

ROME I REGULATION
A—MOSTLY—UNIFIED PRIVATE INTERNATIONAL LAW OF
CONTRACTUAL RELATIONSHIPS WITHIN—MOST—OF THE
EUROPEAN UNION

*Professor Dr. Volker Behr**

I. INTRODUCTION

The year 2009 was an important year in the development of unified private international law in the European Union. At the beginning of the year, Regulation (EC) No. 864/2007 on the law applicable to non-contractual obligations (Rome II)¹ entered into force.² And at the end of the year Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I)³ followed suit.⁴ Hence, within one year significant parts of the private international law relevant to international business transactions have been unified within most of the Member States of the European Union. Further segments are to follow up on these developments.⁵

* Professor of Law Emeritus, University of Augsburg, Germany. The author gratefully acknowledges the invaluable assistance he received from the editorial board of the *Journal of Law and Commerce*. He especially thanks Erin Wilson who assumed the difficult task of checking and adapting citations and helped to make legible the text of a nonnative speaker.

1. Commission Regulation 864/2007, On the Law Applicable to Non-Contractual Obligations, 2007 O.J. (L 199) 40 [hereinafter Rome II].

2. Rome II art. 32 (“This Regulation shall apply from 11 January 2009, except for Article 29, which shall apply from 11 July 2008.”), Rome II art. 31 (“This regulation shall apply to events giving rise to damage which occur after its entry into force.”).

3. Commission Regulation 593/2008 (Rome I), On the Law Applicable to Contractual Obligations, 2008 O.J. (L 177) 6 [hereinafter Rome I].

4. Rome I art. 29 (This Regulation “shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.”). Rome I art. 28 (This Regulation “shall apply to contracts concluded after 17 December 2009.”).

5. As to Rome III, see *Commission Proposal for a Council Regulation Amending Regulation (EC) No 2201/2003, Jurisdiction and Introducing Rules Concerning Applicable Law in Matrimonial Matters*, COM (2006) 399 final (July 17, 2006); as to Rome IV, see *Commission Green Paper on Conflict of Laws in Matters Concerning Matrimonial Property Regimes, Including the Question of Jurisdiction and Mutual Recognition*, COM (2006) 400 final (July 17, 2006); as to Rome V, see *Green Paper on Succession and Wills*, COM (2005) 65 final (Mar. 1, 2005).

Rome I and Rome II are the applicable law in a vast majority of EU Member States. However, their coverage is restricted,⁶ and they do not apply to all Member States. Although under the Treaty establishing the European Community (TEC)⁷ and now the Treaty on the Functioning of the European Union⁸ Community/Union Regulations in general are binding and directly applicable in all Member States of the Union,⁹ this is not true of Regulations based on Part Three, Title IV of the TEC. Such Regulations—like Rome I and Rome II¹⁰—apply to the United Kingdom, Ireland, and Denmark only in case these Member States specifically opt in.¹¹ As far as Rome II is concerned, the United Kingdom and Ireland opted in by taking part in the adoption of the Regulation, while Denmark did not opt in.¹² As far as Rome I is concerned, Ireland opted in from the beginning, while the United Kingdom and Denmark did not.¹³ However, the U.K. has notified the European Union of its intention to take part in Rome I according to Article 4 of Protocol no. 4,¹⁴ and it is in force in the U.K. as well.

Prior to its entering into force and within the short time of its existence, Rome II has received ample and profound discussion within the United States.¹⁵ On the other hand, Rome I until now has found little observation. Its

6. As to the material regarding scope and excluded matters, see Rome I art. 1(2), Rome II art. 1(2) & (3).

7. Treaty Establishing the European Community (consolidated version), Dec. 29, 2006, 2006 O.J. (C 321E) 43 [hereinafter TEC].

8. Treaty on the Functioning of the European Union, May 9, 2008 (effective date Jan. 1, 2009), 2008 O.J. (C 115) 47 [hereinafter TFEU].

9. TEC art. 249; TFEU art. 288. TEC art. 249 (2), TFEU art. 288(2).

10. Rome I and Rome II are based on TEC art. 61(c); see Rome I pmbl. and Rome II pmbl. (allowing measures in the field of judicial cooperation in civil matters as provided for in TEC art. 65); TEC art. 65(b) (vests power in the Community to promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction).

11. See Protocol no. 4 (1997) (United Kingdom and Ireland annexed to the Treaty on European Union (TEU) and to the Treaty establishing the European Community (TEC) art. 1–4); Protocol no. 5 (1997) (Denmark, annexed to the TEU and to the TEC art. 1–5).

12. See Rome II art. 1(4) and recitals 39 & 40.

13. See Rome I recitals 44–46.

14. See Letter from the Permanent Representative of the United Kingdom to the President of the Council of the European Union (July 24, 2008) (notifying the intention of the U.K. to accept Rome I).

15. See, e.g., Richard Fentiman, *Choice of Law in Europe: Uniformity and Integration*, 82 TUL. L. REV. 2021 (2008); Jan von Hein, *Something Old and Something Borrowed, But Nothing New? Rome II and the European Choice-of-Law Evolution*, 82 TUL. L. REV. 1663 (2008); Phaedon J. Kozyris, *Rome II: Tort Conflicts on the Right Track! A Postscript to Symeon Symeonides' 'Missed Opportunity'*, 56 AM. J. COMP. L. 471 (2008); Ralf Michaels, *The New European Choice-of-Law Revolution*, 82 TUL. L. REV. 1607 (2008); Erin A. O'Hara & Larry E. Ribstein, *Rules and Institutions in Developing a Law Market: Views from the United States and Europe*, 82 TUL. L. REV. 2147 (2008); Michael L. Rustad, *Circles of E-Consumer Trust: Old E-America v. New E-Europe*, 16 MICH. ST. J. INT'L L. 183 (2007); Symeon C.

development has been observed,¹⁶ it has been accidentally mentioned as future replacement of the former Rome Convention,¹⁷ and specific aspects have been discussed extensively.¹⁸ On the other hand, and probably due to the late finalization of the Regulation, the overall content of Rome I has not yet reached the level of publicity, which due to its significant impact on international business transactions it deserves.

This article will first briefly describe the development of Rome I (sub II). Next, it will focus on a detailed presentation of the new law, highlighting where it deviates from its predecessor, the Rome Convention (sub III–VI). It will then try an evaluation outlining the most prominent features fundamental to the new conflict of laws rules, mostly where such features are different from the approach in the United States (sub VII). And it will end with a short conclusion (sub VIII).

II. DEVELOPMENT OF ROME I

Different from Rome II, Rome I Regulation already had a predecessor, the 1980 Rome Convention,¹⁹ which it supersedes²⁰ by, technically, transforming it into a regulation and by, in substance, resuming it as to quite a number of provisions. This Rome Convention was a very valuable first step towards unification of the applicable law within the European Union. However, it had some significant shortcomings, which reduced the value of the intended

Symeonides, *Rome II and Tort Conflicts: A Missed Opportunity*, 56 AM. J. COMP. L. 173 (2008); Russell J. Weintraub, *The Choice-of-Law Rules of the European Community Regulation on the Law Applicable to Non-Contractual Obligations: Simple and Predicable, Consequences-Based, or Neither?*, 43 TEX. INT'L L.J. 401 (2008).

16. See Dennis Solomon, *The Private International Law of Contracts in Europe: Advances and Retreats*, 82 TUL. L. REV. 1709 (2008).

17. George A. Bermann, *Introduction: Mandatory Rules of Law in International Arbitration*, 18 AM. REV. INT'L ARB. 1, 10–11 (2007).

18. As to party autonomy and consumer protection see RONALD A. BRAND, *ROME I'S RULES ON PARTY AUTONOMY FOR CHOICE OF LAW: A U.S. PERSPECTIVE*, IN THE ROME I REGULATION ON THE LAW APPLICABLE TO CONTRACTUAL RELATIONS (forthcoming 2011); as to party autonomy and its limitations see Patrick J. Borchers, *Categorical Exceptions to Party Autonomy in Private International Law*, 82 TUL. L. REV. 1645, 1651 (2008); as to mandatory rules see Bernard Audit, *How Do Mandatory Rules of Law Function in International Civil Litigation?*, 18 AM. REV. INT'L ARB. 37 (2007); Johan Erauw, *Observations About Mandatory Rules Imposed on Transatlantic Commercial Relationships*, 26 HOUS. J. INT'L L. 263 (2004); Catherine Kessedjian, *Mandatory Rules of Law in International Arbitration: What Are Mandatory Rules?*, 18 AM. REV. INT'L ARB. 147 (2008).

19. Rome Convention on the Law Applicable to Contractual Obligations, (originally enacted June 19, 1980) (consolidated version) 2005 O.J. (C 334) 1 [hereinafter Rome Convention].

20. The Rome Convention will remain in force in Denmark.

unification. First, due to its very nature as a convention, it was not in force automatically in all Member States of the European Union, but instead had to be transformed into national law pursuant to domestic requirements of the participating Member States. In the course of time it has undergone repeated modifications. On the occasion of new Member States acceding to the European Union and which were obliged to adopt the Rome Convention as a part of the *acquis communautaire*, the convention was repeatedly renegotiated and amended or modified several times. The different dates of accession of Member States to the European Union thus has led to a situation where different versions of the Rome Convention has been ratified by different Member States and hence the text of the convention was no longer identical in all the different Member States. Second, the Rome Convention had allowed Member States to accept it with reservations,²¹ which again diluted uniformity, because quite a number of Member States made such reservations.²² And finally, until recently, uniform interpretation was striven for²³ but not guaranteed. It was only theoretically achieved in 2004 by a Protocol on the interpretation of the convention by the European Court of Justice.²⁴ Even then it was not guaranteed, as national courts only were entitled to request the European Court of Justice to give a preliminary ruling but were not obliged to do so.²⁵

The Amsterdam Treaty²⁶ vested legislative power in the Union, among others, as to measures²⁷ in the field of judicial co-operation in civil matters (Article 61(c) TEC), and specific measures promote the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction (Article 65(b) TEC). Based on those provisions of the EC Treaty, the Council of the European Union and the European Parliament and the Council respectively, in the

21. See Rome Convention art. 22.

22. Lando and Nielsen identify eight Member States having made a reservation to Rome Convention art. 7(1) under Rome Convention art. 22(1)(a). See Ole Lando & Arnt Nielsen, *The Rome I Regulation*, 45 COMMON MKT. L. REV. 1687, 1720 (2008).

23. See Rome Convention art. 18 ("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.").

24. First Protocol on the Interpretation of the 1980 Convention by the Court of Justice, (consolidated version) Dec. 30, 2005, 2005 O.J. (C 334) 20.

25. *Id.* art. 2.

26. Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 1997 O.J. (C 340) 1.

27. *Id.* at 35 (Regulations or Directives).

course of the last decade, have enacted a significant number of regulations in the field of jurisdiction as well as in the field of private international law.²⁸

Rome I Regulation is one of those many regulations. The Hague Programme, adopted by the European Council on 5 November 2004,²⁹ had called for work to be pursued actively on the conflict-of-law rules regarding contractual obligations. In 2005 the European Commission presented a draft proposal³⁰ for a Regulation on the Law Applicable to Contractual Obligations (Rome I), which was modified in 2007 by the European Parliament. On 17 June 2008 Regulation (EC) no. 593/2008 (Rome I) was adopted, and on 17 December 2009 it entered into force.³¹

By transforming the Rome Convention into a regulation, major shortcomings of the convention have been erased. First of all, there is a uniform text in all Member States. Different from the Rome Convention, the Regulation does not allow reservations. Second, Rome I being a Regulation, it is automatically applicable in Member States without any further transformation needed. Third, future modifications of the regulation again will automatically be applicable within the Member States. And fourth, based on Articles 68, 234 TEC (now Article 267 Lisbon Treaty), courts of the Member State, against whose decisions there is no judicial remedy under national law, no longer just may, but instead shall request the Court of Justice to give a ruling, in case they consider that a decision on the question is necessary to enable it to give judgment. Hence, uniform interpretation of a uniform text will be better safeguarded.

28. See, e.g., Council Regulation 1346/2000, 2000 O.J. (L 160) 1 (EC); Council Regulation 1347/2000, 2000 O.J. (L 160) 19 (EC); Council Regulation 1348/2000, 2000 O.J. (L 160) 37 (EC); Council Regulation 44/2001, 2001 O.J. (L 363) 1 (EC); Council Regulation (I206/2001, 2001 O.J. (L 174) 1 (EC); Council Directive 2002/8, 2003 O.J. (L 26) 41 (EC); Council Regulation 2201/2003, 2003 O.J. (L 338) 1 (EC); Regulation 805/2004, 2004 O.J. (L 143) 1 (EC).

29. The Hague Programme: Strengthening Freedom, Security and Justice in the European Union (EC), 2005 O.J. (C 53) 1.

30. Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM (2005) 650 final (Dec. 15, 2005).

31. Rome I art. 29(2).

III. ROME I IN DETAIL (1)—APPLICABILITY

As Rome I shall (only) apply “in situations involving a conflict of laws,”³² it does not apply to what is called a “purely domestic” situation having connecting factors with one single country.³³

1. *Time Requirements*

The provision on entering into force of Rome I is cryptic. Pursuant to Article 29(1), the Regulation entered into force the 20th day after its publication in the Official Journal of the European Union, which means 24 July 2009. Pursuant to Article 29 II, it enters into force 17 December 2009 except for Article 26, which already entered into force 17 June 2009.³⁴ As to parties to an international contract, this confusion is of no significance, because, pursuant to Article 28, Rome I will only apply to contracts which are concluded after 17 December 2009.

2. *Territorial Reach*

Being an EC Regulation, Rome I in principle would be in force in the Member States of the European Union. However, being based on Articles 61 and 65 EC, it is not automatically in force in the United Kingdom, Ireland, and Denmark. Since it has not opted in, it is not in force in Denmark.³⁵ Consequently, Article 1(4) makes a distinction between Member States to the Regulation and Member States of the European Union, the latter being addressed within the Regulation only in Article 3(4) and Article 7.

As is expressly straightened out in the title and is clear from the substance of Article 2, Rome I asks for universal application. The Regulation is not only applicable as among Member States of the Regulation or Member States of the European Union. Like the Rome Convention, it also applies in case the law of a Non-Member State is made applicable.

32. Rome I art. 1(1).

33. The Article 3(3) situation is not a “purely domestic” situation due to the fact that parties’ choice connects the case with another country.

34. Art. 26 is of no direct significance to international transactions. This provision only asking Member States to notify the Commission conventions addressing conflict of law rules relating to contractual relationships, to which Member States were parties at the time of the adoption of Rome I and which pursuant to Art. 25 will be valid.

35. As to the United Kingdom and Ireland, *see* Rome I recitals 42–44.

3. *Material Scope*

Positively speaking, Rome I applies to all contractual obligations in civil and commercial matters, as long as they involve a conflict of laws.³⁶ The requirement of involving a conflict of laws is meant to restrict the applicability of the Regulation to situations linked to at least two different countries. The official version of Rome I, in German language,³⁷ avoids the wording “in situations involving a conflict of laws” and instead reads “featuring a connection to the law of different countries.”³⁸ In substance there is no difference. Clarifying, Article 1(1) states that the Regulation “shall not apply, in particular, to revenue, customs or administrative matters,” which matters are regularly considered not to affiliate to civil or commercial law but instead to public law.

Negatively speaking, Article 1(2 and 3) excludes a number of obligations, which in substance are part of civil or commercial law but for different reasons shall not be treated under the Regulation. Exceptions apply to status or legal capacity of natural persons except for specific situations of parties concluding a contract while being in the same country,³⁹ obligations out of family relations,⁴⁰ obligations out of matrimonial property regimes,⁴¹ obligations out of negotiable instruments,⁴² obligations out of arbitration,⁴³ obligations out of company law,⁴⁴ power of agency,⁴⁵ obligations out of trust,⁴⁶ pre-contractual obligations,⁴⁷ obligations out of specific insurance contracts,⁴⁸ and evidence and procedure.⁴⁹

Most of those exceptions to the applicability of Rome I can be clearly justified. The exception as to power of agency, however, is rather tantalizing.

36. Rome I art. 1(1).

37. As to the official languages of the European Union *see* Regulation No. 1 Determining the Languages to be Used by the European Economic Community 1958 O.J. (17) 385 (stating the official languages of the European Union).

38. Author's translation.

39. Rome I art. 1(2a); Rome I art. 13.

40. Rome I art. 1(2)(b).

41. Rome I art. 1(2)(c).

42. Rome I art. 1(2)(d).

43. Rome I art. 1(2)(e).

44. Rome I art. 1(2)(f).

45. Rome I art. 1(2)(g).

46. Rome I art. 1(2)(h).

47. Rome I art. 1(2)(i).

48. Rome I art. 1(2)(j).

49. Rome I art. 1(3).

A significant quota of international business transactions being negotiated through agents, it would have been more than just helpful, if Rome I had clarified this issue.

IV. ROME I IN DETAIL (2)—APPLICABLE LAW

Applicable law as laid out in Chapter 3 (Articles 3–18) seems to be arranged in general based on parties' choice (subjective approach) on the one hand and closest connection to the law of a specific country (objective approach) on the other hand, with both approaches somehow modified as to special contracts. However, taking a closer look at which special contracts are excluded from the general system, there is an additional underlying principle, which is slightly concealed by the simple mechanical string of provisions, but which becomes evident when looking at the excluded contracts and at the differences as compared to the general system. This additional principle is the principle of favoritism towards presumably weaker parties. What looks like a general principle is thus restricted to a general principle in business to business transactions.

1. Party Autonomy

Under the Rome Convention, under Rome I, parties in principle have an unlimited choice of when and what law to choose.

a) What Law to Choose?

Like under the Rome Convention, like under domestic law of the Member States, and like under the law most everywhere around the world, international contracts under Rome I are preferentially governed by the law chosen by the parties.⁵⁰ As recital 12 of Rome I points out, "The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations. Parties have the utmost freedom to whatever law they want to be applied."

However, parties' choice is limited to either party's national law. The 2005 Draft of the Commission contained a subparagraph to Article 3, which read:

50. Rome I art. 3(1).

The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community. However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.⁵¹

This subparagraph was dropped in the 2007 modified Draft of the Commission and was not introduced into the final Rome I Regulation.⁵² The idea of making applicable to the contract a non-State body of law or an international convention is only addressed now in Recital 13 of Rome I, stating that “This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.” Whether this means that choice of this type of non-state law⁵³ equals the choice of the law of whatever country, or whether it makes it only part of the terms of the contract which otherwise is governed by the law applicable in case of lack of choice of law, is not yet settled. However, incorporation by reference into the contract strongly indicates that such non-state principles only become part of the contract replacing the non-mandatory provisions of the otherwise applicable law, but do not exclusively govern the contract.

Besides the restriction to national law, there are no additional restrictions as to which law parties may choose like under U.S. law. There is no requirement of the chosen law to bear some “reasonable”⁵⁴ or “substantial”⁵⁵ relationship to the parties or the transaction.⁵⁶ Contract law being mostly about parties’, and hence private, interests, under the European concept there seems to be no need to limit party autonomy in general. This unlimited acknowledgment of parties’ choice of law significantly contributes to the general objective of the Regulation: to provide for legal certainty and

51. Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), at 14, COM (2005) 650 final (Dec. 15, 2005).

52. *Id.*

53. UNIDROIT INTERNATIONAL INSTITUTE FOR THE UNIFICATION OF PRIVATE LAW, UNIDROIT PRINCIPLES ART. 1.6(2), PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, available at <http://www.unidroit.org/english/principles/contracts/principles1994/1994fulltext-english.pdf>; Commission on European Contract Law, *Principles of European Contract Law* (1999), available at http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_o_g_II.htm; STUDY GROUP ON A EUROPEAN CIVIL CODE AND THE RESEARCH GROUP ON EG PRIVATE LAW, PRINCIPLES, DEFINITIONS AND MODEL RULES OF EUROPEAN PRIVATE LAW (Outline ed., Sellier 2009), available at http://ec.europa.eu/justice/policies/civil/docs/dcftr_outline_edition_en.pdf.

54. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2a) (1996).

55. Uniform Commercial Code § 1-105(1) (1972) [hereinafter U.C.C.].

56. See Solomon, *supra* note 16, at 1729.

foreseeability.⁵⁷ Different from U.S. law, where parties inserting a choice of law clause to their contract, at least theoretically, will only experience in the court whether their choice is accepted, under Rome I they can feel confident that their choice will be accepted. They know from the very beginning what law will be applicable to their contract. This is notably true in case parties opt for a so-called “neutral” law, a law which is neither related to one of the parties nor to the transaction as such.⁵⁸

Eventual public interests are enforced not by limitations as to the eligible law, but instead by means of adding mandatory provisions of a second law. Hence, in case all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen (i.e. one foreign country situation different from a purely domestic country situation), the choice is valid. However, as choice of the other country’s law normally has for only reason the desire to escape mandatory rules of the law applicable in case of no choice of law, Article 3(3) declares additionally applicable the mandatory provisions of the law of the derogated country. In case all other elements relevant to the situation at the time of the choice are located in one or more Member States and parties opt for a third (non-Member State) country’s law, again the choice is valid. However, under Article 3(4) mandatory rules of EU law as part of the law of the forum will be applied in addition to the law chosen by the parties.

b) How to Choose?

Choice of law can be made expressly⁵⁹ by a choice of law clause either in writing or orally. The only problem is making perfectly clear which law parties want to use. This is not a problem specific to Rome I. Parties had to experience the same problem under the Rome Convention and have to face it as well under U.S. law. The problem has shown up in international sales contracts, where the choice of law of a country may lead to the application not of the genuinely domestic law of that country but instead the law of the Convention on the International Sale of Goods (CISG) as in force in the chosen country.⁶⁰

57. See Rome I Recital 16.

58. As to a “still hesitant [. . .] attitude of U.S. courts,” see Solomon, *supra* note 16, at 1725.

59. Rome I art. 3(1).

60. See, e.g., *Asante Techs., Inc. v. PMC-Sierra, Inc.*, 164 F. Supp. 2d 1142, 1150 (N.D. Cal. 2001); *Helen Kaminski v. Marketing Australian Products, Inc.*, CLOUT case no. 187 [Federal District Court, Southern District of New York, United States, 23 July 1997].

Choice of law can be made as well implicitly; it can be derived from the terms of the contract or the circumstances of the case.⁶¹ This is a common practice in most legal systems, and was similarly addressed in the Rome Convention. However, as ample evidence in case law shows, implicit choice of law can be used, or abused, by courts as a means to easily fall back on the domestic law of the court, which may alleviate decision making, but which is not covered by an unanimous decision of the parties. Courts may assume an implied choice from the contract or the circumstances of the case where the parties, or at least one of the parties, never meant to choose the law. In order to reduce such unwanted and inappropriate assumption of an implicit choice of law, Rome Convention had asked for the choice to be “demonstrated with reasonable certainty.”⁶² Rome I now enhances the requirements for the assumption of an implicit choice by asking for clear demonstration instead of only reasonable certainty.⁶³

Recital 12 to Rome I specifically addresses one of the terms in the contract, which in the past most often had been held to be indicating an implicit choice of law with reasonable certainty. Courts almost automatically have considered a choice of forum clause to imply at the same time a choice of law: He, who chooses a court, chooses the court’s law. This seems to be a highly questionable implication considering that parties who have been aware of a possible international lawsuit and have provided for the appropriate court could have easily added a choice of law clause to the choice of forum clause, in case this was their true intention. Recital 12 now puts out that an exclusive choice of forum clause is one of the factors clearly indicating an implied choice of law. However, it is considered to be only one of the relevant factors, not in itself a decisive factor. What makes Recital 12 somehow questionable and some kind of disguised homeward trend in favor of Member State law is the fact that such indication is addressed only in respect of the choice of forum of courts of a Member State. In case you consider a choice of forum clause an indication of implicit choice of law there is no logical argument why this should not be true as well to the choice of a forum outside the European Union.

61. Rome I art. 3(1).

62. Rome Convention art. 3(1).

63. Rome I art. 3(1).

c) What to Choose?

Like under the Rome Convention the choice of law in general is for the whole contract, matters to be treated separately and differently being specifically addressed in the Regulation. Nevertheless, parties are allowed by Article 3(1) to restrict their choice to just a part of the contract. This would not be a sensible choice in most cases, potentially making applicable incoherent provisions of different legal systems to the different parts of the contract. However, allowing parties to even make an inappropriate or bad choice perfectly reflects the cornerstone function⁶⁴ of freedom of choice. In contract law, conflict of laws rules should enable parties to make a reasonable choice but should not restrict their choice. As long as only the parties' interests are at stake, parties may even make a bad choice,⁶⁵ *stat pro ratione voluntas*.

d) When to Choose?

Choice of law can be made anytime, before the conclusion of the main contract, as part of that contract, or later.⁶⁶ Again, nothing has changed as compared to the Rome Convention.

e) Validity of Choice of Law Clauses

Again, like under the Rome Convention, existence and validity of a choice of law clause in general are governed by the law, which would govern it under this Regulation if the contract or term were valid.⁶⁷ However, there is one small reservation: In order to establish lack of consent a party may rely on the law of the country of his or her habitual residence as far as the legal effects of his or her conduct are concerned.⁶⁸ This is important as to the different attitude of legal systems to the questions of whether and when mere silence can be held to be consent.

As far as formal validity of a choice of law clause is concerned, Article 3(5) refers to Article 11 offering a wide range of solutions in favor of formal validity depending on where the parties are at the time of the conclusion of the

64. Rome I Recital 12.

65. Another example of a bad choice is the choice of a law, which nullifies the contract.

66. Rome I art. 3(2).

67. Rome I arts. 3(5), 10(1).

68. *Id.*

contract. When persons are in the same country at the time of conclusion of the contract, the law which governs the contract itself or the law of the country, where the contract was concluded, must be met.⁶⁹ In case parties are in different countries at the time of conclusion of the contract pursuant to Article 11(2) an even larger variety of options is available. Form must comply either with the law which governs the contract, the law of either of the countries where the parties are present, or the law of the countries where either of the parties has his or her habitual residence.

2. Applicable Law Absent a Valid Choice of Law

Article 4 Rome I on the applicable law in the absence of choice has changed significantly from the wording of Article 4 Rome Convention. However, in substance the modifications are of slightly less importance.

The Rome Convention first outlined as a general principle the application of the law of the country with which the contract is most closely connected. This is similar to the U.S. approach of relying on the most significant relationship⁷⁰ or the centre of gravity⁷¹ or the long time traditional English notion of the proper law of the contract.⁷² All those approaches mirror the idea of looking for the seat of a relationship, which was first formulated in the 19th century by Savigny⁷³ and which marks the beginning of modern private international law.

In itself this is but a guideline of where to go but not an itinerary of how to go there. While the *Restatement* centers on a more individualistic approach by evaluating a series of contacts⁷⁴ leaving all of the decision to the ex post evaluation of the court, the Rome Convention took a step forward evaluating the relevant contacts in advance and introducing presumptions on how to determine the closest connection. In general, the closest connection is to 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.”⁷⁵ As to two specific situations the Rome Convention

69. See Rome I art. 11(1).

70. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1996).

71. *Auten v. Auten*, 124 N.E.2d 99, 101–02 (N.Y. 1954).

72. See, e.g., F.A. Mann, *The Proper Law of Contracts*, 46 INT’L & COMP. L.Q. 437 (1987).

73. FRIEDRICH KARL VON SAVIGNY, SYSTEM DES HEUTIGEN RÖMISCHEN RECHTS 108 (vol. 8 1849).

74. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(2) (1849).

75. Rome Convention art. 4(2).

adds two additional presumptions. Contracts concerned with immovable property are presumed to be closest connected with the country of the location of the immovable property. And contracts for the carriage of goods are presumed to be closest connected with the country of the principal place of business of the carrier only if this country is as well the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated. Only in a case where a characteristic performance cannot be determined⁷⁶ or where the contract is more closely connected with another country, Rome Convention turns towards an individualistic approach weighting all relevant factors.

Rome I like the Rome Convention in principle takes the closest connection approach. However, this is no longer stated in the beginning as the guiding theme to future specifications, but rather at the end.⁷⁷ And instead of mere presumptions Rome I first of all lists a catalogue of specific contracts, for which it directly specifies the applicable law.⁷⁸ Except for Article 4(1)(c), which resumes from the Rome Convention the specific presumption as to contracts relating to immovable property, most of the other specifically addressed contracts are governed by what under the Rome Convention was the “law of the characteristic performance.” Hence, the outcome is mostly identical to what would have been the outcome under the Rome Convention. However, there is no longer any need to justify why the seller, the service provider etc. are performing the characteristic obligation; and there is no need any longer to justify why to look at the debtor of the characteristic obligation instead of the creditor.⁷⁹ Rome I has decided, and courts have to follow and will follow the lead.

There are four addenda modifying the law under the Rome Convention:

First of all, there is an exemption as to the law of the location of the immovable property in case of short term (no more than six consecutive months) tenancies, which are governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country.⁸⁰ This exemption reflects a provision of the Regulation on Jurisdiction⁸¹ and contains exactly the

76. In a barter contract, where both parties have to perform similar obligations.

77. Rome I arts. 4(3), (4).

78. Rome I arts. 4(1)(a)–4(1)(f) (As the Commission stated, this was not meant to alter the approach but instead to enhance certainty. *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at 6, COM (2005) 650 final (Dec. 15, 2005).).

79. As to justifications see Solomon, *supra* note 16.

80. Rome I art. 4(1)(d).

81. Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction, Recognition and

wording of the Regulation on Jurisdiction including the scarcely comprehensible restriction asking for the tenant to be a natural person.

Second, there is a specific provision as to the sale of goods by auction in a determinable place, making applicable the law of the place of the auction.⁸² This is just what would have been the result under the Rome Convention based on the idea of a closer connection.⁸³

Third, there is a special provision on contracts concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law and which are to be governed by that law.⁸⁴

And fourth, what used to be the presumption concerning contracts for the carriage of goods under Article 4(4) of the Rome Convention has turned out to be a separate Article,⁸⁵ modifying the applicable law as to contracts of the carriage of goods and adding a new provision on the carriage of passengers. As far as carriage of goods is concerned, application of the law of the country, in which the carrier has his principal place of business, is replaced by the law of the country in which the carrier has his habitual residence.⁸⁶ The additional requirements to make this law applicable and which were meant to provide some protection against flagging out of ships are but slightly modified. Instead of the place of loading or the place of discharge or the principal place of business of the consignor, one of which has to be in the country, in which the carrier has his habitual residence, Article 5 now reads: place of receipt or the place of delivery or the habitual residence of the consignor. Moreover, Article 5(1) adds a provision applying in case one of the aforementioned requirements is not met. In substance there is no significant change as compared to the Rome Convention.⁸⁷ Under such circumstances the law of the country of the agreed delivery is to be applied.⁸⁸ As far as carriage of passengers is

Enforcement in Civil and Commercial Matters, 2001 O.J. (L 363) 1; Art. 22 of this Regulation establishes exclusive jurisdiction as to lawsuits concerning immovable property, giving an exemption as to short term tenancies.

82. Rome I art. 4(1)(g).

83. See, e.g., DIETER MARTINY, INTERNATIONALES VERTRAGRECHT, marginal note 770 (6th ed. 2004).

84. Rome I art. 4(1)(h).

85. Rome I art. 5(1).

86. Making applicable the definition of habitual residence under Rome I art. 19.

87. Rome I Recital 22 (no change is intended).

88. Rome I Recital 22.

concerned, which was not specifically addressed under the Rome Convention and hence had to be treated according to the general presumption of the habitual residence or principal place of business respectively of the party performing the characteristic obligation, i.e. the carrier, Article 5(2) has developed a protective system similar to other contracts to which one party is presumed to be the weaker party.⁸⁹

Taking from the ranking of the different approaches, predictability obviously has become the most important issue while private international justice on the individual case has become a means of last resort only in case the applicable law cannot be determined according to the fixed connecting factors under Article 4(1) and (2)⁹⁰ or in case the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2.⁹¹ It has turned into an, probably rarely applied, escape clause.⁹²

3. Contracts with Presumably Weaker Parties

Protection of the presumably weaker party and notably the consumer by means of appropriate private international law already had been a goal of the Rome Convention. Rome I follows suit to an even higher degree by modifications to the reach of party autonomy and to the applicable law in the absence of a choice of law. Pursuant to Recital 23 presumably weaker parties “should be protected by conflict of law rules that are more favorable to their interests than the general rules.”⁹³ By now, such rules in favor of presumably or typically weaker parties are laid down with regard to four different types of contracts.

a) Consumer Contracts

Consumer contracts had been treated in the Rome Convention in a somehow restricted sense as far as types of contracts under protection were concerned. Article 5(1) Rome Convention only addressed contract for the supply of goods or services and contracts for the provision of credit for that objective. Contracts of carriage (which in substance are contracts for service) and contracts for services to be supplied to the consumer exclusively outside

89. See *infra* Part 3(b).

90. Rome I art. 4(4).

91. Rome I art. 4(3).

92. See *infra* Part 4.

93. Rome I Recital 23.

the consumer's country of habitual residence where expressly excluded.⁹⁴ As an exception to the exception of Article 5(4) Rome Convention, contracts providing for a combination of travel and accommodation were included.⁹⁵ Contracts as described were to be treated under Article 5 instead of Articles 3 and 4 Rome Convention in case the receiving party was a consumer, who was defined to be a person acting outside his or her trade or profession.

As to consumer contracts, choice of law was fully available, but the legal consequences were different from those under Article 3. Mandatory rules of the law of the country of the consumer's habitual residence were to be applied in addition to the chosen law in case one out of three additional requirements was met. Where either (1) the contract was preceded by a specific invitation addressed to the consumer or by advertising, and the consumer had taken in that country all the steps necessary on his part for the conclusion of the contract; or (2) if the other party or his agent received the consumer's order in that country; or (3) if the contract was 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. In short, the requirements of one of three situations had to be met where the other party had intruded into the shelter of the habitual residence of the consumer or had elicited the consumer out of his shelter. Absent a choice of law, a consumer contract was governed by the law of the country of the consumer's habitual residence in case one of the above mentioned additional requirements was met. Besides, Article 5 Rome Convention, a significant number of Directives on consumer protection provided for the applicable law.

Article 6 Rome I replacing Article 5 of the Rome Convention has brought quite a number of modifications:

First, the consumer contract is defined more precisely, defining not only the consumer being a natural person entering into a contract for a purpose which can be regarded as being outside his trade or profession, but as well the other party (the professional), who is another person—which as opposite to the consumer may be a natural person or legal entity—acting in the exercise of his trade or profession.⁹⁶

Second, there is no longer a short and concluding list of contracts falling under the special provision for consumer contracts. Instead, what used to be

94. Rome Convention art. 5(4).

95. Rome Convention art. 5(5).

96. Rome I art. 6(1).

the exception has turned into the standard. Under Rome I every type of contract can be a consumer contract to the exclusion of those types of contracts.⁹⁷

Third, the additional requirement to bring the contract under Article 6, now is broadened asking for either that the professional:

- a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- b) directs such (commercial or professional) activities to that country or to several countries including that country (of the habitual residence of the consumer)

provided that in doing so the contract falls within the scope of such activities.⁹⁸

Applicable law as to consumer contracts has not changed. The applicable law can be chosen in accordance with Article 3. However, the consumer will be additionally protected by mandatory provisions of the law applicable absent a choice of law,⁹⁹ this being the law of the country of the consumer's habitual residence.¹⁰⁰

The enhancement of consumer protection by Article 6 Rome I mirrors the enormous emphasis of consumer protection under EU law.¹⁰¹ This is not the place to exhaustively review the general concept. It should be noted however, that protection by a double set of mandatory provisions turns a choice of law clause into a threat against the professional and makes it fatuous for him. Therefore it might have been preferable to follow the 2005 Commission proposal to abolish party autonomy in consumer contracts altogether instead of adhering to it formally while threatening it in substance. Or the approach chosen in respect of contracts for carriage of passengers could have been tried.¹⁰² Or it would have been worthwhile to consider the modern Japanese approach of giving the consumer the option of having applied either his domestic mandatory provisions or those of the chosen law.¹⁰³

97. Rome I art. 6(4).

98. Rome I art. 6(1).

99. Rome I art. 6(2).

100. Rome I art. 6(1).

101. See Rome I Recitals 23–25; Salomon, *supra* note 16, at 1732 (comparing consumer protection in European and U.S. conflict of laws).

102. See *infra* subpart 3(b).

103. See Ronald A. Brand & Tabitha Fish, *An American Perspective on the New Japanese Act on General Rules for Application of Laws*, 51 JAPANESE Y.B. INT'L L. 298, 301–04 (2008); see also BRAND, *supra* note 18.

b) Contract for the Carriage of Passengers

Different from carriage of goods carriage of persons had not been specifically addressed in the Rome Convention. On the other hand, all contracts of carriage except for package travel contracts¹⁰⁴ were excluded from the provision on consumer contracts.¹⁰⁵ Consequently it had to be governed by Article 3 and 4 if not otherwise provided for. By now this type of contract is addressed in Article 5(2) Rome I. It is treated significantly different from carriage of goods, differences indicating that carriage of goods is considered—in general—to be a contract between equal parties while carriage of passengers is considered to be typically a contract between a stronger and a weaker party and at the same time a typical consumer contract.¹⁰⁶

First of all, choice of law is restricted to specifically addressed laws, all of which have a real and substantial connection with the parties or the transaction.¹⁰⁷ Hence, at least the protection by a law which is somehow connected with the parties or the transaction will be provided. And second, where no choice of law nor appropriate choice of law exists, the applicable law is the law of the habitual residence of the passenger in case there is an additional connecting factor to this country.¹⁰⁸ Hence, absent a valid choice of law the passenger in general will enjoy the protection of the law which is familiar to him or to which he at least has easy access. Only in case neither the place of departure nor the place of destination is in the country of the passenger's habitual residence, the law of the country of the habitual residence of the carrier will apply. Like in the general system (Article 3 and 4) an escape clause is provided.¹⁰⁹

In a nutshell the passenger is treated similar to a consumer in a consumer contract, although not totally alike.

c) Insurance Contracts

Similar to carriage contracts insurance contracts cover a mix of situations, some strictly business related, others consumer related. Under the Rome Convention they had not found a specific provision as to the applicable law.

104. See Council Directive 90/314, 1990 O.J. (L 158) 59 (EEC).

105. Rome Convention art. 5(4)(b).

106. See Rome Convention art. 6(1), Recital 32.

107. Rome Convention art. 5(2).

108. *Id.*

109. Rome Convention art. 5(3). See *infra* Part 4 (further discussion as to the escape clause).

However, there was a bulk of EC Directives containing conflict of laws provisions,¹¹⁰ which according to the function of EC Directives had to be introduced into the law of the Member States. Private international law thus was complicated, incomplete and somehow incoherent.¹¹¹ Although the 2003 *Green Paper* had discussed the question of whether or not introduce a provision on insurance into the future Rome I Regulation,¹¹² the 2005 Proposal¹¹³ had failed to do so. However, Article 7 Rome I finally has introduced a specific provision on the applicable law to insurance contracts.

Quite a number of distinctions are to be made in order to find out about the applicable law as to specific types of insurance contracts.

First of all and already addressed in Article 1(1)(j) Rome I: Insurance contracts arising out of operations carried out by organizations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance¹¹⁴ the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work do not fall under Rome I. In short and plain language: Insurance offered by insurers from outside the European Union for labor related death or illness is not governed by Rome I. This type of insurance is somehow related to social security and therefore excluded. Instead, it is governed by the law applicable under domestic private international law of the Member States. However, in practice this is unlikely to happen as insurance specialists stress that “the rules concerning freedom to provide services require the non-Community service provider to declare an address for service in the Union, which brings them under Community law.”¹¹⁵

110. Second Council Directive 88/357, arts. 2(d), (5), (7), (8), 1988 O.J. (L 172) 1 (EEC); Council Directive 92/49, art. 27, 30, 1992 O.J. (L 228) 1 (EEC); Directive 2002/83, arts. 1(g), 32, 2002 O.J. (L 345) 1 (EC).

111. See *Commission Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation*, at 21, COM (2002) 654 final (Jan. 14, 2003).

112. See *id.* at 21–22.

113. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, COM (2005) 650 final (Dec. 15, 2005).

114. Council Directive 2002/83, 2002 O.J. (L 345) 1 (amended by Council Directive 2008/19, 2008 O.J. (L 76) 44 (EC)).

115. See *Commission Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernisation*, at 22.

Second, Article 7 distinguishes insurance contracts and reinsurance contracts,¹¹⁶ the latter not falling under this provision and hence to be handled under Articles 3 and 4.

Third, Article 7 distinguishes regular insurance contracts from insurance contracts covering large risks,¹¹⁷ the latter being under Article 7 whether or not the risk covered is situated in a Member State. Such insurance contracts, which in substance are not consumer contracts, are governed by the law chosen by the parties in accordance with Article 3. Absent a valid choice of law and in line with the dogmatic approach under Article 4 they are governed by the law of the country of the insurer's habitual residence;¹¹⁸ but like in all other cases, the escape clause may lead to a different result. In the outcome, insurance contracts covering large risks are treated like ordinary contracts under Articles 3 and 4.

Finally, there is the John Q. Public type of insurance contract, which in substance is a consumer contract. It is addressed in Article 7(3) which applies only in case the risk is situated in a Member State.¹¹⁹ Choice of law is available, albeit restricted to five options:

- (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
- (b) the law of the country where the policy holder has his habitual residence;
- (c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
- (d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
- (e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.¹²⁰

All these options lead to a law which is somehow related to the insured person.

116. Rome I art. 7(1).

117. Rome I art. 7(1)(2). *See* Council Directive 73/239, 1973 O.J. (L 228) 3 (EEC) (amended by Council Directive 2005/68, 2005 O.J. (L 323) 1 (EC)).

118. Rome I art. 7(2).

119. Rome I art. 7(1).

120. Rome I art. 7(3).

Absent a valid choice of law this consumer orientated insurance contract is governed by the law of the Member State in which the risk is situated, as defined in Article 7(5), at the time of conclusion of the contract.

In case of compulsory insurance, Article 7(4) transfers rights to Member States imposing such obligation to provide for specific provisions.

d) Individual Employment Contracts

Individual employment contracts had received a special provision already in Article 6 of the Rome Convention. Article 8 Rome I adopts this provision adding but minor clarifications and modifications.

Article 8 now starts with a repetition of the general principle of party autonomy, which in the Rome Convention was in substance the same but only addressed indirectly by reference to Article 3 Rome Convention. Like in the Rome Convention and typical as to protection of presumably weaker parties, Article 8(1) then limits the effect of choice of law by obligatory application of mandatory provisions of the law applicable absent a valid choice of law.

Absent a valid choice of law, Article 8 provides two different approaches depending on the place of work. In case the employee habitually carries out his work in performance of the contract in one country or, failing that, carries out his work from one country, the law of that country applies; temporary employment in another country does not impair this effect.¹²¹ The words “from which country” have been added to the original Convention text in order to cover employment of international flight attendants and similar persons, who carry out their work in different countries but from a base in one country. Their employment is different from the employment of persons working in different countries insofar as they do not travel to different countries in order to carry out their work in the country of destination, but instead take their working place—an airplane or a ship e.g.—with them through different countries.¹²²

In case the employee has no habitual country of work and hence Article 8(2) does not apply, the contract is governed by the law of the country of the place of the business engaging the employee.¹²³

121. Rome I art. 8(2).

122. See generally Volker Behr, *Auf Schiene und Strasse; Ueber den Wolken und auf Hoher See—Probleme des Internationalen Arbeitsvertragsrechts bei Arbeitsvertragsrechts bei Mobilen Arbeitsplaetzen*, Festschrift fuer Herbert Buchner 81–95 (2009).

123. Rome I art. 8(3).

Like in most other contracts there is an escape clause.¹²⁴

4. *The Escape Clause*

In principle Rome I endeavors to establish clear cut rules on the applicable law. Legal certainty is expressly labeled to be the “general objective” of the Regulation. Conflict of law rules are shaped to be “highly foreseeable.”¹²⁵ This goal is reached first by allowing parties to choose the applicable law, and second by fixing the relevant criterion on which to rely for a comprehensive catalogue of contracts. However, this goal is foiled in part by what is called escape clauses, allowing the courts to set aside the clear cut rules and to rely instead on an evaluation of all relevant factors of the individual case in order to “determine the law that is most closely connected to the situation.”¹²⁶ Ex ante certainty and predictability thus can be turned into ex post re-evaluation and hence uncertainty.

The escape clause reads identical in most all types of contracts giving the court discretion to deviate from the fixed rule if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated. Under such circumstances the court applies the law of the country closest connected to the contract.¹²⁷ It is slightly different only as to individual employment contracts insofar as in Article 8(4) the word “manifestly” is missing.¹²⁸

The escape clause of the Convention had been criticized for being too willing to give discretion to the courts and especially for allowing courts to give in to what is called the homeward trend. The 2005 proposal of the Commission¹²⁹ had totally abandoned the escape clause. It only addressed choice of law and fixed rules as means to determine the applicable law abolishing what it called the exception clause.¹³⁰ The final text of Rome I then has reintroduced the clause. However, by adding the word “manifestly” Rome

124. See Rome I art. 8(4).

125. Rome I Recital 16.

126. *Id.*

127. See Rome I art. 4(3); Rome I art. 5(3) (contracts for carriage); Rome I art. 6(3) (consumer contracts not falling under Art. 6 referring to Arts. 3 and 4); Rome I art. 7 (insurance contracts covering large risks).

128. Rome I art. 8(4) (adopts the wording as in the provisions on individual labor contracts as well as in contracts in general as it was used in the Rome Convention).

129. *Commission Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, COM (2005) 650 final (Dec. 15, 2005).

130. *Id.* at 5.

I indicates that this should be a rare exception. There is no rationale given in the recitals and no rationale identifiable for omitting the word “manifestly” as to individual labor contracts. So eventually it is but a mistake in editing the final text.

The escape clause under Rome I comes close to what is stated in § 188(2) of the *Restatement*. However, there are two differences to be taken into account. First of all, due to the added word “manifestly” what is an escape clause under Rome I is to be narrowly interpreted. Wording and legal history clearly indicate that the escape should not be taken easily. On the other hand, according to the U.S. system weighing of all relevant factors is framed as a general principle. And second, § 188(2) and (3) of the *Restatement* gives an—albeit not exhaustive—list of factors to be taken into consideration and even a hint as to the respective relevance of some factors, while Rome I only relies on “all the circumstances of the case.”¹³¹ The only factor expressly mentioned in Recital 19 is, that account should be taken, *inter alia*, “whether the contract in question has a very close relationship with another contract or contracts.”¹³²

5. *Mandatory Provisions and Public Policy*

Private international law of contractual relationships in general can restrict itself to adequately administer the interests of the parties involved in the transaction; however, it cannot completely neglect public interests. While in the past public interests were introduced by means of restrictions to the applicable law based on the idea of public policy, the Rome Convention and similarly Rome I pursue a triple approach. They first specifically modify the rules on the applicable law where deemed to be necessary to protect public interests. Second, they introduce mandatory rules to be applied next to the applicable law. And third, they still rely on the traditional public policy approach.

The first approach must not be discussed at length, as modifications of the rules on the applicable law have been addressed in the previous chapter. Insofar it is sufficient to remember, that protection of the weaker party and provisions to safeguard such protection are not merely based on private interests of the weaker party but likewise on public interests.

131. Rome I art. 4(3).

132. Rome I Recital 19.

The second and third approaches sometimes seem to be intermingled. However, there are significant differences. First, while public policy considerations are defensive, not applying the otherwise applicable law, mandatory provisions are aggressive, adding parts of a second law to the otherwise applicable law. Second, while public policy in general is restricted to protect domestic values of the forum, mandatory rules may additionally be used to protect values of third countries.

a) Mandatory Provisions

Like in the Rome Convention mandatory provisions are addressed in Rome I in two different ways. They apply to different situations; and their reach is different as well.¹³³

On the one hand there are “provisions which cannot be derogated from by agreement” as in Article 3(3) and (4), Article 6(2), Article 8(1). They are meant to restrict a choice of law by adding to the chosen law mandatory provisions of the law applicable absent a choice of law. The mere fact that they are mandatory is sufficient to make them applicable.

On the other hand there are what is called in Article 9(1) Rome I “overriding mandatory provisions.” They as well are provisions which cannot be derogated from by the parties’ agreement. However, they cover not all indispensable provisions but only some of them. They are but a subdivision of all mandatory provisions.¹³⁴ As the definition now given in Article 9(1) states, they additionally must be:

[P]rovisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.¹³⁵

Hence, they not only prevail over a law chosen by the parties but as well over the law applicable absent a choice of law. Private international law of contracts focuses on parties’ interests and hence private interests. And it can restrict itself mostly to private interests because in contractual relationships in general only the parties’ interests are involved. However, even in contracts public interests of countries other than the country which law applies to the

133. See generally Borchers, *supra* note 18, at 1651.

134. See BRAND, *supra* note 18.

135. Rome I art. 9(1).

contract may be seriously affected. Article 9 then provides for a possibility to take into account such interests.

As compared to the Rome Convention, Article 9 Rome I provides two improvements. First, there is the definition of overriding mandatory provisions in Article 9(1) which the Rome Convention missed and which had given cause to serious uncertainty on how to distinguish “simple” indispensable provisions from overriding mandatory provisions. The substantial requirement of being crucial for safeguarding the public interest is derived from the famous European Court of Justice *Judgment in the Matter Arblade*.¹³⁶ However, while in the *Arblade* decision the European Court of Justice exclusively used the wording “political, social or economic organisation,” Article 9(1) starts with “such as,” indicating that this list is not exhaustive but simply exemplary. And second, while under the Rome Convention Member States were allowed to opt out of Article 7(1) Rome Convention—as Germany and quite a number of other Member States did,¹³⁷ Article 9 Rome I is binding on all Member States to the regulation.

Overriding mandatory provisions of the law of the forum are always to be applied, Article 9(2). They are meant to aggressively enforce overriding interests of the forum against applicable foreign law and thus mirror the public policy defence, which is meant to defensively protect against threatening applicable foreign law.

On the other hand, application of overriding mandatory provisions of the law of another country is significantly restricted. Pursuant to Article 9(3) effect only may be given to such provisions depending on their nature and purpose and the consequences of their application or non-application. Hence, courts have significant discretion in applying overriding mandatory provisions of the law of a third country. Additionally there is a restriction as to which country’s overriding mandatory provisions may be given effect. It is only the law of the country where the obligations arising out of the contract have to be or have been performed. Moreover, such overriding mandatory provisions may only be applied in so far as they render the performance of the contract unlawful. Insofar Rome I falls behind the Rome Convention which allowed the application of overriding mandatory provisions of the law of any other country with which the situation had a close connection.

136. Cases C-369/96 *Arblade* and C-376/96, *Leloup*, 1999 E.C.R. I-8453.

137. Germany made a reservation to Rome Convention art. 7(1) because this provision was held to be too vague.

Allowing recourse to mandatory provisions of a law other than the applicable law or the law of the forum only in the restricted way it is phrased out in Article 9(3) has been an offer towards a compromise with Member States which had made a reservation as to Article 7(1) Rome Convention. Notably the U.K. was opposed to a provision like Article 7(1) of the Rome Convention.¹³⁸ Restricting the applicability of foreign mandatory provisions to just the country of performance and to the single question of whether they render the performance unlawful erased some of the uncertainty of Article 7(1) of the Rome Convention. However, if there are several places of performance regarding different obligations of a contract, it might happen that mandatory provisions of different countries may be applied.

It has been questioned whether Article 7(1) Rome Convention ever has been of practical relevance in the courts.¹³⁹ The same question might be raised vis-à-vis Article 9(3) Rome I. It should be noted however, that at least German courts had to decide some cases, where U.S. embargo provisions or Nigerian provisions to protect cultural inheritance were at stake and where Article 7(1) might have worked out in case it had been in force in Germany.

b) Public Policy

Like Article 16 of the Rome Convention and Article 26 Rome II, Article 21 allows courts to refuse the application of provisions of the applicable law in case application would be manifestly incompatible with the public policy of the forum.

Public policy considerations remain restricted to domestic public policy. In the development of the Rome II Regulation the Commission had tried to introduce some kind of Community public policy directed at a prohibition of punitive damages granted by the applicable law. This experiment had not been successful.¹⁴⁰ It was not repeated in the final version of Rome I.

6. Applicable Law in Specific Situations Involving Third Parties

Articles 14–16 Rome 2 address specific situations involving third parties.

138. Andrew Dickinson, *Third Country Mandatory Rules In the Law Applicable to Contractual Obligations: So Long, Farewell, Auf Wiedersehen, Adieu?*, 3 J. PRIVATE INT'L L.J. 53 (2007).

139. See Erauw, *supra* note 18, at 267.

140. See von Hein, *supra* note 15, at 1694.

As far as voluntary assignment and contractual subrogation are concerned, Article 14 in substance repeats Article 12 Rome Convention.¹⁴¹ Hence, according to Article 14(1) the law appertaining to the relationship between assignor and assignee is to be determined based on Articles 3 *et seq.* Rome I while according to Article 14(2) the law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged. Unfortunately, the highly questionable problem of what law governs the relationship between the assignee and third parties—claiming e.g. prior assignment—is still left open.

The legal subrogation of Article 15—like Article 13 Rome Convention—relies on the law which governs the third person's duty to satisfy the creditor. And as to multiple debtors liable for the same claim the law governing the paying debtor's obligation in principle also governs the debtor's right to claim recourse from the other debtors.

V. ROME I IN DETAIL (3)—REACH OF THE APPLICABLE LAW

1. *In Principle*

The law applicable by means of Articles 3–8 in principle applies to all issues starting at the formation of the contract and ending at the last act of performance and even beyond. In principle it is to be applied from the cradle to the grave of a contract.

As far as the existence and the material validity of the contract are concerned, they are determined by the law which would govern under this Regulation if the contract or term were valid.¹⁴² Only as to the question of implied consent, e.g. by mere silence or inactivity,¹⁴³ a party may rely on the law of the country of his or her habitual residence.¹⁴⁴

141. Only difference is that Rome II art. 14(1) replaces “the mutual obligations of assignor and assignee” with “the relationship between assignor and assignee,” which modification according to Recital 38 “should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations.”

142. Rome II art. 10(1).

143. See United Nations Convention on Contracts for the Sale of Goods art. 18(1), U.N. Doc. A/CONG. 97/18, Annex 1, (Apr. 11, 1980) [hereinafter CISG].

144. Rome II art. 10(2).

Article 12 then gives a non exhaustive list of issues which at any rate will be governed by the law applicable under Articles 3–8, namely interpretation, performance, consequences of breach of contract, ways of extinguishing of obligations, prescription and limitation of actions, and consequences of nullity of the contract. In principle, the manner of performance and the steps to be taken in the event of defective performance are governed by this law as well. However, Article 12(2) allows that as to the latter issues “regard shall be had to the law of the country in which performance takes place.”¹⁴⁵

Besides the general provision of Article 12 there are two more provisions pertaining to the reach of the applicable law. Article 17 provides that a setoff is governed by the law applicable to the claim against which the right to set-off is asserted. And Article 18 makes this law applicable to rules which raise presumptions of law or determine the burden of proof.

Obligations arising out of dealings prior to the conclusion of a contract are expressly excluded from Rome I by Article 1(2)(i). However, they sneak in to be determined by the law applicable under Articles 3–8, because Rome II Regulation, which directly applies to this type of issues,¹⁴⁶ declares applicable the law governing the contract or the “would have been” contract.¹⁴⁷

2. Separately Determined Issues (*Dépeçage*)

a) Formal Validity

Formal validity of the contract is separated from material validity. It has received a general solution added by several modifications as to specific contracts. Alterations as compared to the Rome Convention are minor.

As long as the parties (or agent acting on behalf of the parties)¹⁴⁸ at the time of the conclusion of the contract are in the same country, the formal requirements of either the law applicable to the contract or of the law of the country, where the contract was concluded, must be observed.¹⁴⁹ This classic dichotomy of the law of the transaction and the law of the place of action, which favors the formal validity of a transaction, has been broadened

145. Rome I art. 12(2).

146. See Rome II art. 2(1) (*culpa in contrahendo*).

147. Rome II art. 12(1).

148. This is different from the Rome Convention only as to the technique. In the Rome Convention agents had been addressed in a separate subparagraph. In substance there is no modification.

149. Rome II art. 11(1).

significantly in case the parties (or their agents acting on behalf of them) are in different countries at the time of the conclusion of the contract. Then the place of conclusion is replaced by either the place where either one of the parties is present at the time of the conclusion¹⁵⁰ of the contract; additionally the law of the country of the habitual residence of either of the parties may be applied to formally validate the contract.¹⁵¹ The law of the habitual residence is an addition as compared to the Rome Convention, highlighting that formal requirements are meant to be as little as possible an obstacle to the validity of a contract. And it highlights as well, that public interests, which may be the reason of formal requirements, in general are held to be not significant.

Public interests are, however, important in consumer contracts, which are excluded from Article 11(1)–(3) Rome II and instead as far as formal requirements are concerned are governed exclusively by the law of the country of the consumer's habitual residence.¹⁵²

Finally Article 11(5) provides for a specific provision as to formal requirements for contracts on immovable property, which as well reflects public interests. In general, Article 11(1)–(3) applies. However, the law of the country, where the immovable property is situated, will apply to formal requirements in case they are imposed irrespective of the applicable law and the place of contracting and moreover they are mandatory in the sense that they cannot be derogated by agreement.¹⁵³

b) Capacity

Questions of capacity of natural persons or companies in general are excluded from Rome I. Article 1(1)(a) and (f). An exception is made by Article 13 only in case of a contract concluded between parties being in the same country as far as a party may not invoke his or her incapacity derived from the law of another country unless the other party knew or negligently was unaware of such incapacity.

150. This time requirement is a precision as compared to the Rome Convention. Its rationale is somehow questionable considering that to the parties the time of making their declarations is much more relevant—and taken into consideration—as the eventual time of the conclusion of the contract, at which time the declaring party may be travelling somewhere around the world.

151. Rome II art. 11(2).

152. Rome II art. 11(4).

153. Bürgerliches Gesetzbuch [BGB] [Civil Code] Aug. 18, 1896, Bundesgesetzblatt § 311b (asks for notarization of contracts for the sale of goods, is one of the provisions, which are mandatory under German law. However, it is held that this provision does not ask for application irrespective of the applicable law.).

VI. ROME I IN DETAIL (4)—HABITUAL RESIDENCE

Out of the reservoir of “other provisions” in Articles 19 through 28, one provision, which has been addressed ever and again but has not yet been discussed up to now, deserve special attention.

Next to party autonomy the habitual residence of one of the parties has become the most important connecting factor to determine the applicable law. It is used to almost all contracts listed in Article 4; it is used in Article 5 as to contracts of carriage; it is used in a double function in Article 6 protecting the consumer against a choice of law giving less protection than his or her domestic consumer protection law and as well as the general rule absent a choice of law; it is used in Article 7 on insurance contracts; it is used in Article 12 on formal requirements. Out of the three factors closely connecting a party to country (nationality, domicile, and habitual residence), habitual residence has turned out to be the decisive factor. Taking into consideration that notably in Europe millions of people are immigrants much closer connected with the country of habitual residence than with the country which gave them nationality, and taking into consideration that there is no uniform concept of domicile throughout the world, this was a rather sensible choice.

Article 19 on habitual residence, which is shaped upon the pattern of Article 23 Rome II, gives a definition of habitual residence of companies and natural persons acting in the course of their business, naming the place of central administration and the principal place of business respectively. In contrast the habitual residence of a natural person not acting in the course of his or her business is not addressed. At first glance this omission is of no big significance, because where Rome I relies on habitual residence it is most often the habitual residence of a company or a person doing business, which is the relevant connecting factor. However, at least as to consumer contracts some clarification would have been helpful. Absent a valid choice of law Article 6(1) Rome I declares applicable the law of the country of the habitual residence of the consumer (who most often is not acting in the course of his or her business). Question then is what law applies in case the consumer has not just one habitual residence—living close to a border in one country but working in the neighboring country. And question is what to do about persons having no habitual residence at all.

VII. MOST PROMINENT CHARACTERISTICS OF ROME I

Evaluation of the new EC Regulation on the law applicable to contractual relations shall focus on five characteristics. Their origin can be traced back to the Rome Convention. However, Rome I has significantly advanced them.

1. Top Priority: Predictability

First of all, the “perennial tension between the need for certainty and predictability on the one hand, and the need for flexibility and equity on the other”¹⁵⁴ in principle is deliberately decided in favor of predictability. This is stated on several occasions in the Preamble of Rome I. Insofar the Preamble highlights the objective of improving “predictability of the outcome of litigation” “and certainty as to the law applicable.”¹⁵⁵ Legal certainty and foreseeability are labeled to be the “general objective of the Regulation.”¹⁵⁶ And a clear definition of habitual residence is given “for the sake of legal certainty” and because otherwise “the parties would be unable to foresee the law applicable to their situation.”¹⁵⁷

Rome I’s strong commitment to predictability as the fundamental guideline in fixing rules on the applicable law in contractual relationships can easily be justified. First of all, predictability and legal certainty are important issues in conflict of laws. They are especially important as to conflict of laws in contractual relationships. Parties entering into contracts have legitimate interests to know or at least to find out in advance what exactly are their rights and obligations out of the contract. They are entitled to know about the applicable law not only in the rare worst case scenario of deciding on whether or not to sue the other party out of an alleged breach of contract or to take on such a lawsuit. They are entitled as well already at the time when they enter into the contract. Only then the parties will have the necessary information to figure out what they owe to each other besides expressly stipulated obligations, what additional mandatory provisions might be applicable to their contract, and how to correctly fulfill their obligations. Such information is notably required in Europe, where on the one hand parties still are used to not elaborately define their contractual rights and obligations in bulky contracts but very often restrict themselves to just outline their main rights and

154. Symeonides, *supra* note 15, at 179.

155. Rome I Recital 6.

156. Rome I Recital 16.

157. Rome I Recital 39.

obligations, leaving the rest to—presumably—balanced provisions of the law. And it is notably true taking into consideration the geographical scale of Europe, where a significant amount of contracts are international, while under United States geographical standards they would be but interstate. It can hardly be justified—even under the heading of equity—to suspend parties’ knowledge of the applicable law and the rights and obligations arising out of such law up until a final decision of a court or arbitral tribunal. Second, and as a matter of principle, there is definitely significant less tension—if any—between predictability and legal certainty on the one hand and flexibility and equity on the other hand in an area of law, where parties are entitled to jointly select the applicable law and within the law chosen are entitled to autonomously deviate from almost all of the law of the applicable legal system. This is true at least as far as parties of approximate bargaining power enter into a contract.

2. *Party Autonomy*

Preponderance of predictability and legal certainty can best be proved by the way the applicable law is determined.

Party autonomy is declared to be “one of the cornerstones” of Rome I.¹⁵⁸ It not only reflects the basic principle of contract law,¹⁵⁹ but as well best secures predictability of the applicable law at the earliest point of time. It is first of all granted by clearly allowing parties’ choice of law without any restriction to whatever law the parties chose to be the applicable law to their contract under Article 3 Rome I. No review and rejection of the parties’ choice of law based on an evaluation of their choice by the courts will threaten predictability.

As far as party autonomy is concerned Rome I in principle resumes what was the law under the Rome Convention. Explicit choice of law and implied choice are similarly allowed and of equal ranking. However, as far as implied choice of law is concerned, Rome I has raised the bar. While the Convention absent an express choice just asked for demonstration of choice of law “with reasonable certainty,” Rome I requires that the choice must be “clearly demonstrated” thus trying to avoid the uncertainty linked up with the former notion of reasonableness.¹⁶⁰ Rome I thus tries to prevent courts from too easily

158. Rome I Recital 11.

159. See PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 2 (1999) (stating that freedom of contract is an essential part of the market economy).

160. Lando & Nielsen, *supra* note 22, at 1698 (mentioning that the 1955 Hague Convention on the

surprising parties by applying the law of a specific country under the heading of implied choice, where in reality there was at best what used to be called hypothetical choice and what originally was understood to be no real choice but instead the court's assumption of what reasonable persons under the same circumstances would have chosen.¹⁶¹ Prior to the Rome Convention such hypothetical choice was occasionally abused as a requested means of courts to apply their own law. Such abuse should be somehow better prevented or at least limited and hence predictability better secured.

What is even more important and what distinguishes Rome I—like the Rome Convention—from the approach taken in the U.S. is the idea that in principle the choice of law is unlimited as far as the range of eligible laws is concerned. Different from the United States approach as stated in § 187(2) *Restatement (Second) of Conflict of Laws*¹⁶² there are no restrictions on the parties' choice of law based on lack of substantial relationship or fundamental policies of another state. There must be no connection between the parties and/or the transaction and the chosen law. Public interests—including interests of protecting weaker parties—are not pursued by limitations on the range of eligible laws but instead by additional application of provisions of a second law protecting such public interests.¹⁶³ There is just one single and small exception. As to ordinary insurance contracts,¹⁶⁴ Rome I restricts parties' choice to specifically itemized laws, which are somehow related to the transaction.¹⁶⁵ Insofar party autonomy is limited, however in a manner, which by no means hampers predictability as to the applicable law.

3. Objective Determination of the Applicable Law by Categorized Types of Contracts

Predictability as a top priority is similarly granted absent a valid choice of law by objectively determining the applicable law as far as possible based on fixed rules on a comprehensive catalogue of contracts. While the Rome Convention insofar in principle relied on the idea of making applicable the law

Law Applicable to International Sales of Goods had asked for even more certainty by requiring that the implied choice must result from the provisions of the contract "beyond doubt").

161. Later this subjective approach was replaced by an "objective presumed intention test," which in substance became a "closest and most real connection" test. LAWRENCE COLLINS, DICEY, MORRIS & COLLINS ON THE CONFLICTS OF LAWS 1539 (14th ed. vol. 2, 2006).

162. See BRAND, *supra* note 18 (as to the development of the U.S. law).

163. See Rome I arts. 3(3), 3(4), 6(2), 8(1).

164. Council Directive 73/239, arts. 5(d), 6(1), 6(2), 2008 O.J. (L 228) 3 (EC).

165. Lando & Nielsen, *supra* note 22, at 1700.

of the country with which the contract is most closely connected¹⁶⁶ and only subsequently refined this approach by presumptions on such closest connections,¹⁶⁷ which concept mirrors the U.S. approach of relying on the most significant relationship under § 188(1) *Restatement (Second) of Conflict of Laws* as refined by presumptions under §§ 189 *et seq. Restatement (Second) of Conflict of Laws*, Rome I reduces the general concept of closest connections/most significant relationships to a mere corrective and to a means of last resort. Ex post determination of the applicable law by the court is available only in two specific situations. First it has to be done in case the applicable law cannot be determined according to the catalogue of Article 4(1) or according to a specified closest connection under Article 4(2). And second it can be done based on the escape clause. Only in those restricted areas legal flexibility and equity prevail over predictability. As to the first situation the courts are allowed to determine the applicable law autonomously according to the principle of the closest connection. As to the second situation courts should “retain a degree of discretion” to determine the applicable law¹⁶⁸ by overruling the standardized provisions. However, as far as the escape clause is concerned, by asking for a “manifestly” closer connection instead for just a closer connection, Rome I indicates that deviation from prefixed rules should be a rare exception.

At least verbally Rome I thus significantly deviates from the Rome Convention and the United States approach under § 188(1) *Restatement (Second) of Conflict of Laws*. It presumably hands in the complicated combination of “flexibility and predictability” of the Rome Convention in favor of more predictability by replacing a balancing of connecting factors test by “hard and fast choice of law rules.”¹⁶⁹ And in the outcome this statement—hopefully—might turn out to be true. However, at least theoretically Rome I still in principle relies on the fundamental idea of private international law as already developed in the 19th century, which asked for the application of the law of the country, to which the legal relationship according to its specific nature was related,¹⁷⁰ or—in its more modern modifications—with which it has the most significant relationship,¹⁷¹ is most

166. Rome Convention art. 4(1).

167. Rome Convention arts. 4(2)–4(4).

168. Rome I Recital 16.

169. Lando & Nielsen, *supra* note 22, at 1700.

170. VON SAVIGNY, *supra* note 73, at 108.

171. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 188(1) (1971).

closely connected,¹⁷² or where it has its center of gravity.¹⁷³ What is new is the realization of this concept? Rome I does not leave it to the court to decide this question on the individual case, nor does Rome I restrict itself to give guidelines by establishing presumptions. Instead it directly determines by hard and fast rules, which country it considers to be the center of the contract, leaving to the court but little leeway to escape.

The closest connection test of the Rome Convention and the most significant relationship test of the United States law definitely enshrine a sound principle.¹⁷⁴ However, the more precision this principle gets, the more predictability is granted. Insofar we should never forget that predictability is not an antipode to equity and fairness but at least as to international contracts predictability in itself is a principle founded in equity and fairness. Moreover, from a practical point of view, as long as parties have the option to determine the applicable law by mutual consent and thus to determine on their own, with which country they want to have their contract most closely connected, there is little need to ex post impose on them the law of a country other than the one held to be closest connected ex ante based on a typified evaluation.

4. Protection and Preferential Treatment of Presumably Weaker Parties

Protection and preferential treatment of presumably weaker parties already had been an objective of the Rome Convention.¹⁷⁵ In Rome I it has become even more predominant, although modifications are more concerned with detail than with principle. Trying to keep the substantive scope and the provisions of the new Regulation consistent with the Brussels I Regulation on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters,¹⁷⁶ which was one of the objectives of Rome I,¹⁷⁷ specific insurance contracts were added to the set of contracts, which are specifically addressed giving some kind of preferential treatment to the presumably weaker party.

172. Rome Convention art. 4(1); as to the similar English approach in pre-Rome Convention times see COLLINS, *supra* note 161.

173. *Auten v. Auten*, 124 N.E.2d, 99, 101 (N.Y. 1954); *Seneca Falls Machine Co. v. McBeth*, 368 F.2d 915, 916 (3d Cir. 1966).

174. See *Lando & Nielsen*, *supra* note 22, at 1703.

175. See, e.g., Rome Convention art. 5 (on certain consumer contracts and Article 6 on individual employment contracts).

176. Council Regulation 44/2001, 2001 O.J. (L 363) 1 (EC).

177. Rome I Recital 7.

Hence, by now carriage of passenger contracts,¹⁷⁸ consumer contracts,¹⁷⁹ specific insurance contracts,¹⁸⁰ and individual employment contracts¹⁸¹ are separated from contracts in general. Such contracts are to be treated differently from all other (ordinary) contracts falling under Articles 3 and 4 Rome I. In line with this group of specifically named or “classified” contracts we possibly should put contracts, “where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen” (Article 3(3) Rome I)—and which was already the law under the Rome Convention. Similarly we should put in line contracts “where all other elements relevant to the situation at the time of the choice are located in one or more Member States”¹⁸² which constitutes an invention of Rome I. Legal consequences in such situations mirror what is provided as to consumer contracts and individual employment contracts: Unlimited choice of law is available, but does not exclude additional application of the law applicable absent a valid choice. Reason probably is, that at least as far as the purely domestic situation under Article 3(3) Rome I is concerned, choice of law is in a way so inconvenient and exceptional that it raises suspicion of abuse of bargaining power. While in contracts falling under Articles 5(2) through 8 Rome I one party is typically suspect to have less bargaining power, because this party is a non-professional contracting with a professional, in Article 3(3) type contracts the mere fact of no identifiable understandable reason of a choice of law agreement indicates possible individual lack of bargaining power.¹⁸³

5. Graduated Influence of Public Interests

A fifth significant characteristic of Rome I is the restricted and graduated influence of public interests. The Rome Convention had taken the same approach. However it had been at least in part less successful, because quite a number of Member States had made a reservation to one of the relevant provisions excluding Article 7(1), which allowed application of mandatory provisions of third countries closely connected with the transaction.¹⁸⁴ Rome

178. Rome I art. 5(2).

179. Rome I art. 6.

180. Rome I art. 7(3).

181. Rome I art. 8.

182. Rome I art. 3(4).

183. However, Article 3(3) and 3(4) situations additionally indicate other than protectionist motives.

184. See Lando & Nielsen, *supra* note 22.

I like the Rome Convention insofar again deviates significantly from the U.S. approach. While under American law public interests already are used in determining the applicable law,¹⁸⁵ European conflicts' law instead applies this approach only after determination of the applicable law and as a means to restrict results reached by the applicable law. Moreover, it clearly distinguishes different means using them in a graduated way depending on the type of issue at stake. Mandatory rules in general, which Rome I prefers to name "provisions of the law [. . .] which cannot be derogated from by agreement"¹⁸⁶ of a law other than the law applicable in general are to be applied in case the result of parties' choice of law is to be modified. A more restricted subcategory of mandatory provisions is named "overriding mandatory provisions." Such provisions may be applied to possibly modify the results reached by the law applicable in general independent of whether such law was agreed by the parties or was applicable by objective determination.¹⁸⁷ As to those overriding mandatory provisions Rome I additionally differentiates between overriding mandatory provisions of the forum and overriding mandatory provisions of third countries. Finally, Rome I applies the traditional public policy approach in order to deny application of some parts of the applicable law.¹⁸⁸

As far as predictability and certainty of the applicable law are concerned, all restrictions based on public interests to a degree diminish predictability. It should be noted however, that under the concept of Rome I the reduction of predictability is significantly reduced. Provisions safeguarding public interests do not afflict the choice of law or the determination of the applicable law as such. They only cut in some additional provisions into the applicable law or cut out some provisions out of the applicable law. And they do so very cautiously. As to "provisions of the law [. . .] which cannot be derogated from by agreement" it is clearly fixed in which situations they will be cut in.¹⁸⁹ As those provisions are taken from the law which would be applicable absent a choice of law and as in most situations this law can easily be found out, the threat to predictability is restricted to a minimum. As to "overriding mandatory provisions" the situation is a little bit more awkward. Parties do not necessarily know about where a lawsuit will be instituted and hence which forum may apply its own "overriding mandatory provisions" in addition to the

185. See generally RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 6(2) (1971).

186. Rome I art. 3(3); see Rome I Recital 37 (as to the linguistic problems).

187. Rome I arts. 9(2), 9(3).

188. Rome I art. 21.

189. Rome I Recital 15.

otherwise applicable law. However, parties can reduce the risk by entering into a choice of forum clause. And as far as “overriding mandatory provisions” of third countries are concerned, Rome I has significantly reduced the risk of uncertainty by limiting the range of countries, the law of which may be involved. Finally, as far as public policy restrictions are concerned, there is a strong tendency to make use of this limitation only in an extremely narrow range. It is but an ultimate protection of fundamental values of the law of the forum.¹⁹⁰

VIII. CONCLUSION

Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) is a big step forward towards unification of private international law within the European Union. It resolves most of the impediments towards unification inherent to the Rome Convention. At the same time it reduces—at least in part—the fragmentation of private international law as induced by scattered private international law provisions in numerous EC directives.

In substance Rome I improves the Rome Convention, notably by enhancing predictability and certainty as to the applicable law by a distinct commitment to party autonomy and by means of an exhaustive catalogue of contracts fixing the applicable law leaving little leeway to *ex post* determination by courts. Improvement can as well be found in numerous details, e.g. where Rome I gives definitions or at least guidelines to controversial issues like “overriding mandatory provisions,” where it generalizes the random small catalogue of consumer contracts, where it more precisely determines the place of performance of the employee.

However, not everything is cooked to perfection. Provisions on protection and favoritism of presumably weaker parties are somehow scattered where combined with regular business transactions like in insurance contracts and contracts of carriage. A specific chapter on protection of weaker parties consolidating this area would have been preferable. It would have given an opportunity to reconsider, whether the double advantage approach jeopardizing choice of law agreements could have been replaced by a more sensible and more adequate solution. Provisions on insurance law are still extremely complicated. The definition of habitual residence is incomplete. The list of desiderata could be extended. Luckily Rome I like modern EC

190. See BRAND, *supra* note 18.

Regulations in general contains a review clause,¹⁹¹ which already addresses some of these issues to be reconsidered. And considering the time-frame asking for a report by 17 June 2013 and further considering that under the Lisbon Treaties legislation on now chapter 3 on judicial cooperation in civil matters can be done in what is called the ordinary legislative procedure¹⁹² there is hope that modifications will be reached more easily than under the Rome Convention.

191. Rome I art. 27.

192. TFEU arts. 81(2), 289, 294.