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THE E-COMMERCE INTERNATIONAL CONSUMER CONTRACT IN THE EUROPEAN UNION

by

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Article 6 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) adapts the rule laid down in the Rome Convention regarding international consumer contracts, to take into account the requirements of the consumer protection in an international contract, as the weaker party, and the demands of electronic commerce. Article 6 determines the types of international contract protected and establishes the mechanisms to protect the consumer. However, the legal provision in question is not free from complications and requires an effort of interpretation to adjust the rule to the diffuse nature of the internet and to the characteristics of electronic commerce. This paper identifies the difficulties of application of the provision to e-commerce and discusses the interpretative options of the European Union Court of Justice (ECJ).

KEY WORDS

International consumer contracts, e-commerce, applicable law, Private International Law, contractual obligations, Regulation (EC) No 593/2008, Rome I Regulation

1. INTRODUCTION

The European Union regulates the international consumer contract according to a perspective of protection of the weaker party. Private autonomy is a basic principle of contractual law and is founded on the legal equality of the parties: the contracting parties should be in a position of

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equal bargaining, so they can decide to conclude (or not) the contract and decide its contents. However, sometimes certain natural, legal, social or economic factors introduce distortions in the legal relationship which are translated into abnormal bargaining power of one party over the other. Legal systems ethically cannot tolerate this situation and try to correct it using material criteria for the protection of those considered the weaker party. Generally, consumers are considered the weakest because they hold less information at their disposal, for their inexperience negotiating (because they are not doing it on a professional basis) and by the absence of a commercial organization (as often exists on the side of the other contractor). In terms of transnational relations, the consumer becomes more fragile and the position of the other contractor stronger. In general, the exercise of a commercial activity in the international market requires greater preparation and organization. The consumer will have more difficulty in determining the applicable law that governs the contract and in accessing the content of a foreign law.¹ It seems to me that in what concerns international contracts concluded by consumers through the internet the fragility of the consumer is superior, because of the nature of the internet as a way of cross-border communication. The internet has a worldwide reach, and the delocalization of users gives an international nature to most of the activities that occur there. This internationality facilitates the establishment of trade links between firms and between firms and consumers, established in different countries. For consumers, the immediacy that arises in the conclusion of electronic contracts often pushes them to conclude pre-formulated standard contracts.

The regulation of international consumer contracts by the European Union (EU) is related to the importance of consumer protection policy (established in Article 169 of the Treaty on the Functioning of the European Union) and the healthy functioning of the internal market. For this reason, there are several legislative acts of the Union that have shaped the substantive law of the Member States on consumer rights, such as the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011. The regulation of international consumer contracts by the

¹ The weaker position of the consumer in international trade has been recognized by the ECJ: e.g. *Johann Gruber v. Bay Wa AG*, Case C-464/01, 20.01.2005, ECR 2005, p. I-00439, §34; *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v. Olivier Heller* (C-144/09), Joined Cases C-585/08 and C-144/09, 7.12.2010, ECR 2010, p. I-12527, §58.

European Union mainly focuses on two key issues: on the one hand, the determination of the court that has jurisdiction to settle disputes arising from such contracts, through rules on international jurisdiction; on the other hand, the determination of the applicable law. The evolution of the regulation of international consumer contracts in Europe was determined by the need to adapt the existing rules to the demands of e-commerce. This paper tries to explain the current conflict-of-law rule and how it aims to cover international consumer contracts concluded online and the difficulties that this application carries. This paper focuses on the issue of the applicable law; however I am aware of the relevance of international jurisdiction in this matter, as will be shown.

2. THE ROME I REGULATION AND THE SCOPE OF THE APPLICABLE LAW

The Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) governs international contracts, by allowing the determination of the applicable law. It replaced the Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention).

The Rome I Regulation rules transnational contractual obligations in civil and commercial matters [Article 1 (1)], and from its material scope are excluded the issues listed in Section 1 (second part), Section 2 and 3 of Article 1. The Rome I Regulation has universal application, i.e., the law designated in accordance with the rules of the Rome I Regulation applies even if it belongs to a State that is not part of the European Union (Article 2). Finally, the Rome I Regulation applies to contracts concluded after 17 December 2009 (Article 28). For contracts signed prior to 17 December 2009, the Rome Convention is applicable, and its material scope (Article 1) and spatial scope (Article 2) coincide largely with the ones of the Rome I Regulation.

The *lex contractus* (determined according with the rules of the Rome I Regulation) will govern: the interpretation of the contract; the obligations emerging from it and the consequences of its breach (which includes the assessment of damages); the causes of extinction of obligations, including the effect of time (prescription and limitation of actions); and the consequences of the nullity of the contract (Article 12 of the Rome I Regulation and Article 10 of the Rome Convention). Nevertheless, in

relation to the manner of performance of the contractual obligations, including the creditor's rights in situations of defective performance, it shall be regarded the law of the place of performance (Article 12, Section 2, of the Rome I Regulation and Article 10, Section 2, of the Rome Convention). It also will be the law of contract, determined as if it were valid, to establish the existence and validity of the contract or of its provisions (Article 10 of the Rome I Regulation and Article 8 of the Rome Convention).

The international consumer contract is regulated by Article 6 of the Rome I Regulation, which replaced Article 5 of the Rome Convention, and it was thought of as a way to adapt the already existing rule to the specificities of e-commerce. This is recognized in the draft proposal of the Rome I Regulation, where it is stated that the new rule should take into account "developments in distance selling techniques."² The new rule should also be compatible with Article 15 of the Brussels I Regulation³, so that there is a concurrence between the legal instrument that governs the applicable law and the one that determines the jurisdiction of the court, to thus avoid forum shopping situations in the European Union.

3. ARTICLE 6 OF THE ROME I REGULATION

3.1 THE PROFESSIONAL AND THE CONSUMER

Article 6 of the Rome I Regulation is applicable to international consumer contracts, protecting consumers through some mechanisms because they are regarded as being weaker (Recital 23).

Article 6 is applicable to contracts concluded between a consumer and a professional. In Article 6 of the Rome I Regulation, the notion of the person that contracts with the consumer is optimized based on the jurisprudence of the European Union Court of Justice (ECJ)⁴ and is now designated as a "person acting in the exercise of their business or professional activities ('professional')". The concept of consumer is also clarified. Article 5 of the Rome Convention settled a protection for the consumer, not specifying

² EUROPEAN COMMISSION (2005) *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*. COM (650 final) p.6.

³ Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters. This provision was replaced by Article 17, Section 1, of the Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Recast).

⁴ EUROPEAN COMMISSION (2005) *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*. COM (650 final). p.6.

whether this would be a natural person or a legal person. Article 6, Section 1 of Rome I solves this question, stating that the consumer is a natural person. Therefore, for the purposes of protection provided for in Article 6 of Rome I, it is clear that the rule only concerns a contract between an individual and a professional.

It is still required that the purpose of the contract is not intended for trade or for the professional activity of the consumer. According to the ECJ, the concept of consumer should be interpreted strictly, and what identifies a consumer in a contract is not the subjective situation of the person but the nature and the aim of the contract.⁵ Therefore, “only contracts concluded for the purpose of satisfying an individual's own needs in terms of private consumption come under the provisions designed to protect the consumer as the party deemed to be the weaker party economically.”⁶ If the purpose of the contract is the trade or professional activity of the person, even if it is a future activity, the protection of the provision does not apply.⁷ According to the ECJ regarding the interpretation of Article 13, first paragraph, of the Brussels Convention⁸, if the contract has a dual purpose, the protection of the provision cannot be relied upon by the person who contracts partially aiming his or her professional activity, except “if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety.”⁹ In this analysis, the court must take into account the nature, the contents and purpose of the contract and other objective circumstances existing at the time of its conclusion.¹⁰

One interesting question about the concept of consumer is to know if the protection of Article 6 would be applicable if the professional could have been reasonably unaware of the private purpose of the contract because of

⁵ ECJ, *Francesco Benincasa v. Dentalkit Srl.*, Case C-269/95, 03.07.1997, ECR 1997, p. I-03767, §16. Cfr. about the concept of consumer: ECJ, *Shearson Lehmann Hutton Inc. v. TVB Treuhandgesellschaft für Vermögensverwaltung und Beteiligungen mbH.*, Case C-89/91, 10.01.1991, ECR 1993, p. I-00139, § 24.

⁶ *Idem*, *ibidem*, §17.

⁷ *Idem*, *ibidem*.

⁸ Replaced by Article 15, Section 1, of Regulation No 44/2001 (Brussels I), and after 10 January 2015 by Article 17, Section 1, of Regulation No 1215/2012, of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I bis).

⁹ ECJ, *Johann Gruber v. Bay Wa AG*, Case C-464/01, 20.01.2005, ECR 2005, p. I-00439 § 39.

¹⁰ *Idem*, *ibidem*, §47.

the conduct of the consumer that gave the professional the impression the consumer was acting for business purposes. According to the ECJ, the protection of the provision shall not apply to those situations, even if the purpose of the contract is not the professional activity of the consumer “in view of the impression he has given to the other party acting in good faith, as having renounced the protection afforded by those provisions.”¹¹ I agree with the position of the ECJ because the conclusion of the contract shall be governed according to the principle of good faith. If the supposed consumer gave the impression, objectively, that he or she was acting within his or her profession, the consumer cannot subsequently come to rely on his or her capacity as a consumer to enjoy the protection of Article 6. Furthermore, having given the impression that the purpose of the contract was professional, the contract concluded certainly would be different from one in which the party had identified as a consumer, and would probably have had more advantageous conditions. The supposed consumer cannot have the best of both worlds. This interpretation also seems to me the most appropriate to e-commerce, where usually the contracts are based on the declarations of the parties and the trust that must exist between them. Often these contracts are concluded through distance techniques, and the professional has no way to assess the purpose of the contract other than by the declarations of the other party.

3.2 TYPES OF INTERNATIONAL CONSUMER CONTRACTS PROTECTED

Article 6 of the Rome I Regulation limits the type of consumer contracts to which it applies. There are two requirements in Article 6, Section 1, for the application of the rule: firstly, it is necessary that the professional pursues his or her professional activities in the country of the habitual residence of the consumer [(a)] or directs activities to that country by any means [(b)]; on the other hand, it is necessary that the contract is within the scope of these activities.

Those requirements already existed in Article 15 of the Brussels I Regulation to regulate electronic commerce in a more convenient way, and Recital 24 of the Rome I Regulation imposes a consistent interpretation between the two rules. This articulation justifies the assertion in Recital 24¹²

¹¹ *Idem*, *ibidem*, §53 .

¹² According to the interpretation that was made for the purposes of Article 15 of Brussels I.

that the mere fact that the website is accessible from the habitual residence of the consumer is not sufficient: it is necessary that this internet site solicits the conclusion of a distance contract, and that is actually concluded by the use of any means. Any means may involve sending letters, emails etc. We can read in the explanatory memorandum of the Rome I Regulation proposal that the rule is not intended to be limited to interactive sites, covering the cases of “a place that invites you to send an order by fax” as way to conclude a contract.¹³ Excluded from the scope of the rule will be the situations in which the site only promotes a product and the conclusion of the contract is subsequently made by a local agent.¹⁴

However, Recital 24 of the Regulation raised the question whether the rule only apply to distance contracts. In the decision *Daniela Mühlleitner v. Ahmad Yusufi and Wadat Yusufi*, the ECJ stated, about the rule with identical wording to Article 15, Section 1 (c) of the Brussels I Regulation, that the scope of that rule is not limited to distance contracts.¹⁵ According to the ECJ, the requirement of a distance contract between the professional and the consumer was weighted in the drafting of the Brussels I Regulation and was not accepted; moreover, the necessity of concluding the distance contract must be rejected because it precludes the purpose of protecting the weaker party - that underlies this rule.¹⁶ For the ECJ, the essential requirement for the application of Article 15, section 1 (c) of the Brussels I Regulation “is that relating to a commercial or professional activity directed to the State of the consumer’s domicile. In that respect, both the

¹³ EUROPEAN COMMISSION (2005) *Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)*. COM (650 final). p.7.

¹⁴ *Idem*, *ibidem*.

¹⁵ ECJ, *Daniela Mühlleitner v. Ahmad Yusufi and Wadat Yusufi*, C-190/11. Daniela Mühlleitner lived in Austria and searched the internet, on a German internet search engine, for a car for personal use. After choosing the specifications, the proposal of Ahmad Yusufi and Wadat Yusufi, car dealers, was sent through a company based in Germany. When Mühlleitner asked for more information about the vehicle through an international number available online, she was told that the car was no longer available, but the purchase of another car was proposed, and its features were sent over the internet. Daniela Mühlleitner went to Germany, where she concluded the purchase and sale of that car, paid the price and thus the car was delivered. Coming to Austria, she realized that the car had substantive defects and, as Ahmad Yusufi and Wadat Yusufi refused to repair the car, Daniela Mühlleitner requested the termination of the purchase and sale agreement and, as a consumer, she addressed the Austrian courts for this purpose, according to Article 15, section 1 (c) of the Brussels I Regulation. There was no doubt on the part of the Austrian courts that Daniela Mühlleitner was a consumer and Ahmad Yusufi and Wadat Yusufi directed their professional activities to Austria. The question asked was whether it would be a requirement of Article 15, section 1 (c) of the Brussels I Regulation that the contract was concluded at a distance.

¹⁶ *Idem*, *ibidem*, §40, §42.

establishment of contact at a distance, as in the present case, and the reservation of goods or services at a distance, or a fortiori the conclusion of a consumer contract at a distance, are indications that the contract is connected with such an activity.”¹⁷ The necessary coordination between the provisions of the Brussels I Regulation and the Rome I Regulation (referred to in Recital 7 of the Rome I Regulation) allows us to transpose into Article 6 of the Rome I Regulation the same teleological interpretation. The conclusion of a distance contract as a requirement of the application of that rule would restrict its scope, when the aim of the wording of Article 6 (and changes done in relation to Article 5 of the Rome Convention) was precisely the opposite: to broaden their scope in order to protect the consumer as weaker party.

Still regarding to this issue, the ECJ has also decided, in a case involving the client of a hotel as a consumer, that the delivery of the key and the payment in person does not preclude the application of the rule that protects the consumer “if the reservation was made and confirmed at a distance, so that the consumer became contractually bound at a distance.”¹⁸ The same applies if the website belongs to an intermediary company, not the trader, in which case the intermediary acts “for and on behalf of the trader.”¹⁹

The expression directing activities for the country of habitual residence of the consumer also poses doubts about what it should mean in an online context. Given the vague content of the concept directing activities for the country of habitual residence of the consumer, I think that it should be understood in a broad sense. On one hand, it matches the broad interpretation that was made to the concept of advertisement for the purposes of Article 5, Section 2 of the Rome Convention.²⁰ Moreover, the ECJ, regarding the same terminology used by Article 15, Section 1 (c) of Brussels I, has also decided on a broad interpretation due to the more

¹⁷ *Idem*, *ibidem*, §44.

¹⁸ ECJ, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v. Olivier Heller* (C-144/09), Joined Cases C-585/08 and C-144/09, 7.12.2010, ECR 2010, p. I-12527, §87.

¹⁹ *Idem*, *ibidem*, §89.

²⁰ With this opinion, v. GAGNO, F. (2009) *The Law Applicable to Consumer Contracts under the Rome I Regulation*. In FERRARI, F. & LEIBLÉ, S. (eds.). *Rome I Regulation, The Law Applicable to Contractual Obligations in Europe*. Munich: Sellier European Law Publishers. p.149; FERRARI, F. (2007) *L'applicabilità della disciplina internazionale privatistica relative ai contratti del consumatore (art. 5 Conv. Roma del 1980)*. *Obbligazioni e Contratti*. 8-9. p.691 *et seq*; MANKOWSKI, P. (2008) *Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge*. *Internationales Handelsrecht*. 4. p.142.

generic wording of the rule (compared to the previous one): “in order to ensure better consumer protection with regard to new media and development of electronic commerce.”²¹ Finally, it seems to be a way to expand the application of Article 6, increase the consumer protection and balance consumers’ position, because they are already penalized: in many situations, it will not be easy for them to prove that the contract they concluded was the result of an activity directed to their country of residence by a professional.

To determine what is an activity directed to a State, the ECJ in the decision *Peter Pammer and Hotel Alpenhof* considered it necessary to examine whether, prior to the conclusion of the contract, “it is apparent from those websites and the trader’s overall activity that the trader was envisaging doing business with consumers domiciled in one or more Member States, including the Member State of that consumer’s domicile, in the sense that it was minded to conclude a contract with them.”²² Thus, Article 6 is applicable if the site invites the conclusion of a contract through objective elements that should be analyzed in a case by case basis, and that can translate an activity directed to a State: if the site allows the conclusion of the contract online; if it has means of payment; if it has detailed information on the contract to be concluded, including the standard clauses of the contract; if it has information about consumer rights; if it has directions on how to conclude the distance contract by the consumer initiative or the itinerary for the consumer to go to another country to do so; and the domain name used, among others.²³ According to the ECJ²⁴, it may constitute further evidence: the international nature of activity; the reference to customers resident in other States; the indication of phone numbers with international prefixes; in order to facilitate access to the trader’s site or that of its intermediary by consumers domiciled in other Member States “outlay of expenditure on an internet referencing service;”²⁵ the “use of a top-level domain name other than that of the Member State in which the trader is

²¹ ECJ, *Renate Ilsinger v. Martin Dreschers*, acting as administrator in the insolvency of Schlank & Schick GmbH, Case C-180/06, 14.05.2009, ECR 2009, p. I-03961, §50.

²² ECJ, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v. Olivier Heller* (C-144/09), Joined Cases C-585/08 and C-144/09, §92.

²³ With more examples, CALIESS, G.-P. (ed) (2011) *Calliess Rome Regulations, Commentary on the European Rules of the Conflict of Laws*. The Netherlands: Wolters Kluwer. p.144-145.

²⁴ ECJ, *Peter Pammer v. Reederei Karl Schlüter GmbH & Co. KG* (C-585/08) and *Hotel Alpenhof GesmbH v. Olivier Heller* (C-144/09), Joined Cases C-585/08 and C-144/09, §93.

²⁵ *Idem*, *ibidem*.

established.”²⁶ These circumstances are to be assessed globally, but in this analysis the currency or language used are not relevant when they are equivalent to those used in the State where the trader carries on his activity (Recital 24). However, it may already be an indication of activity directed to another State, if the site allows consumers the use of another language and a different currency. So, according to the ECJ interpretation, for the application of the rule the intention of the professional (subjective factor) in contracting with consumers domiciled in other States is crucial, and is determined through signs which reflect objectively that intention. The enhancement of subjective factors in online cross-border disputes seems to be a trend of ECJ jurisprudence. In the *Wintersteiger* case, about the online infringement of an intellectual property right, the ECJ decided that the place of the event giving rise to the infringement of a trade mark was the place of the establishment of the tortfeasor because it was the place of the decision of the act of infringement and that was considered to be the decisive element.²⁷

Another issue that has been given attention by the ECJ was whether the fulfillment of the requirement laid down in Article 15, section 1 (c)²⁸, activity directed to the country of the consumer's residence, was dependent on the unwritten condition “that the consumer was induced to enter into the contract by the website operated by the trader and, consequently, that the internet site has a causal link with the conclusion of the contract.”²⁹ In the *Lokman Emrek* case, it was examined if the existence of a causal link between the means used to direct the professional activity to the country of the consumers habitual residence and the conclusion of the contract was required. First, the ECJ noted that the causal link is not expressly set in the rule.³⁰ Secondly, to add this new requirement would be contrary to the scope of the rule that is the consumer's protection. Adopting an argument put forward by the European Commission, the ECJ considered “that the requirement of prior consultation of the Internet site by the consumer could give rise to problems of proof, in particular in cases where the contract was not concluded at a distance through that site,”³¹ and this would make it

²⁶ *Idem*, *ibidem*.

²⁷ ECJ, *Wintersteiger AG v Products 4U Sondermaschinenbau GmbH*, Case C-523/10, 21.04.2012, ECR 2012, §37.

²⁸ Which corresponds to Article 17, Section 1 (c), of the Regulation Brussels I recast.

²⁹ ECJ, *Lokman Emrek v. Vlado Sabranovic*, Case C-218/12, 17/10/2013, ECR 2013, §18.

³⁰ *Idem*, *ibidem*, §21.

³¹ *Idem*, *ibidem*, §25.

difficult for consumers to resort to the courts of their habitual residence through this Article 15, lowering the protection of the consumer. However, it was decided that an existing causal link “may constitute strong evidence which may be taken into consideration by the national court when determining whether the activity is in fact directed to the Member State in which the consumer is domiciled.”³²

Besides the requirements indicated, certain types of consumer contracts are excluded from the application of Article 6, by its section 4. According to Section 4 (a), the contracts for the supply of services where the services are to be supplied to consumers exclusively in a country other than that in which they have habitual residence are excluded from the protection of Article 6. These will be governed by the general rules (Article 3 or Article 4 of the Rome I Regulation). In this regard and for contracts whose performance is conducted online, I sustain the interpretation that I have done in relation to Article 5, Section 4 (b) of the Rome Convention, because it seems more suitable for the purposes of that rule:³³ it must be considered that services are to be supplied in a country other than that in which the consumer has his or her habitual residence, when the consumer comes out physically from his or her country of habitual residence so that the services will be supplied. The reasons for this interpretation in the Rome I Regulation are the same as we have presented about the Rome Convention. The contracts for the supply of services performed online must a fortiori benefit from the protection of Article 6 of the Rome I Regulation. I believe that the consumer who contracts online is in a weaker position than the one that does not use any electronic means to contract, due to the simplicity of contracting inherent to the internet, the difficulty in locating the provider and the ease of manipulating one’s location, for example. So being, the question to be raised is on account of who should run the risk of contracting through the internet: on the account of the consumer (who does it occasionally) or on the account of the professional (who enjoys the benefits of using this technique of contracting and generally does so in a systematic

³² *Idem*, *ibidem*, §26. In this case, Sabranovic explored, in a French city located near the German border, a business selling second-hand motor vehicles and that had an internet site with phone numbers with German and French indicatives. Emrek, domiciled in Germany, was looking for a used car and was informed by the acquaintances about Sabranovic’s commercial activity (not by the internet). On December 13, 2010, Emrek concluded in Sabranovic’s establishment the written contract for the sale of a second-hand motor vehicle. Emrek bought an action against Mr Sabranovic, in Germany, under the warranty.

³³ GONÇALVES, A.S.S. (2103) *Evolução da regulamentação europeia dos contratos de consumo internacionais celebrados por via electrónica*. *Scientia Iuridica*. 331. pp.10 *et seq.*

way and hence draw economic benefits from this activity)? It seems to me that the risk of contracting and the greatest burden of e-commerce should run on the account of the trader. This is the basis of general consumer protection in international contracts, present in Article 6, and it seems to me that in those contracts executed online it must be safeguarded.

Still excluded, among others, are all the other types of contracts listed in Article 6, Section 4, like the contracts of carriage other than a contract relating to package travel (b)³⁴ or the contracts relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis, within the meaning of the Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts.³⁵

3.3 THE MECHANISMS TO PROTECT THE CONSUMER

The first mechanism for consumer protection under Article 6 of the Rome I Regulation lies in the law designated by the legislator as applicable to the contract in the absence of a choice-of-law agreement. In the absence of an *electio iuris*, to consumer contracts covered by Article 6 of the Rome I Regulation, the law of the country of the habitual residence of the consumer will be applicable. The option by law of consumer's habitual residence is justifiable under the goal of consumers' protection. It is assumed that the application of the law of the consumer's habitual residence is more advantageous to the consumer, because being a closer legal system, the consumer knows better or can more easily know the content of that law and with lower costs may establish which are the rights and obligations deriving from it (compared to the application of a foreign law). Note that, in this type of contract, the rule of Article 4 of the Rome I Regulation, which was conceived in order to obtain the application of the law that has a closer connection with the contract, is waived. The former Article 4 of the Rome Convention had a general clause of closest connection that would be

³⁴ Within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours.

³⁵ That under its Article 18 revoked the Directive 94/47/EC and also establishes that the references to provision of the revoked Directive shall be understood as references to the Directive 2008/122/EEC.

determined according to paragraphs 2, 3, and 4³⁶. The Rome I Regulation, for reasons of foreseeability, establishes the applicable law according to a particular type of contract.³⁷ To a contract for provision of services the law of the country will be applicable where the service provider has their habitual residence, which would correspond in a consumer contract to the law of the country of habitual residence of the professional [Article 4, Section 1 (b)]. The contracts for sale of goods shall be governed by the law of the country where the seller has their habitual residence [Article 4, Section 1 (b)], which would also correspond in a consumer contract to the law of the country of habitual residence of the professional. Where the contract cannot be classified as being one of the types listed, or if it is classified as several types, the contract should be governed by the law of the country where the party required to do the characteristic performance of the contract has their habitual residence (Article 4, Section 2). To determine the characteristic performance of a contract, it is necessary to assess what the provisions that characterize a particular type or category of contract are, in order to identify its center of gravity.³⁸ The characteristic performance will be the one by which the essential economic and social aim of a given contract is accomplished, being generally identified with the non pecuniary provision of the contract in onerous contracts. The application of Article 4 to consumer contracts would mean that this contract would be governed by the law of habitual residence of the professional (or of his or her central administration in cases of companies and other bodies, corporate or unincorporated, or the professional principal place of business if he or she is a natural person acting in the course of business activity, according to Article 19, Section 1). The option for the law of habitual residence of the consumer becomes more favorable to the consumer by the familiarity and simplicity in determining the content of that law. As stated in the report by

³⁶ For a better understanding of the Article 4 of the Rome Convention, v. GONÇALVES, A.S.S. (2013) *Da Responsabilidade Extracontratual em Direito Internacional Privado, A Mudança de Paradigma*. Coimbra: Almedina. p.166-169.

³⁷ About Article 4 of the Rome I Regulation, v. idem, ibidem, pp. 442-444.

³⁸ About the concept of characteristic obligation, v. D' OLIVEIRA, H.U.J. (1977) "Characteristic Obligation" in the Draft EEC Obligation Convention. *The American Journal of Comparative Law*. 25. p.304 *et seq*; GIULIANO, M. and LAGARDE, P. (1980) Report on the Convention to the law applicable to contractual obligations. *JO C*. 282. p.19; GONÇALVES, A.S.S (2013) *Da Responsabilidade Extracontratual em Direito Internacional Privado, A Mudança de Paradigma*. Coimbra:Almedina. p.167-168; SANTOS, A.M. (2004) A Convenção de Roma e as operações bancárias. *Estudos de Direito Internacional Privado e de Direito Público*. Coimbra: Almedina. p.237-238; SCHNITZER, A.F. (1968-I) Les contrats internationaux en droit international privé suisse. *RCADI*. 123, p. 571 *et seq*.

Giuliano and Lagarde, comparing to Article 4, in consumer contracts there is a “reversal of the connecting factor”³⁹ - the burden of resorting to international trade is transferred to the professionals, who have greater organization and experience, because they can convey to their customers the costs of information about the content of a foreign law.

The second mechanism for the protection of the consumer lies in the limitation of the general principle of freedom of choice. Article 6 allows the choice of law in consumer contracts, according to the requirements of the conflict-of-law rule of Article 3 of the Rome I Regulation, which is applied to contracts in general. However, the choice of law in a consumer contract has an important limitation: the chosen law cannot deprive the consumer of the protection that is given by the law of his or her habitual residence. So the provisions of the law of the consumer’s habitual residence will be applicable, and cannot be derogated from by agreement, if those provisions grant to consumers a higher protection than the provisions of the chosen law. In other words, Article 6, Section 2, establishes a minimum standard of protection in favor of the consumer that is given by the mandatory rules of the country of his or her habitual residence: between this law and the chosen law, the contract will be governed by the mandatory provisions which are more favorable to the consumer. Thus, it is not possible to negate the strength of the professional over the consumer in e-commerce because the former can, through pre-formulated standard contracts, impose a choice-of-law clause in favor of a legal system that promotes its own interests. In these pre-formulated standard contracts there is a mere consent (or not) to the contractual standard terms, without a real negotiation and without the possibility of the consumer influencing the terms of the contract. Pre-formulated standard contracts in consumer contracts in e-commerce being frequent, the consumer is only left with the option to conclude the contract or not. Given this situation, Article 6, Section 2, gives the consumer the assurance of the protection provided by the law of his or her habitual residence.

4. CONCLUSIONS

The evolution of the regulation of international consumer contracts in the European Union was determined by the need to adapt the conflict-of-law

³⁹ GIULIANO, M. and LAGARDE, P. (1980) Report on the Convention to the law applicable to contractual obligations. *JO C*. 282. p.23.

rule applicable to the demands of e-commerce. With this aim, Article 5 of the Rome Convention, which was thought to protect the consumer as a weaker part within the contract, was reviewed according to the wording of Article 15 of the Brussels I Regulation.

The Rome I Regulation maintains the protection of consumers in international contracts given by the law of their habitual residence, even in situations of choice-of-law agreements. However, Article 6 determines the types of consumer contracts that are covered by its protection, by setting up new conditions for its easier application to online cross-border contracts. Nevertheless, the legal provision in question is not free from complications in its application to electronic commerce.

The legal framework established by the Rome I Regulation, which aims for the protection of the consumer in international consumer contracts, is completed by a group of European Union directives that, through substantive rules, establishes a minimum degree of protection for consumers within the Union.

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