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From Rome Convention to Rome I Regulation – could the evolution be a revolution?

Some aspects of new Regulation.

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I. Introduction

After six years and many rounds of consultations and political debates, the Rome Convention on the Law Applicable to Contractual Obligations[1] has been converted into a Community instrument. The Rome I Regulation of 17th of June 2008[2] replaced the Rome Convention 1980 in the EU Member States, with the exception of Denmark, and applies to all contracts concluded as from 17 December 2009.

In the Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)[3], what the European Parliament and the Council of the European Union intended by adopting it was that the new regulation shall "*develop European conflict-of-law rules in a logical way and close a loophole in the current system of Community law*".

The Committee saw further the Regulation as "*useful and necessary for the development of a single European area of justice, since the 1980 Rome Convention that currently regulates this field is in need of modernization but, as multilateral agreement, the prospects of that happening are doubtful and would in any case involve time-consuming negotiations*".

Also the Max Planck Institute for Comparative and International Private Law saw the Rome I as an "*important further step towards a homogeneous codification of the private international law of obligations in the Community*".[4]

However, from the very beginning the Rome I Regulation gave rise to many different, sometimes quite critical opinions. For example *Garcimartín Alférez*[5] saw the end result of the new Regulation as "*not very promising*" and the lost chance to improve the text of the Rome Convention and solve some of its main problems.

Also during the Consulegis Spring Conference 2010, *Brödermann*, to some extent with reference to this discussion, asked the pertinent and important question about the historical meaning of Rome I as compared to the Rome Convention on the Law

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[1] Rome Convention on the law applicable to contractual obligations, 19 June 1980. Current Version OJ C 27, 26.1.1998, p. 36

[2] Regulation (EC) No. 593/2008 of 17th of June 2008 on the law applicable to contractual obligations, OJ L 177, 04.07.2008, p. 6.

[3] Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) OJ C 318, 23.12.2006, p. 56.

[4] Max Planck Institute for Comparative and International Private Law: Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) in: RabelsZ Bd.71 (2007) p.226.

[5] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, February 2008, p. I 63.

Applicable to Contractual Obligations: how should the new Regulation be seen – as evolution or revolution?[6]

II. Rome Convention as a basis of a new Regulation?

In fact, from the adoption of the Regulation, there were rather no doubts, that "*to a large extent, Rome I replicates the provisions of the Rome Convention"* and Rome I "*is a relatively modest modernization of pre-existing choice of law rules designating the applicable law to contractual obligations*". Further, it was clear that *"Rome I preserves the parties' right to choose the law that will govern their contract where this choice is expressly made or clearly demonstrated by the terms of the contract or the circumstances of the case*".[7]

On the other hand, it was noticed that Rome I rephrased or clarified the wording of several articles and also a number of important changes have been introduced. These changes included: "*a minor adjustment*" to the principle of party autonomy; "*a complete revision of the choice of law rules regarding the applicable law in the absence of choice*"; new rules on transportation and insurance; an "*expansion of the choice of law rules regarding consumer contracts*"; and finally a rephrasing of the so-called "mandatory rules" of the law.[8]

However, the important aspect of the new legal instrument is that the Regulation has a legal nature different from the Convention.

The Rome I Regulation is a **regulation of Community Law** which means it has a general application, is fully binding and directly applicable in all Member States. It takes effect "*automatically and simultaneously in all Member States*" and the transposition or implementation by national legislation is not necessary.[9]

III. Party autonomy as a fundamental principle

Art. 3. 1, the general rule of the Regulation provides that a contract shall be governed by the law *chosen by the parties* and the choice of law shall be made *expressly* or *clearly demonstrated* by the terms of the contract or the circumstances of the case.

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[6] Eckert *Brödermann* (RA, Dr.), in the presentation and lecture during the Consulegis Spring Conference 2010, Funchai: The New European international contract law: evolution or revolution? – a comparative analysis.

[7] Compare inter alia with the articles on Worldwide Legal Directories: http://www.hg.org/article.asp?id=18033 and Nils Willem *Vernooij* in: Columbia Journal of European Law 71 (2009); on http://www.cjel.net/online/15_2-vernooij/.

[8] Nils Willem *Vernooij* in: Columbia Journal of European Law 71 (2009); on http://www.cjel.net/online/15_2-vernooij/ .

[9] Francisco J. Garcimartin *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, February 2008, p. I 61.

An important issue is that by making their choice the parties can select the law applicable not only to the whole contract but also to its part.

That is the same principle as provided by the Convention that the contract shall be governed by the law chosen by the parties who are "*absolutely free to choose any State Law*".[10]

As stated in the literature, by defining of the parties' implicit choice the Rome I Regulation departs slightly from the wording of the Convention, however it "*does not intend to introduce any substantive change, only to clarify some of the doubts raised by the different language versions of that text*". [11] It is important that "*the aspects of choice of law clauses related to the existence and validity of the consent of the parties shall be determined by the national law designated by Articles 10,11 and 13 Rome I*".

In the Regulation, there are also some restrictions on the freedom of choice of the law[12].

a) in the so-called "domestic situations", the choice cannot displace the *mandatory rules of law* which would apply if the choice had not been made (Article 3.3. of Rome I);

b) in the so-called "intra-Community" cases, the choice of law of a non-member state cannot derogate from the *mandatory rule of Community law* (Article 3.4. of Rome I);

c) the choice of a foreign law cannot prejudice the application of the *mandatory rules of the forum* (Article 9.2. of Rome I);

d) the choice of law agreement may be *disregarded by the court* to give effect to "the *overriding mandatory provisions* of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful" (Article 9.3. of Rome I).

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[10] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 66

[11] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, February 2008, p. I 66; compare also: Consultation Paper CP05/08 of the Ministry of Justice of 2 April 2008:Rome I - Should the UK opt in? - A consultation produced by the Ministry of Justice, the Northern Ireland Department of Finance and Personnel and the Scottish Government, with the assistance of HM Treasury, the Department for Business, Enterprise and Regulatory Reform, and the Department for Transport, p. 19-20.

[12] Compare: Marcin *Czepelak*, The Law Applicable to the contract of Carriage under the Rome I Regulation, in the catalogue of: Czech Yearbook of international law, the article added on 23 February, 2010, available on: http://www.czechyearbook.org/the-law-applicable-to-the-contract-of-carriage-under-the-rome-i%C3%82%C2%A0regulation-p-11.html .

In the literature, some points concerning the freedom of choice have been seen as disputable. These were: types of the choice of law provided for in the regulation, the existence of an international element as a condition for the choice of law, the issue of reflecting the interests of the EC, the choice of non-state legislative resources, or *lex mercatoria*.[13]

As discussed by *Rozehnalová*, *Valdhans* on the example of Czech literature, the choice of law is a fundamental and preferred concept in the governing of relations within the scope of the Rome I Regulation[14]. In the analysis of the concept of choice of law under the Rome I Regulation, the authors consider it appropriate by indicating the **possible** types of choice of law and compare them to the types provided for in the Regulation.

The following types of the choice of law were distinguished:

- *conflict choice of law,* where the choice of law exists only at the level of conflict rules and direct restrictions are imposed exclusively on that level, along with the means related to the conflict rules;

- *material choice of law,* where there are restrictions, regardless of the chosen law, as a result of the substantive provisions of the legal order and the law is usually **designated directly in the conflict rules**;

- *materialized choice of law*, where the determination of law takes place not at the level of the conflict-based choice, albeit with certain limitations, but is placed in the position of choice at the level of substantive rules.

Further within the category "*conflict choice of law*" there are two subcategories distinguished: *"unlimited conflict choice of law"*, which has a **basic position within the Regulation** but is also alleviated by the limitations contained in the Regulation and *"limited conflict choice of law"*, which is a situation where legal orders are predetermined and the choice is limited to these legislations.

As it was noted the classification of choice in respect of the Rome I Regulation is **not clear from the text of the rules**.

Is the existence of an international element a necessary condition for the choice of law and is it enough, if the domestic parties choose the foreign law? This issue

[13] Naděžda *Rozehnalová*, Jiří *Valdhans*, A Few Observations on Choice of Law, in catalogue of: Czech Yearbook of international law, the article added on 25 February, 2010, available on: http://www.czechyearbook.org/a-few-observations-on-choice-of-law-p-25.html .
[14] Naděžda *Rozehnalová*, Jiří *Valdhans*, A Few Observations on Choice of Law, in catalogue of: Czech Yearbook of international law, the article added on 25 February, 2010, available on: http://www.czechyearbook.org/a-few-observations-on-choice-of-law-p-25.html .

seems also not to be clear: the possibility that "*even in an entirely domestic situation it is possible to choose foreign law and the judge is obliged to apply that law ex officio and to ascertain its contents*" is seriously discussed by the doctrine and is an actual problem. This view makes sense also in the light of the wording of the regulation.[15]

Even the literal text of Art. 3.3 provides, that the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement, if 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. As mentioned above, *Czepelak* found that this rule covered the *"so-called domestic situations"*.

However, there are a lot of difficulties, if we assume, that the domestic parties could choose a foreign law that would cause a conflict of law. The aforementioned *Rozehnalová*, *Valdhans* and *Collins*[16], wrote interestingly about these matters and the difficulties faced when deciding whether or not a relationship has an international element

Furthermore, in the doctrine there were rather neither doubts nor discussion that, the "*Rome I Convention did not permit the direct choice of lex mercatoria or non-state rules*".[17] However, the indirect application of lex mercatoria or a set of the non-state provisions is possible on the basis of the choice of law, if the parties incorporate them into their contract („*within the scope of mandatory rule of otherwise applicable law*"). Hence, Paragraph 13 of the Preamble does not exclude a possibility of the application of these rules by the parties to their contract under a non-State body of law or an international convention, even though the Rome I Regulation does not allow to choose direct *lex mercatoria* or non-state rules.

It is interesting that the text of the Regulation is much closer to the Convention than the Commision's Proposal, which allowed the parties to choose a non- State law. This part of the rule was rejected during the negotiation[18], despite the fact, that there were a lot of opinions which saw the non-state rules such as UNIDROIT Principles of International Commercial Contracts (PICC), or the Principles of European Contract Law (PECL) as useful, while the so called lex mercatoria, or private

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[15] Naděžda *Rozehnalová*, Jiří *Valdhans*, A Few Observations on Choice of Law, in catalogue of: Czech Yearbook of international law, the article added on 25 February, 2010, available on: http://www.czechyearbook.org/a-few-observations-on-choice-of-law-p-25.html

[16] Lawrence *Collins*, Dicey, Morris and Collins on the Conflicts of Laws. Second Supplement to the Fourteen Edition 320 (14th ed. 2008); cited from *Rozehnalová*, *Valdhans*.

[17] Naděžda *Rozehnalová*, Jiří *Valdhans*, A Few Observations on Choice of Law, in catalogue of: Czech Yearbook of international law, the article added on 25 February, 2010, available on: http://www.czechyearbook.org/a-few-observations-on-choice-of-law-p-25.html, compare: Thomas *Pfeiffer*, Neues Internationales Vertragsrecht – Zur Rom-I Verordnung in EuZW 2008, p. 623 from beck-online catalogue.

[18] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, February 2008, p. I 67.

codifications not adequately recognized by the international community such as standard contract forms should not be eligible.[19]

As also stated in the literature[20], the working party could have considered applying Rome I to the substantive validity of jurisdiction agreements, because in fact, neither the Rome Convention nor Rome I applies to jurisdiction agreements. At present, each Member State applies its own choice of law rules on this issue and Article 23 of Brussels I to formal validity of such agreements. In accordance with the jurisprudence of the ECJ Article 23 of Brussels I covers some material issues, but not others. That is the reason of the "gap" in Rome I, which enables parties "*to a formally valid jurisdiction agreement to have it set aside by a court in a country not designated in the jurisdiction agreement as the competent court*".

The new rule in the autonomy principle, which didn't exist in the Convention, is contained in Art. 3.4.

Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of the Community law, where appropriate as implemented in the Member state of the forum, which cannot be derogated from by agreement. The cited rule limits the scope of the chosen law of third countries to the framework of the mandatory rules of Community law.

The goal is the respect for EC interests, which should be assured by provisions restricting the choice of law or chosen law. The sense of this rule in the literature is disputable, especially the points which "*provide anything other or further than what would be possible if this issue was not explicitly regulated*"?[21]

IV. Law applicable in the absence of choice

In the absence of choice the applicable rule is Art. 4, however, to the special subjects of contracts first applicable are the exceptions to the rule of Art. 4 – provisions of Art. 5, Art. 6, Art. 7, Art. 8[22] (special provisions for certain types of contracts).

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[19] Max Planck Institute for Comparative and International Private Law: Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) in: RebelsZ Bd.71 (2007). P. 230, compare also: Ana M. *López-Rodríguez*, , The revision of the Rome Convention of 1980 on the law applicable to contractual obligations – A crucial role within the European *contract law project*? available on: http://ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/university_aarhus_en.pdf, p. 18- 20.

[20] *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.

[21] Naděžda *Rozehnalová*, Jiří *Valdhans*, A Few Observations on Choice of Law, in catalogue of: Czech Yearbook of international law, the article added on 25 February, 2010, available on: http://www.czechyearbook.org/a-few-observations-on-choice-of-law-p-25.html

[22] Dieter *Martiny*, Internationales Handelsrecht I-Arbeitspapier on: http://www.rewi.euv-frankfurt-o.de/de/lehrstuhl/br/intrecht/Emeritus/lehre/LV_SS_09/index.html#Fam .

As mentioned above, Rome I contains some major changes regarding the law applicable to the contract in the absence of choice of law by the contracting parties in comparison to the Rome Convention.[23]

1. Consumer contracts

Consumer contracts governed by Art. 6 of the Rome I Regulation cover **all kinds of contracts and the only connecting factors are the consumer and the professional.**

A contract concluded by a natural person (without prejudice to Articles 5 and 7) for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the **law of the country where the consumer has his habitual residence**, provided that the professional:

- pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

- by any means, directs such activities to that country or to several countries including that country and the contract falls within the scope of such activities.

So in case of the absence of the choice of law under the consumer contracts mandatory provisions of the law are the provisions where the consumer has his usual residence. But **even if the law was chosen**, the laws of the country where the consumer has his usual residence have to be observed and if the provisions of the law of the country where the consumer has his usual residence are more favorable, they will be applicable to the consumer contract (Art 6.2.).

The rule for consumer contracts were strong criticized by the doctrine. For example *Pfeiffer* set, that the clear weakness of the rule of Art. 6 is, that the rules from different European Union directives concerning consumer protection were not placed in one central provision in Rome I Regulation.[24]

Alférez[25] is of quite similar opinion, but he added also a conclusion that the Regulation differentiate between a so called "*passive*" and "*active consumer*" and only p*assive consumers* are protected by the Regulation. The *Passive consumer* is

[23] Nils Willem *Vernooij* in: Columbia Journal of European Law 71 (2009); on http://www.cjel.net/online/15_2-vernooij/

[24] Thomas *Pfeiffer*, Neues Internationales Vertragsrecht – Zur Rom-I Verordnung in EuZW 2008, p. 626 from beck-online catalogue.

[25] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 79.

a consumer who does not go to the market of the professional but the professional comes to his market or directs activities to the market of the consumer.

The "*paradoxical difference of treatment between consumers*", where active and mobile consumers "*are treated as if they were professionals*" shall be one of the main **loopholes** in the text, even if active consumers inside the EU are partially protected by the Directives. [26]

Except of abovementioned matters the Regulation, as regards the Rome Convention, extends the **material scope of application of the rule** and **clarifies the definition of "passive consumer"**.[27]

2. Contracts of carriage

Just like the Rome Convention, the Regulation also includes a special rule for contracts of carriage, but it moved it to **an autonomous provision**[28], which maintains the difference between transport for goods and for passengers and look follows:

If the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country.

If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

If law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country.

If these requirements are not met, the law of the country where carrier has his habitual residence shall apply.

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[26] Francisco J. Garcimartin *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, February 2008, p. I 73 - 74.
[27] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 71, compare also with: Nils Willem *Vernooij* in: Columbia Journal of European Law 71 (2009); on http://www.cjel.net/online/15_2-vernooij/ about an expansion of the choice of law rules regarding consumer contracts.
[28] Francisco J. Garcimartin *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 70.

The rule is also important which "*limits the menu of eligible laws*"[29] that the parties may choose as the law applicable to a contract for the **carriage of passengers** in accordance with Article 3 only to the law of the country where:

- the passenger has his habitual residence; or
- the carrier has his habitual residence; or
- the carrier has his place of central administration; or
- the place of departure is situated; or
- the place of destination is situated.

In both cases (carriage of goods as well as carriage of passengers) the Regulation maintains the escape clause: where it is clear **from all the circumstances** of the case that the contract, in the absence of the choice of law, is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

3. Insurance contracts

In compare with the Convention, where the rules applicable to insurance contracts under the Rome Convention with three differentiated hypotheses for three different kinds of contracts were rather complex[30], new Regulation includes also conflict-of-laws regime, what was before a part of different EU- directives[31]. In this context important is the rule of art. 23 providing that, the Article 7 (as an exception in the Rome I Regulation) **shall prejudice** the application of provisions of Community law which in relation to particular matters, lay down conflict-of-law rules relating to contractual relationship.

The article 7 should apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

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[29] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, February 2008, p. I 75.

[30] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 74.

[31] Thomas *Pfeiffer*, Neues Internationales Vertragsrecht – Zur Rom-I Verordnung in EuZW 2008, p. 627 from beck-online catalogue.

An insurance contract covering a large risk was defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and carrying out the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

If the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country **where the insurer has his habitual residence**. Furthermore, if it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

When an insurance contract is other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

- the law of any Member State where the risk is situated at the time the contract is concluded;

- the law of the country where the policy holder has his habitual residence;

- in the case of life assurance, the law of the Member State of which the policy holder is a national;

- 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;

- where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a freelance occupation 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.

If in the cases set out in points (a), (b) or (e) the Member States concerned grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

A contract, where the law applicable has not been chosen by the parties in accordance with these five above mentioned rules, shall be governed by the law of the Member State in which the risk is situated at the time the contract is concluded.

The following additional rules apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

- the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

- by way of derogation from paragraphs 2 and 3, a Member State may lay down that an insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1) (g) of Directive 2002/83/EC.

4. Individual employment contracts

An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. So party autonomy is – as a starting point – allowed for such contracts, and the choice of law agreement must meet the requirements of Article 3.[32]

Employees, like consumers, are in need of protection for social and economic reasons, they are considered weak parties and party autonomy is thus restricted in the same manner as it is for consumer contracts under Rome I, Article 6.2.[33] For that reason the choice of law may not have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable to the employment contract.

If the law applicable to an individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or,

[32] *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.
[33] *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.

failing that, from which the employee habitually carries out his work in performance of the contract. Further, the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.

In the situation where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business by which the employee was engaged is situated.

Further, there is also some escape rule: where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

5. Article 4 – the general rule in the absence of choice

As stated by *Lando, Nielsen* "*even though the new Article 4 of Rome I is radically different in terms of structure and methodology from Article 4 of the Rome Convention, the new provision manages to combine predictability with some flexibility*".[34]

Predictability should play now – according to the authors - the leading part and **flexibility** should be a subordinate part for those contracts listed in Article 4.1. and for those types of contract, which are not on the list, but where the characteristic obligation can be identified (contracts falling under Art. 4.2.).

The new rule departs significantly from the rule of the Convention, which was based on a structure of: "general principle + reputable presumptions + escape clause".[35]

To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

- a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;

- a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;

[34] *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.
[35] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 67.

- a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

- notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be 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;

- a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;

- a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

- a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

- a contract 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, shall be governed by that law.

The list in Article 4.1. may give rise to problems with distinguishing between the various categories of contracts in points a - h, because sometimes a contract may be categorized under two or more headings. Article 4.2. provides that if the elements of a contract are covered by more than one of points a - h in Article 4.1., the contract would be governed by the law of the country where the **party who is required to deliver a performance which is characteristic of the contract has his habitual residence**. The same solution is adopted when the contract is not covered by paragraph 1.

Where 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 in paragraphs 1 or 2, the law of that other country shall apply.

What is important for the contracts, which are not on the list above and where the characteristic obligation cannot be identified (contracts falling under Art. 4.4.), nothing has changed from Rome Convention, and these contracts are still governed by the law of the country of the closest connection.[36]

[36] *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.

V. Overriding mandatory provisions

The rule containing "overriding mandatory rules" departs significantly from its parallel in the Convention. [37] Firstly, according to the Regulation text, overriding mandatory provisions were defined in the Regulation. Overriding mandatory provisions are the provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Further, what is important in the new Regulation, the new provisions eliminates the problems raised by the concept of mandatory rules in the Convention, where the same term was used in a very different context.[38]

Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, insofar as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

In essence, the application of Article 9.3. is still left to the discretion of the courts, but the discretion is now more limited[39]: *"First, the connecting factor to the State whose internationally mandatory provisions are considered to be applied is not a close connection, but the fact that the obligations under the contract have to be or have been performed in that country. Second, the internationally mandatory provisions considered to be applied must render the performance of the contract unlawful."*

These two guidelines for the discretion are precise, and they do provide more certainty than Article 7.1. of the Rome Convention. However in Rome I, there is no doubt that Article 9.3. applies regardless of whether the contract is governed by the law of the forum or a foreign law, be it the law of a Member State or a non-Member State.

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[37] Francisco J. Garcimartin *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 76.
[38] Francisco J. Garcimartin *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 76.
[39] compare: *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.

VI. Conclusion

How was mentioned above, the Rome I Regulation is a regulation of Community Law and only this **new legal character** of the Rome I Regulation makes Rome I quite different when compared to Rome Convention.

Even if, the new Regulation **replicated many of provisions of the Convention**, passed a possibility to improve the text of the Convention, to solve the main problems known from the practical application of the Convention and to remove its loopholes[40] and have some others problematic gaps, which for example enables parties to get a formally valid jurisdiction agreement [41] should be seen a **big step** on the way to build new European Private Law.

Also the facts, that the new Regulation has failed on issues such as laying down a uniform and consistent regime for insurance contracts, solving the problems of interaction between the Rome I Regulation and the unilateral conflict rules contained in some Directives on consumer contracts, or determining the law applicable to the property effects of the assignments of credits, doesn't change the positive character of new Regulation for European Union.

Most important advantage of new Regulation is **more certainty on the European Community Market.**[42] Helpful is also a big respect for EC interests, which are assured by provisions restricting the choice of law or chosen law.

Despite of the fact, that the text of Regulation is much closer to the Convention than the Commision's Proposal, which for example allowed the parties to choose a non-State law, it doesn't have to be an exaggeration, if we call Rome Convention – because of the new legal character – **revolutionary**.

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[40] Francisco J. Garcimartín *Alférez*, The Rome I Regulation: Much ado about nothing?, in: The European Legal Forum, Februar 2008, p. I 79.
[41] *Lando* Ole, *Nielsen* Peter Arnt: in CML Rev.2008.6.1687 The Rome I Regulation.
[42] Thomas *Pfeiffer*, Neues Internationales Vertragsrecht – Zur Rom-I Verordnung in EuZW 2008, p. 627 from beck-online catalogue.

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