International Law (1995) 66; Münch.Komm. *(-Spellenberg)* (supra n. 168) Vor Art. 11 EGBGB no. 169; *Rigaux*, Agency, in: Int. Enc.Comp.L. III: Private International Law (1973) Chapter 29, nos. 8 seqq; *Karsten*, Explanatory Report, in: Actes et documents de la Treizième session IV: Agency (1979) 378 nos. 70 seqq; *Hay/Müller-Freienfels*, Agency in the Conflict of Laws and The 1978 Hague Convention: Am.J.Comp.L. 27 (1979) 1 (at 16 seqq.).

[231] Bundesgesetz vom 15. 6. 1978 über das internationale Privatrecht, IPRG, (österr.) BGBl. No. 304/1978.

[232] Legge di riforma del sistema italiano di diritto internazionale privato, 31. 5. 1995 n. 218, Gazz. Uff., suppl. ord. n. 68 al n. 128 del 3. 6. 1995; a German translation is published in: RabelsZ 61 (1997) 344.

[233] See supra at n. 103.

[234] Legea nr. 105 din 22 septembrie 1992 cu privire la reglementarea raporturilor de drept international privat, Monitorul Of. Nr. 245 din 1 octombrie 1992, p. 1; a German translation is published in: RabelsZ 58 (1994) 344.

[235] Civilinio kodekso patvirtinimo, 2000 m. liepos 18 d. Nr. VIII-1864, available at <http://www3.lrs.lt/c-bin/eng/preps2?Condition1=17687&Condition2=>; a German translation is published in: IPRax 2003, 298.

[236] Gesetz über die Anwendung des Rechts auf internationale zivil-, familien- und arbeitsrechtliche Beziehungen sowie auf internationale Wirtschaftsverträge vom 5. 12. 1975 (Rechtsanwendungsgesetz), GBl. I 1975, 748.

[237] Voorstel van wet houdende wetboek van internationaal privaatrecht/Proposition de loi portant le code de droit international privé; the Proposal including explanatory remarks is available at the following address: <www.ipr.be> (Dutch version), <www.dipr.be> (French version).

[238] See supra at n. 47.

These findings give reason to reconsider the exclusion laid down in art. 1(2)(f) 1st alternative and to recommend a uniform provision in this area. Having said that, this provision should only relate to voluntary (or consensual) agency, i.e., the authority of an agent depending on the principal's will, whereas agency by operation of law (e.g., the powers of a company's or corporation's organ) should remain excluded since the choice-of-law rules as to the latter follow different principles.

2. The trilateral relationship of agency. – The characteristic of agency is a triangular setting with three different relationships: that between principal and agent (internal relationship), that between principal and third party (external relationship or main operation), and that between agent and third party. While the internal relationship is subject to Rome I, both other relations depend upon the agent's authority, i.e., the question of whether the agent was actually able to bind the principal; insofar as they involve a third party, they are excluded from the Convention. In this respect, a conflict of interests arises: on the one hand, the principal has an interest in not being bound by a contract concluded on his behalf but without his consent; on the other hand, there is the third party's interest in protecting her reliance on the (apparent) authorization of the agent to act on behalf of the principal, viz. her interest in the validity of the main operation. In this context, the principal, having deliberately employed the agent to expand his business, should primarily bear the risk of any commercial uncertainty resulting from that. Finally, the agent may also have an interest in the authority, because, obviously, the existence and the extent of the authority is decisive as to the question of whether the agent can be held liable for acting without authority either by the principal or the third party.

3. The need for a separate conflicts rule. – As a result, it seems inappropriate to subject the agent's authority to the law governing the internal relationship: as the third party generally has no insight into the circumstances of the agent's appointment and therefore cannot ascertain the law applicable to the internal relationship, applying the law of that relationship might affect the functioning of and the confidence in commercial intercourse. On the other hand, there is a legitimate interest of the principal in being protected against a (fraudulent) choice of law agreed upon by the agent and the third party for the main operation, which has an impact on the extent of the agent's authority. Finally, it would be equally unjustified if the principal and the third party had the opportunity to limit the agent's authority by (subsequently, see art. 3[2]) choosing a more restrictive law without making it known to the agent who, as a result, might be held liable as falsus procurator. Hence, the application of the law governing the main operation to the agent's authority is not an appropriate solution either. For the given reasons, it is necessary to draft a separate choice-of-law rule for the agent's authority independent from the law applicable to the internal or external relation. This corresponds to the solutions

provided by the existing codifications,[239] to German case law,[240] and to the prevailing opinion in Greek legal writing.[241] In this respect, only the English case law still seems to be somewhat unclear: some decisions subject the agent's authority to the law of the main operation, whereas others seem to be in favor of a separate connecting factor.[242]

4. Subjective connecting factors. a) Choice of law.[243] – At first sight, the need for an adequate protection of the parties' legitimate interests as described above seems to demand an exclusion of the possibility to choose the law applicable to the agent's authority. However, a comparative survey shows that most of the countries recognize party autonomy in this respect.[244] This is due to the fact that none of the cited interests could be harmed if the choice of law is duly communicated to the agent and the third party before the main operation is effected: in that case, the law applicable to the authority would be clear and foreseeable for everybody involved. That way, the principal would be enabled to minimize the risks resulting from the use of agents by limiting the authority according to a chosen law, and the third party as well as the agent would be able to verify the extent of the authority before concluding the contract.

Because the principal grants the authorization and determines its extent,[245] it seems appropriate to give the principal the exclusive power to choose the applicable law to the agent's authority (i.e., a unilateral choice)[246] without requiring the third party's consent (i.e., a bilateral choice).[247] However, both

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[239] Art. 11 HAC; § 49 Austrian IPRG; art. 60 Italian legge 31. 5. 1995, n. 218; art. 95 Romanian legea 105/92; art. 126 Swiss IPRG; art. 10(11) Spanish C.c.; art. 39 Portuguese C.c.; art. 1.40 2nd sentence Lithuanian C.k.p.; art. 108 Belgian Proposal.

[240] Cf., e.g., BGH 29. 3. 2001, BGHZ 147, 178 (185) = IPRspr. 2001 no. 5; 17. 11. 1994 BGHZ 128, 41 (47).

[241] *Mpampetar*, Annotation to ECJ 9.11.00 – case C-381/98 *(Ingmar Ltd.* v. *Eaton Leonard Technologies Inc.)*: Chronika Idiotikon Dikaion 2001, 66 (68); *Papaconstantinou*, in: Commercial Agency and Distribution Agreements[3], ed. by *Bogaert/Lohmann* (2000) 352.

[242] Cf. *Dicey/Morris* (supra n. 113) no. 33R-416 seqq., 33–427; *Verhagen* (supra n. 230) 95.

[243] For a comprehensive and comparative study, cf. *Claßen*, Rechtswahl im internationalen Stellvertretungsrecht (1998).

[244] France, the Netherlands, Portugal: art. 14 HAC; Austria: § 49(1) IPRG; Spain: art. 10(11) C.c. (see *Calvo Caravaca et al.*, Derecho International Privado II [1998] 493 no. 136); Romania: art. 95(1); Switzerland: art. 126 in conjunction with art. 116 IPRG (see IPRG Kommentar*[-Keller/Girsberger]*, ed. by *Heini et al.* [1993] Art. 126 no. 45); Germany: prevailing opinion in legal writing, a leading case is lacking, see *Staudinger(-Magnus)* (supra n. 95) Einl. zu Art. 27–37 EGBGB no. A 12; *Reithmann/Martiny(-Hausmann)* (supra n. 204) no. 1722; *Kropholler* (supra n. 168) 299; *v. Hoffmann*, Internationales Privatrecht[7] (2002) 281 no. 55.

[245] Depending on the national legal concept of agency possibly with the consent of the agent.

[246] Solution approved in Austria, Germany, and Spain; cf. the references above in n. 244.

[247] Solution adopted in the Hague Convention, Switzerland, and Romania; cf. the references above in n. 244.

possible solutions regularly entail similar results: if an agent concludes a contract after having presented the principal's proxy containing a choice-of-law clause, the third party's consent can easily be interpreted as an approval not only of the main operation but also of the choice of law concerning the agent's authority.[248]

b) Law of the intended place of acting. – In some legal systems, another subjective connecting factor can be found besides the possibility of choosing the law:[249] the assignment of the country in which the principal intended the agent to act. This rule amounts to an implied choice of law. It is directed to cases in which the principal shows in a foreseeable way that he or she wanted the authority to be exercised in a definite country, but the agent actually contravenes those instructions and acts in another country. If the third party must have known the principal's intention to limit the exercise of the authority to the former country, his or her reliance on the applicability of the latter country's law as the lex loci actus (see below 5) seems to be illegitimate and the third party therefore can be treated as if there had been a duly communicated choice of law. In a case in which both subjective connecting factors apply to determine different laws as applicable, the (explicit) choice of law should prevail and the territorial limitation of the authority should be an issue of the chosen substantive law.

5. Objective connecting factors. – In the absence of explicit or implied choice of law, two objective criteria are generally approved: the place of acting and the agent's principal place of business.

a) Lex loci actus. – In order to safeguard the easy and smooth functioning of international commercial intercourse, third parties must be enabled to quickly check whether the agent actually has the power to bind the principal. They must have easy access to the law governing the authority which would best be ensured by applying the law of the market on which they are carrying on their business. At this place, the agent will regularly effect the main operation with the third party. Normally, this will also be the country in which the principal expected the agent to act. Hence, the lex loci actus is the appropriate basic objective connecting factor balancing the different interests, and is usually easy to apply in practice (on exceptions, see below b] and 6).[250]

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[248] Cf. *Verhagen* (supra n. 230) 135, 355; *Claßen* (supra n. 243) 135; Münch.Komm. *(-Spellenberg)* (supra n. 168) Vor Art. 11 EGBGB no. 193.

[249] Cf., e.g., § 49(2) Austrian IPRG; for Germany, see BGH 29. 3. 2001, BGHZ 147, 178 (185) = IPRspr. 2001 no. 5; 17. 11. 1994, BGHZ 128, 41 (47); *Kropholler* (supra n. 168) 298; *Reithman/Martiny(-Hausmann)* (supra n. 204) no. 1725. However, there has not been any case in German case law yet in which the actual place of acting and the intended place of acting fell apart, and in some decisions the BGH only referred to the lex loci actus (e.g., BGH 26. 4. 1990, IPRspr. 1990 no. 25 = NJW 1990, 3088). As a result, it is still somewhat unclear whether the BGH will actually consider the principal's intention in such cases.

[250] This corresponds to the prevailing solution in Europe, cf. § 49(3) Austrian IPRG; art. 60(1) 2nd phrase Italian legge 31. 5. 1995, n. 218; art. 10(11) Spanish C.c.; art. 126(2)

b) Law of the agent's principal place of business. – If agents acted in the course of their trade or profession, most of the legal systems refer to the law of the agents' principal place of business as the decisive objective connecting factor.[251] This can be explained by the following reasons. First, this is the law that is most closely connected with the person whose authority is in question. Professional agents have an interest that all the authorizations given to them from different principals are subjected only to one law with which they are familiar. Second, it is a compromise: the agent's principal place of business is easily perceptible for both the principal and the third party. Third, the business establishment is a fixed connecting factor which, unlike the individual locus actus, can hardly ever be manipulated. However, this law should only apply if the business establishment was foreseeable for third parties, because otherwise they would not have a sufficient possibility of identifying the law governing the authority.[252]

6. Authority to affect rights in immovable property. – The conflict-of-law rules presented so far, in particular the freedom of choice of law, do not fit to an authority concerning transactions in immovable property. Substantive property law is characterized by its erga omnes effects. Its main objective is to provide legal certainty and the protection of third parties by means of mandatory rules. As a result, most countries adopted a land register system with special procedural requirements as to rights in immovable property. In this respect, it is hardly conceivable that the registrar would accept an authority subjected to a foreign law with the inevitable uncertainties that result from it. Consequently, authorities concerning transactions in immovable property should be subjected to the generally accepted conflict-of-laws rule in property law matters, i.e., to the lex rei sitae.[253]

Swiss IPRG; art. 39(1) Portuguese C.c.; art. 1.40 2nd sentence Lithuanian C.k.p.; § 15(1) East German RAG; art. 108 1st sentence Belgian Proposal; for German case law cf. BGH 26. 4. 1990, IPRspr. 1990 no. 25 = NJW 1990, 3088; 9. 12. 1964, BGHZ 43, 21 (26) = IPRspr. 1964/65 no. 33; for Greece, see above in n. 241; under further requirements, also art. 11(2) HAC; art. 95(2) Romanian legea 105/92.

[251] Cf. art. 11(1) HAC; art. 126(2) Swiss IPRG; art. 60 (1) 1st phrase Italian legge 31. 5. 1995, n. 218; art. 39(3) Portuguese C.c.; art. 95(2) Romanian legea 105/92; for Germany see BGH 26. 4. 1990 (preceding note); 29. 11. 1961, IPRspr. 1960/61 no. 40; art. 108 2nd sentence of the Belgian Proposal (Although referring to the agent's habitual residence, it was expressly inspired by the provisions of the HAC and the Swiss IPRG; see the explanatory remarks concerning art. 108 [supra n. 237]).

[252] Cf., e.g., art. 126(2) Swiss IPRG; art. 60 (1) 1st sentence Italian legge 31. 5. 1995, n. 218; art. 39(3) Portuguese C.c.

[253] E.g., art. 100 Romanian legea 105/92; for Germany, cf. OLG München 10. 3. 1988, IPRspr. 1988 no. 15 = IPRax 1990, 320 (322); *Staudinger(-Magnus)* (supra n. 95) Einl. zu Art. 27–37 EGBGB no. A 30; for Austria cf. *Rummel(-Schwimann)*, Kommentar zum Allgemeinen Bürgerlichen Gesetzbuch II (1992) § 49 IPRG no. 5; for Switzerland cf. *Vischer/Huber/Oser* (supra n. 119) no. 1023.

7. *Authority to contract at exchanges and auctions*. – According to art. 11(2)(c) HAC, the lex loci actus shall apply regardless of the agents' principal place of business if they acted at an exchange or auction,[254] whereas party autonomy is not excluded (see art. 14 HAC). This was necessary since the law of the agents' business establishment applies without the requirement of perceptibility to third parties according to art. 11(1) HAC. However, the solutions suggested here all require that the law applicable to the authority is foreseeable for third parties in case it differs from the lex loci actus. Thus, operators of exchanges or auctions will always be able to identify the law governing the authority so that commercial intercourse cannot seriously be hampered. In a case in which an auctioneer admits an agent having an authority subjected to a foreign country's law by means of choice of law, and thus prejudices legitimate interests of third parties participating in the auction, the conflict of interests between the third party and the auctioneer can be settled on the level of the substantive law governing the third party/auctioneer relations. The same holds true for exchanges. As to electronic trading platforms, most choice-of-law problems are covered by appropriate contractual clauses of the standard conditions. For the remainder, a reasonable interpretation of the connecting factor lex loci actus by the judge suffices to provide legal security in this area. As a result, there is no need for a special rule for an agent's authority concerning transactions at auctions or exchanges.[255]

8. Scope. – a) Relation between principal and third party. – First of all, the law applicable to agency should adjudicate on the existence, the extent, the limits, and the termination of the agent's authority. The same law should equally decide if the agent acted with apparent authority, since the borders between an implied grant of authority by conduct of the principal and apparent authority are fluid. The critical question in all these cases is how an objective bystander would reasonably interpret the situation presented to him.[256]

As to the question of which law shall govern the legal consequences of the exercise of the authority, two solutions have been suggested: first, the application of the law governing the main operation (i.e., a restrictive scope of the conflict rule on agency),[257] and second, the application of the law governing

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[254] Similarly the prevailing opinion in German legal writing; cf. *Staudinger(-Magnus)* (supra n. 95) Einl. zu Art. 27–37 EGBGB no. A 32; *Reithmann/Martiny(-Hausmann)* (supra n. 204) no. 1741.

[255] Cf., e.g., art. 108 of the recent Belgian Proposal; art. 60 Italian legge 31. 5. 1995, n. 218; art. 10(11) Spanish C.c.; art. 39 Portuguese C.c.; art. 126 Swiss IPRG.

[256] Cf. *Kötz/Weir*, European Contract Law I (1997) 234 seq., 235 n. 90.

[257] Cf. in particular the German literature: *Rabel*, Vertretungsmacht für obligatorische Rechtsgeschäfte: RabelsZ 3 (1929) 807 (at 834); *Raape*, Internationales Privatrecht[5] (1961) 503; *Berger*, Das Statut der Vollmacht im schweizerischen IPR mit vergleichender Berücksichtigung Deutschlands, Frankreichs, Großbritanniens sowie der internationalen Verträge und Vertragsentwürfe (1974) 136 seq.; *Reithmann/Martiny(-Hausmann)* (supra n. 204) nos. 1745 seqq.; *v. Hoffmann* (supra n. 244) no. 49.

the authority (i.e., an extensive scope).[258] The substantive law of agency usually provides a complex and comprehensive system in which the existence of an authorization and the legal consequences of its exercise are harmonized with each other. In order to avoid an inevitable dichotomy resulting from two laws governing the inseparably connected questions arising from an agency situation, a special conflict rule on agency should be comprehensive. Indeed, it would be odd if, in a given case, the law governing the authority were to decide that the agent was invested with apparent authority but the legal consequences thereof were adjudicated by another law.[259] Consequently, the existence of the agent's authority as well as the effects of its exercise must be subjected to the same law.

b) Relation between agent and third party. – In many systems, the rules of substantive law applicable to the principal/third party and the agent/third party relationship complement one another, so that the substantive law provides a uniform system covering both relationships.[260] In this respect, an undesirable discrepancy may arise if the law governing the principal/third party relationship differs from the law applicable to the agent/third party relation. The former may decide that the agent acted without authority not binding the principal, whereas the latter states that the agent's acts were covered by apparent authority so that the agent cannot be held liable as falsus procurator. Or, in the opposite case, both legal systems declare both parties liable. In order to avoid such inconsistencies, the law governing the authority must apply to the agent/third party relation as well.[261] Furthermore, a separation of the law governing the principal/third party relation from that governing the agent/third party relation is logically impossible in cases of undisclosed agency in common law because the third party may choose against whom the contract shall be enforced.[262]

9. Proposal. – For the given reasons, the Institute suggests deleting the first alternative of art. 1(2)(f) and adopting a new art. 8a concerning contracts concluded by agents. As a question of formation of the contract, the new provision should be placed behind art. 8 dealing with "the existence and validity" of the contract. See art. 1(2)(g) (art. 1[2][f] of the Convention), below at p. 98, and art. 8a, below at p. 109.

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[258] Art. 11(1) HAC; art. 49(1) Austrian IPRG (cf. OGH 13. 1. 1983 SZ 57/7 at 31); art. 39(1) Portuguese C.c.; art. 96(1) Romanian legea 105/92; for Spain see *Calvo Caravaca et al.* (supra n. 244) 493 n. 137; for Switzerland see *Vischer/Huber/Oser* (supra n. 119) no. 1026 seqq.; for Italy see *Ballarino*, Diritto Internazionale Privato[3] (1999) 740.

[259] *Verhagen* (supra n. 230) 123.

[260] *Karsten* (supra n. 230) no. 84.

[261] This solution is adopted in art. 15 HAC, art. 126(3) Swiss IPRG and art. 1.40 2nd sentence Lithuanian C.k.p. (probably) as well as in Austrian (cf. OGH 30. 9. 1987 SZ 60/192 at 317) and in German case law (cf. OLG Hamburg 27. 5. 1987, IPRspr. 1987 no. 14).

[262] Cf. *Karsten* (supra n. 230) no. 85.

Appendix

ROME CONVENTION OF 19.6. 1980 ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)	PROPOSAL OF THE MAX PLANCK INSTITUTE FOR A COUNCIL REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS (ROME I)
Article 1 – Scope of the Convention	**Article 1 – *Material* scope of the *Regulation***
1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.	1. The rules of this *Regulation* shall apply to contractual obligations in any situation involving a choice between the laws of different countries.
2. They shall not apply to:	2. They shall not apply to:
(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;	(a) [no changes]
(b) contractual obligations relating to: – wills and succession, – rights in property arising out of a matrimonial relationship, – rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;	(b) [no changes]
	(c) obligations arising from pre-contractual relationships except as provided for in Article 8(2). (see additional comment 21)
(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;	*(d)* [no changes]
(d) arbitration agreements and agreements on the choice of court;	*(e) [deleted]* agreements on the choice of court; (see question 6)

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;	*(f)* [no changes]
(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or unincorporate, to a third party;	*(g)* the question whether *[deleted]* an organ is able to bind a company or body corporate or unincorporate, to a third party; (see additional comment 22 and art. 8a Proposal)
(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;	*(h)* [no changes]
(h) evidence and procedure, without prejudice to Article 14.	*(i)* [no changes]
3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in these territories the court shall apply its internal law.	*[deleted]* (see question 7 and art. 4a Proposal)
4. The preceding paragraph does not apply to contracts of re-insurance.	*[deleted]* (see question 7 and art. 4a[4] Proposal)
Article 2 – Application of law of non-contracting States	**Article 2 – Application of law of *non-Member* States**
Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.	Any law specified by this *Regulation* shall be applied whether or not it is the law of a *Member* State.

Article 3 – Freedom of choice	**Article 3 – Freedom of choice**
1. A contract shall be governed by the law chosen by the parties.	1. A contract shall be governed by the law chosen by the parties. *The parties may choose as the applicable law:* *(a) the law of any country,* *(b) an international convention, or* *(c) general principles of law such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract law.* (see question 8)
The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.	The choice must be expressed or *established as the parties' actual consent* by the terms of the contract *or by their conduct* in the circumstances of the case. (see question 9)
By their choice the parties can select the law applicable to the whole or a part only of the contract.	By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.	2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this *Regulation*. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by	3. The fact that the parties have chosen a *[deleted]* law *in accordance with paragraph 1*, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the *contract* at the time of the choice are connected with one country only, prejudice the application of rules of *the internally mandatory* rules of that

contract, hereinafter called 'mandatory rules'.	country. *Internally mandatory rules are provisions* which cannot be derogated from by contract *in a situation without any transborder element but which would normally be set aside if the parties concluding a contract which carries one or more relevant international elements choose the law of another country to govern the contract.* (see questions 13 and 16) *4. The fact that the parties have chosen a law other than that of any Member State, whether or not accompanied by the choice of a tribunal situated in a non-Member State, shall, where all the other elements relevant to the situation at the time of the choice are connected with one or more of the Member States, neither prejudice the application of internally mandatory rules contained in European Regulations nor the application of internally mandatory Member State rules which implement European Directives. In the latter case, the provisions of the relevant Directive apply as implemented in the domestic law of the Member State that would govern the contract in the absence of a choice-of-law clause.* (see question 4)
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.	*5.* The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.
Article 4 – Applicable law in the absence of choice	**Article 4 – Applicable law in the absence of choice**
1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the	1. [no changes] (see question 10)

law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. 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.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. 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. *This paragraph shall not apply if the characteristic performance or the identity of the party effecting the characteristic performance cannot be determined.*

(see question 10)

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated. *However, a*

	tenancy of immovable property concluded for temporary private use for a maximum period of six consecutive months shall be presumed to be most closely connected with the country where the landlord has his habitual residence or place of business, provided that the tenant is a natural person and has his habitual residence in the same country. (see question 11)
4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.	*[deleted]* (see question 10)
5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.	*4. [integrated in para. 2 3rd sentence]* The presumptions in paragraphs 2 and 3 *may exceptionally* be disregarded if it *is clear* from *all* the circumstances *of the case* that the contract is *manifestly* more closely connected with another country. (see question 10)
	Article 4a – Certain insurance contracts
	1. The law applicable to the insurance contract shall be the law of the country in

which the policyholder has his habitual residence or central administration at the time of the conclusion of the contract.
(see question 7)
2. The parties to the contract of insurance may choose
(a) the law of the country in which the risk or part of it is situated in accordance with the internal law of the forum;
(b) in case of an insurance contract limited to events occurring in a given State, the law of that State;
(c) in life insurance contracts, the law of a country of which the policyholder is a national;
(d) in travel or holiday insurance of a duration of six months or less, the law of the country where the policyholder took out the policy.
(see question 7)
3. The law applicable to a compulsory insurance contract is the law of the country which imposes the obligation to take out insurance.
(see question 7)
4. The rules set out in paragraphs 1 and 2 of this Article do not apply to re-insurance and to large risks as defined in Council Directive 73/239/EEC as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended.
(see question 7)

Article 5 – Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade

Article 5 – Certain consumer contracts

1. This Article applies to a contract *concluded by* a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, *and a person acting in the*

or profession, or a contract for the provision of credit for that object.	*course of his trade or profession ("the supplier").*
	(see question 12)
2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: – if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or – if the other party or his agent received the consumer's order in that country, or – if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.	2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the *internally* mandatory rules of the law of the country in which he has his habitual residence at the time of conclusion of the contract, *if the contract has been concluded with a supplier who pursues commercial or professional activities in that state or, by any means, directs such activities to that state or to several states including that state, and the contract falls into the scope of such activities.* (see question 12) [*If a supplier residing in a non-Member State directs his business activities to one or more Member States, the choice of a law other than that of any Member State as the law applicable to a contract falling into the scope of such activities does not deprive a consumer who, at the time of the conclusion of the contract, is habitually resident in a Member State of the protection afforded by the relevant Directives; in this case, the provisions of the relevant Directives apply as implemented in the domestic law of the Member State in which the consumer concluded the contract.*]
	(see question 3)
3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered	3. Notwithstanding the provisions of Article 4, a contract to which this article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence *if the supplier*

into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:
(a) a contract of carriage;
(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

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

acts in the way described in paragraph 2 of this Article.
(see question 12)
4. This Article shall not apply to:
(a) a contract of transport other than a contract which, for an inclusive price, provides for a combination of travel and accommodation;
(b) a contract to the extent that its subject matter of the contract is a right in immovable property or a right to use immovable property other than on a timeshare basis;
(c) a contract of insurance.
(see question 12)
[integrated in para. 4(a)]

Article 6 – Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
(a) by the law of the country in which the employee habitually carries out his work in performance of

Article 6 – Individual employment contracts *and contracts of commercial agents*

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the *internally* mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.
(see question 13)
2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:
(a) by the law of the country in which the employee habitually carries out his work in performance of

the contract, even if he is temporarily employed in another country; or	the contract. *The country where the work is habitually carried out is not to be regarded as having changed if the employee is posted for a limited period to work in another country. The conclusion of a contract of employment with an employer belonging to the same group as the original employer shall not exclude a finding that such a posting has taken place*;
(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated;	(b) if the employee does not habitually carry out his work in any one country, *e.g., personnel on international flights*, by the law of the country in which the place of business through which he was engaged is situated; *or*
	(c) in case of seamen by the law of the country whose flag the ship flies;
unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.	unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.
	(see questions 14 and 15)
	3. The foregoing provisions are without prejudice to the application of the mandatory rules of the law of the country to which the employee is posted provided for by Directive 96/71/EC concerning the posting of workers in the framework of the provision of services.
	(see questions 14 and 15)
	4. In an agency contract between a principal and a self-employed commercial agent, a choice of law made by the parties shall not have the effect of depriving the agent of the protection afforded to him by the internally mandatory rules of the law which would be applicable under Article 4.
	(see questions 14 and 15)

Article 7 – Mandatory rules	**Article 7 – *Internationally* mandatory rules**
	1. This Article applies to internationally mandatory rules which are deemed to be of such fundamental importance for the political, social, and economic order of a country that, under the law of that country, those rules claim to be applied irrespective of the law applicable to the contract under Articles 3 and 4 of this Regulation. (see questions 13 and 16)
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.	*2. The internationally mandatory rules of the law of the forum are applicable regardless of the proper law of contract insofar as those rules claim to be applied.* (see questions 13 and 16)
	3. The internationally mandatory rules of the law governing the contract apply to the contract if they so demand. (see questions 13 and 16)
1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.	*4. The internationally mandatory rules of a country, the law of which is neither the law of the forum nor the law governing the contract, may be given effect if the contract bears a close connection to this country. In considering whether to give effect to such internationally mandatory rules, regard shall be had to their nature and purpose in accordance with paragraph 1 of this Article and to the consequences of their application or non-application for the purposes pursued by the concerned internationally mandatory rule and for the parties to the contract.* (see questions 13 and 16)
Article 8 – Material validity	**Article 8 – *Consent and* material validity**
1. The existence and validity of a contract, or of any term of a con-	1. [no changes]

tract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.

2. Legal consequences resulting from the breaking-off of negotiations shall be governed by the law which would govern the contemplated contract.
(see additional comment 21)
3. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that
(a) he did not consent, *or*
(b) that he was under no obligation arising from the negotiations
if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding *paragraphs*.
(see additional comment 21)

Article 8a – Contracts concluded by agents

1. Where a contract is concluded by an agent, the existence, the extent, the limits and the termination of the agent's actual or apparent authority as well as the effects of the agent's exercise or pretended exercise of this authority shall be governed
(a) by the law chosen by the principal, or
(b) in the absence of choice, by the law of the country where the principal intended the agent to act,
provided that the agent and the third party were aware of this choice or intention or could not reasonably be unaware thereof.
(see additional comment 22)
2. If the law applicable cannot be determined under the provisions of paragraph

1, the law of the country in which the agent acted shall apply. However, if the agent acted in the course of his trade or profession, the law of his principal place of business shall apply, provided that the third party was aware of this place of business or could not reasonably be unaware thereof.
(see additional comment 22)
3. The provisions of paragraphs 1 and 2 do not apply to the extent that the subject matter of the agency is a right in immovable property. In this case, the law of the country where the immovable property is situated shall apply.
(see additional comment 22)
4. The law determined by the provisions of paragraphs 1 to 3 shall also govern the relationship between the agent and the third party arising from the fact that the agent has acted in the exercise of his authority, has exceeded his authority, or has acted without authority.
(see additional comment 22)

Article 9 – Formal validity

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.

2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Conven-

Article 9 – Formal validity

1. A contract *[deleted]* is formally valid if it satisfies the formal requirements of the law which governs it under this *Regulation* or of the law of the country where *either of the parties or its agent is present at the time of the conclusion of the contract or of the law of the country in which either party is habitually resident at that time.*
(see question 17)
[integrated in para. 1]
(see question 17)

tion or of the law of one of those countries.

3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.

4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

[integrated in para. 1]
(see question 17)

2. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this *Regulation* governs or would govern the contract or of the law of the country in which the act was done *or of the law of the country in which the person who effected the act was habitually resident at that time*.

3. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

4. Notwithstanding paragraphs 1 *and 2* of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 10 – Scope of the applicable law	**Article 10 – Scope of the applicable law**
1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention shall govern in particular:	1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this *Regulation* shall govern in particular:
(a) interpretation;	[no changes]
(b) performance;	
(c) within the limits of the powers conferred on the court by its procedural law, the consequences of breach, 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;	
(e) the consequences of nullity of the contract.	
2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.	2. [no changes]
Article 11 – Incapacity	**Article 11 – Incapacity**
In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.	[no changes]

	Article 11a – Certain types of set-off
	1. The law applicable to set-off is the law of the claim against which set-off is invoked. (see question 20) *2. This rule does not apply to set-off by agreement.* (see question 20)
Article 12 – Voluntary assignment	**Article 12 – Voluntary assignment**
1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.	1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this *Regulation* applies to the contract between the assignor and assignee. (see question 18)
2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.	2. [no changes] (see question 18)
	3. Validity and effects of the assignment with regard to third parties are governed by the law of the assignor's habitual residence. (see question 18)
Article 13 – Subrogation	**Article 13 – *Legal* subrogation *and multitude of debtors***
1. Where a person ("the creditor") has a contractual claim upon another	1. Where a person ("the creditor") has a contractual claim upon 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, the law which governs the third person's duty to satisfy the creditor shall determine whether 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 and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

("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, the law which governs the third person's duty to satisfy the creditor shall determine whether 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 and, if so, whether he may do so in full or only to a limited extent. *The law governing the debtor's obligation remains applicable to its enforcement and to the debtor's protection, excluding the question of whether the right can be subject to subrogation at all.*
(see question 19)

2. *[deleted]* Where several persons are subject *to the same creditor's claims arising from the same fact pattern*, and one of them has satisfied the creditor *of these claims, the law governing this debtor's obligation also governs that person's right to contribution from the other persons. Where the law governing those other persons' obligations toward the creditor contains rules deemed specifically to protect them from liability, those rules are equally applicable against the claim for contribution.*
(see question 19)

Article 14 – Burden of proof, etc.

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

Article 14 – Burden of proof, etc.

1. The law governing the contract under this *Regulation* applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognized by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

2. [no changes]

Article 15 – Exclusion of renvoi

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

Article 15 – Exclusion of renvoi

The application of the law of any country specified by this *Regulation* means the application of the rules of law in force in that country other than its rules of private international law.

Article 16 – "Ordre public"

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

Article 16 – "Ordre public"

The application of a rule of the law *[deleted]* specified by this *Regulation* may be refused only if such application is manifestly incompatible with the public policy ("ordre public") of the forum.
(see question 8)

Article 17 – No retrospective effect

This Convention shall apply in a Contracting State to contracts made after the date on which this Convention has entered into force with respect to that State.

Article 17 – No retrospective effect

This *Regulation* shall apply in a *Member* State to contracts made after the date on which this *Regulation* has entered into force with respect to that State.

Article 18 – Uniform interpretation	**Article 18 – Uniform interpretation**
In the interpretation and application of the preceding uniform rules, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application.	*[deleted]*
Article 19 – States with more than one legal system	**Article 19 – States with more than one legal system**
1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention. 2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.	1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this *Regulation.* 2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this *Regulation* to conflicts solely between the laws of such units.
Article 20 – Precedence of Community law	**Article 20 – *Relationship with other provisions* of Community law**
This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts.	*1. This Regulation shall not prejudice the application of provisions which are or will be contained in the Treaties establishing the European Communities or in acts of the institutions of the European Communities or national provisions adopted for their implementation which:* *(a) in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; or*

(b) lay down rules which apply, irrespective of the national law governing the contractual obligation in question by virtue of this Regulation; or
(c) prevent application of a provision or provisions of the law of the forum or of the law designated by this Regulation.
(see question 5)
2. This Regulation shall not prejudice the application of Community instruments or national provisions adopted for their implementation which, in relation to particular matters and areas coordinated by such instruments, subject services to the laws of the Member States where the service provider is established and, in the area coordinated, allow restrictions on freedom to provide services originating in another Member State only in limited circumstances.
(see question 5)

Article 21 – Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

Article 21 – Relationship with international conventions

1. This Regulation shall not prejudice the application of international conventions which
(a) lay down rules relating to arbitration, or
(b) predominantly affect substantive law.
(see question 5)
2. This Regulation shall not prejudice, as far as the relation to states that are not members of the European Community is concerned, the application of international conventions to which one or more of the Member States are or may become party and which, in relation to particular matters, lay down choice of law relating to contractual obligations.
(see question 5)

Article 22 – Reservations	**Article 22 – Reservations**
1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply: (a) the provisions of Article 7 (1); (b) the provisions of Article 10 (1) (e). 2. Any Contracting State may also, when notifying an extension of the Convention in accordance with Article 27 (2), make one or more of these reservations, with its effect limited to all or some of the territories mentioned in the extension. 3. Any Contracting State may at any time withdraw a reservation which it has made ; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.	*[deleted]* (see question 2)