CONTRACTS IN CYBERSPACE AND THE NEW REGULATION "ROME I"

by

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The new EC Regulation on the Law Applicable to Contractual Obligations (Regulation Rome I), adopted on 17 June 2008, contains rules dealing with situations involving a conflict of laws in the field of contracts. It will replace the 1980 Rome Convention and bring about a number of important changes, some of which will affect directly contracts entered into or performed through the Internet.

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Many contracts made through the Internet are of an international character. The parties may habitually reside in different countries and/or the performance of the contractual obligations may take place, or is supposed to take place, in a country other than that or those of the parties' habitual residence. Sometimes the contract is not only entered into through the Internet but is even performed through the same, such as when the delivery of digital goods (for example music, movies or computer games) takes place by electronic downloading and the payment is effected on-line by a credit card or a money transfer.

Just like other contractual undertakings, even the Internet-related contracts can give rise to many types of disputes to be solved by applying legal rules. If the contract is connected with more than one country, and thereby with several legal systems potentially providing different solutions to the disputed legal issue, the applicable legal system will have to be designated

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by the private international law (the conflict-of-laws rules) of the forum country. These conflict-of-laws rules have traditionally also varied from country to country, making the outcome of adjudication depend on the country of the forum and consequently inviting the plaintiff to choose that country on the basis of tactical considerations (the so-called forum shopping, which is particularly attractive when, like in the European Union, judicial decisions made in one Member State are in principle recognized and enforced throughout the territory of all Member States).[1]

It is therefore hardly surprising that the countries involved in the process of European integration attempted, at a relatively early stage, to unify their conflict-of-laws rules in this field, in particular after having realized that due to the numerous fundamental differences between their substantive provisions pertaining to contracts neither a complete unification nor a far-reaching harmonization of their laws was a realistic alternative in the short run. These efforts resulted in 1980 in the signing of the Convention on the Law Applicable to Contractual Obligations[2] (this Convention, which entered into force in 1991, is commonly called the Rome Convention and must not be confused with the Rome Treaty of 1957 establishing the European Economic Community). Due to the fact that in 1980 the Community did not have the authority to issue regulations and directives unifying or harmonizing the conflict rules of the Member States, the Rome Convention is formally an independent treaty rather than an instrument of EC law in the strict sense, but it is closely connected with the Community in several respects, such as the duty of all new Member States to ratify the Convention and the competence, since 1 August 2004, of the Court of Justice of the European Communities (ECJ) to provide authoritative interpretations thereof.

Since the entry into force in 1999 of the Amsterdam Treaty, Articles 61(c) and 65(b) of the EC Treaty stipulate, inter alia, that the Council may take measures promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws. The need to modernize the conflict-of-laws provisions of the Rome Convention, partially due to the increasing use of the Internet in contracting, resulted therefore not merely in changes in the conflict-of-laws rules as such but also in the legal nature of the whole instrument. On 17 June 2008, the EC Regulation No 593/2008 on the Law Applicable to Contractual Obligations (the so-called Rome I Regulation) was

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1 See, in particular, the EC Regulation No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, Official Journal of the European Communities 2001 L 12 p. 1 (the so-called Brussels I Regulation).

2 A consolidated wording of the Convention is found in Official Journal of the European Union 2005 C 334 p. 1.

adopted.[3] Pursuant to its Articles 24, 28 and 29, the Rome I Regulation shall replace the Rome Convention, even though merely with regard to contracts concluded after 17 December 2009 (this means that the 1980 Rome Convention will retain some of its importance for a considerable time in the future). Similarly to the Rome Convention, the Rome I Regulation is intended to be used in relation to all legal systems in the world, irrespective of whether the law specified by its conflict-of-laws rules is the law of a Member State or not. In this sense, the Regulation is intended to have "universal application", without any requirement of reciprocity (Article 2).

In the following, I shall attempt to present the main features of the new Regulation, with special focus on those rules that are of particular relevance in Internet-related situations. Due to space constraints, the presentation will be of an extremely summary nature, omitting many special rules and exceptions and containing some unavoidable oversimplifications.

The main principle of the Rome I Regulation is the same as that of the Rome Convention: in Article 3 it allows the parties to choose the legal system that is to govern their contract, provided the contract contains an international element, i. e. provided it is not of a purely domestic nature. This main principle is not affected by the fact that the contract has been concluded or is to be performed through the Internet. The same is true about most of the principal conflict rules in article 4, which are used in the absence of a choice-of-law clause in the contract, as these rules refer normally directly or indirectly to the law of the country where one or the other of the parties has his habitual residence, which is a connecting factor normally unaffected by the use of the Internet. Among these rules, which are in fact mere presumptions because they are disregarded where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the designated one (see Article 4(3)), one may mention that a contract for the sale of goods is normally governed by the law of the country where the seller has his habitual residence and that a contract for the provision of services is normally governed by the law of the country of the habitual residence of the service provider. However, at the interpretation of these rules it is necessary to keep in mind Article 19(2) of the Regulation: where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such an establishment, the place where the establishment is located will be treated as the place of habitual residence. This gives, again, rise to a question I have had the opportunity to

[3] Official Journal of the European Union 2008 L 177 p. 6.

speak about here in Brno at the conference "Cyberspace 2005", namely the question of whether a web-site can constitute an establishment for the purposes of private international law. Traditionally, an establishment is imagined as something with physical premises, street address and staff, but an interactive web-site can today fulfill the same functions, seeing that contracts can both be entered into and performed through it. I do not wish to repeat today what I said three years ago;[4] it suffices to say that the Rome I Regulation does not shed any new light on that highly controversial issue.

Of considerable interest from the Internet point of view is that a contract for the sale of goods by auction will be governed by the law of the country where the auction takes place, "if such a place can be determined" (Article 4(1)(g)). The reason behind this special rule is that at an auction the buyer and the seller are often not aware of each other's habitual residence and the application of the law of the country of the habitual residence of the seller might come as a complete surprise to the buyer. What comes to mind in this context are the Internet auctions which have become quite frequent. The Internet address of one popular auction site operating in Sweden used to have the national domain of ".nu", referring to the small South Pacific island of Niue, which is hardly the place where the auction takes place within the meaning of Article 4(1)(g). Some other Internet sites, such as the world-renowned site operated by the American company eBay Inc. with headquarters in San José in California, do not use any national domain at all and prefer an address ending with ".com". If the site focuses openly on one national market only, for example using the Swedish language and quoting prices in the Swedish currency or even explicitly stating that the bidding is open exclusively to persons habitually residing in a certain country, the problem can be avoided by relying on the above-mentioned Article 4(3) and applying Swedish law as the law of the country with which the contract is manifestly most closely connected, but this may not be possible in the case of truly international sites, where the seller and the buyer are habitual residents of different countries and the transactions are negotiated in an internationally used language such as English.

Another provision of Internet relevance is Article 4(1)(h), pursuant to which a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interest in financial instruments, in accordance with non-discretionary rules and governed by a single legal system, is normally governed by that legal system, i.e. by the law proper to the multilateral market as such.

[4] Bogdan, M. 2006, 'Can a Web-site Constitute an Establishment for the Purposes of Jurisdiction and Applicable Law?' in Cyberspace 2005, ed. Polčák, R., Škop, M. & Šmahel, D.

The selling and buying of financial instruments within such markets, such as stock exchanges, is nowadays normally carried out by electronic means and some of the trading is done through the Internet.

The legal system governing the formal validity of a contract (i.e., its validity in respect of formal requirements such as witnesses, writing or the acceptability of electronic signatures) is designated by Article 11 of the Rome I Regulation, which distinguishes between, on the one hand, contracts concluded between persons who (or whose agents) are in the same country at the time of conclusion and, on the other hand, contracts between persons who (or whose agents) are at the time of contracting in different countries. A contract belonging to the former category is formally valid if it satisfies the formal requirements of the law which governs it in substance or of the law of the country where it is concluded. A contract belonging to the latter group is formally valid if it satisfies the formal requirements of the law which governs it or of the law of any of the countries where any of the parties or their agent was present at the time of conclusion or of the law of the country where any of the parties had his habitual residence at that time. The use of these rules may be problematic in those cases where the contract is concluded through the Internet, because one party may not know where the other party or its agent was present at the time of the conclusion of the contract.

Article 6 of the Rome I Regulation brings some important changes in respect of consumer contracts, i.e. contracts concluded by a natural person for a purpose which can be regarded as being outside his trade or profession with a person acting in the exercise of his trade or profession (the professional). Such contracts will be governed, in respect of both substance and form, by the law of the country where the consumer has his habitual residence and the parties' choice of another law will not deprive the consumer of the protection afforded to him by the mandatory provisions of the law of the country of his habitual residence. This privileged position is, however, not enjoyed by all consumers, because Article 6 requires, in addition, that the contract falls within the scope of the professional's activities which are either pursued by him in the country where the consumer has his habitual residence or are directed, by any means, to that country or to several countries including that country. As much of the marketing on the Internet is, in fact, intended for consumers in many countries, the last-mentioned situation is of particular interest and gives rise to questions about the meaning of the requirement that the professional directs, by any means, his activities to a certain country or group of countries. The exact meaning is unfortu-

nately not quite clear. Recital 24 makes it clear that this requirement must be interpreted as having the same meaning as the identical requirement in Article 15 in the Brussels I Regulation, dealing with jurisdiction in consumer disputes. Recital 24 also refers to a special joint declaration of the Council and the Commission on the last-mentioned Article 15. Pursuant to this declaration, the mere fact that an Internet site is accessible from the consumer's country is not sufficient and the language or currency used by the website does not normally constitute a relevant factor either. The professional may, of course, make it clear on his website that he directs himself exclusively at consumers habitually residing in a particular country or particular countries, or that habitual residents of a particular country or particular countries are excluded from his offers. But even if the website is silent on this point, it would hardly be reasonable to consider an advertisement placed on the Internet by a Czech company, in the Czech language, with prices in Czech currency, and obviously intended for the Czech consumer market, to be directed to Sweden. On the other hand, if the disputed contract has actually and knowingly been concluded over the website with a consumer residing habitually in a particular country, the language and currency used by the website do not constitute relevant factors, for example if the professional accepts knowingly an order placed through the Czech website by a Czech-speaking Swedish resident like myself. Thus, the most relevant factor is that the Internet site solicits the conclusion of distance contracts and that the contract in dispute has actually been concluded at a distance, by whatever means (i.e., not necessarily through the soliciting Internet site).

While introducing the (alternative) criterion requiring that the professional's activities be directed to the country of the consumer, the Rome I Regulation abolishes some of the requirements found in Article 5(2) of the Rome Convention, namely that the conclusion of the contract was preceded by a specific invitation addressed to the consumer or by advertising in the consumer's country and that the consumer has taken all the steps necessary on his part for the conclusion of the contract in the country of his habitual residence. This change is an improvement, because these criteria are hardly reasonable in today's Internet environment, where it often may be difficult to decide whether a website constitutes advertising in the country of the consumer and where it should make no difference whether a consumer living in Brno has placed his order from home or from an Internet café while on a half-day shopping visit in Vienna.

An Internet-related problem, arising in connection with the above-mentioned conflict-of-laws rules protecting the interests of the consumers, is

that the businessman has usually limited possibilities to check whether the distant person he contracts with through the Internet is really a consumer or not. Even though the protection offered to consumers in Article 6 is in principle mandatory and cannot be waived by the consumer in the contract, the ECJ has held that a consumer who by his own behavior creates the impression that he enters into the contract within the framework of his trade or profession (for example by using a business letterhead or by claiming the right to restitution of value-added tax), must be considered to have validly abstained from that protection, provided that his counterpart has acted in good faith.[5] A similar approach should be used when the consumer lied about his habitual residence, for example because he knew that the professional would not accept his order if he were aware of his true domicile. It may also happen that a businessman acting in the exercise of his trade or profession pretends to be a consumer in order to benefit from the advantages enjoyed by consumers, but he will naturally lose those advantages once his true nature is disclosed.

Pursuant to Article 23, the Regulation does not exclude the possibility of inclusion of special conflict-of-law rules relating to contractual obligations into provisions of EC law with regard to particular matters. Furthermore, Recital 40 states that the Regulation should not prejudice the application of other EC instruments laying down provisions designed to contribute to the proper functioning of the internal market. The application of the substantive law designated by the Regulation's conflict rules should not restrict the free movement of goods and services as regulated by EC instruments. As an example, Recital 40 mentions explicitly the EC Directive No 2000/31 of 8 June 2000 on Certain Legal Aspects of Information Society Services, in particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce).[6] Unfortunately, due to its ambiguity this Directive is one of the most criticized pieces of EC legislation ever, and its co-existence with the Rome I Regulation will probably give rise to complications.

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5 *Gruber v. Bay Wa* AG (2005) C-464/01; European Court Reports I-439.

6 Official Journal of the European Communities 2000 L 178 p. 1.