

Consumer contracts concluded via Internet in European Union Private International Law

Visão do Direito Internacional Privado Europeu sobre os contratos de consume concluído via Internet

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Abstract

The article covers the analysis of the applicable law to consumer contracts concluded via Internet from the perspective of European Union Law. After the introduction to the topic the notions of European Union Private International Law and consumer contracts are explained. The core of the article is the analysis of the uniform European Union applicable law provisions in cases arising out of consumer contracts concluded via Internet. In this part, first the article covers the problem of the law applicable to consumer contracts concluded via Internet on the basis of conflict of law rules. In the second part, the article discusses the choice of law concerning such consumer contracts. The last part of the article consists of the conclusions.

Keywords: consumer contracts; European Union; International Private Law; Applicable law; Choice of Law.

Resumo

O presente artigo analisa a aplicabilidade do direito aos contratos de consumo concluídos pela internet sob a perspectiva do direito da União Europeia. Inicia-se introduzindo noções sobre o direito internacional privado europeu e os contratos de consumo. Procura-se destacar como ponto central a análise sobre a uniformização do direito europeu no que diz respeito ao assunto. Nesta parte, destaca-se que pode ocorrer um conflito entre regras jurídicas, levando a discussão sobre qual deve ser a escolha do direito aplicável no caso dos contratos de consumo.

Palavras-chave: Contratos de consumo; União Europeia; Direito internacional privado; Aplicação do direito; escolha jurídica.

1 Introduction

New technologies are nowadays more and more often used to conduct business. Among them the most important channel of distribution of goods and services is Internet. New technologies¹ cause that the borders of the countries create less obstacles to taking part in the global economy. Such new technologies as Internet allow people or legal entities from different countries to conclude contracts all over the world. Such contracts concern not only global business companies. Also consumer contracts in which parties are professionals and consumers (non- professionals) are concluded via Internet. The most important feature of such contracts is that parties are separated by distance and often they are located in different countries. The latter one raises the question of law applicable to such contracts. In European Union the provisions concerning the applicable law for such contracts were unified by Rome I Regulation² and this article covers the analysis of this matter³.

2 Notions of European Union Private International Law and Consumer Contract

2.1 Notion of European Union Private International Law

In order to answer the question what is European Union Private International Law one should start from the notion of Private International Law (*direito internacional privado, droit international privé, internationales Privatrecht*). The latter one is a branch of law which norms (conflict of law rules) indicate the country of which material law applies to the particular case⁴. This branch of law covers the problems that arise from the application of provisions of private law with different content in particular

- 1 See about new technologies in consumer arbitration in RYSZKOWSKI, Karol. New technologies in the Polish commercial arbitration. In EKONOMIKA, Právo obchod. Zborník vedeckých prác. SUCHOŽA, Jozef; HUSÁR, Ján; HUČKOVÁ, Regina.ed. Košice: Univerzita Pavla Jozefa Šafárika Vydavateľstvo Šafárik Press, 2020. p. 250.
- 2 UNIÃO EUROPEIA. (2008) *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations*. Bruxelas. p. 6–16. Disponível em: <http://data.europa.eu/eli/reg/2008/593/oj>. Acesso em: 26 nov. 2021.
- 3 The analysed provisions of Rome I Regulation apply, if any court of European Union Member State has the jurisdiction in dispute concerning consumer contract. The Rome I Regulation apply to contracts concluded on and after 17th December 2009 (about the date of application of Rome I Regulation see: PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 27.
- 4 This is a concept of a Polish professor Andrzej Mączyński and it was presented in: CZEPELAK, Marcin. *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*. Warszawa: Wolters Kluwer Polska, 2008. p. 42.

countries. Because of the diverse content of these provisions in different countries arises a problem which law should be applied as the basis for resolving the particular case. The conflict of law rule of private international law indicates the law on the basis of which a given case should be judged. In this way, the conflict of law rule delimits the scope of application of substantive laws that are in force in different countries⁵. Such problems arise in cases with “international element”⁶. The abovementioned understanding of private international law is the “narrow” meaning of this concept⁷. However, there is also a “broad” understanding of private international law according to which this branch of law includes also jurisdictional norms and norms regarding recognition and enforcement of judgments⁸. The latter, due to the scope of the study in this article, have been left outside of the analysis.

Those private international law provisions that are enacted by the European Union are called European Union Private International Law. European Union is the international organisation that now has 27 Member States⁹. The private international law in “narrow meaning” is partly unified in the European Union. From the Treaty of Amsterdam of 1999¹⁰ the European Union has the competence to regulate among

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- 5 PRZYBYŁOWSKI, Kazimierz. *Zagadnienie definicji prawa prywatnego międzynarodowego*. Komunikat: Sprawozdania Wrocławskiego Towarzystwa Naukowego, 13A, 1958. p. 71.
- 6 From Polish point of view the Private International Law for its application does not need the existence of the so called ‘foreign element’. The foreign element is only the so called ‘alarm bell’, which reminds the judge about the necessity of application of the conflict of law rule. However the existence of ‘the foreign element’ is not the premise of application of conflict of law rule. (See, PRZYBYŁOWSKI, Kazimierz. *Prawo prywatne międzynarodowe. Część ogólna*. Lwów: Gubrynowicz 1935. p. 3. TRAMMER, Henryk. *Zasięg obowiązywania prawa prywatnego międzynarodowego*. Państwo i Prawo, 1966. p. 868-872. MOSTOWIK, Piotr. *Bezpodstawne wzbogacenie w prawie prywatnym międzynarodowym*. Warszawa: Lexis Nexis, 2006. p. 11-12. JURYK, Anna. *Alimenty w prawie prywatnym międzynarodowym*. Warszawa: Lexis Nexis, 2012. p. 18. PAZDAN, Maksymilian. *Prawo prywatne międzynarodowe. System Prawa Prywatnego, private international law. The system of private law*, v. 20A, p. 17-18, 2015.
- 7 This “narrow” meaning of private international law is applied in Germany, Poland. (See about RÜHL, Giesela. Germany. *In Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 2. Cheltenham, Northampton: Edward Elgar Publishing, 2017. p. 1380.
- 8 This ‘broad’ meaning of private international law-also including the law of nationality and citizenship and law of the aliens -is applied in France, Belgium, Italy. (See, RÜHL, Giesela. *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 2. Cheltenham, Northampton: Edward Elgar Publishing, 2017. p. 1380-1381.) In the book concerning private international law in Brazil the title “Private International Law in Brazil” is used for the content concerning also jurisdiction and recognition and enforcement of foreign judgments. (See, DOLINGER, Jacob. *Private International Law in Brazil*. Alphen aan den Rijn: Wolters Kluwer 2012. passim).
- 9 Great Britain left the European Union on 31st January 2020.
- 10 Treaty of Amsterdam amending the UNIÃO EUROPEIA. (1997) *Treaty on European Union, the Treaties establishing the European Communities and certain related acts*. Bruxelas. Disponível em:

others this branch of law. EU Regulations have the priority to national laws of Member States and are applied directly. European Union uses such instrument as EU Regulation to introduce conflict of law rules¹¹. In the field of “narrow” private international law (only applicable law provisions) the European Union introduces the provisions that have the universal scope of application¹². This means that the EU conflict of law rules apply not only to cases that concern law of the EU Member States but also to the cases concerning the conflict of laws with the third countries¹³.

European Union unified the private international law (conflict of laws) in scope of most contractual obligations (Rome I Regulation) and non-contractual obligations¹⁴, maintenance obligations¹⁵ and successions¹⁶. Of course some Member States may have former commitments to third states arising from international agreements (usually bilateral international agreements) that have priority to EU Regulations in relations

<http://data.europa.eu/eli/treaty/ams/sign>. Acesso em 26 nov. 2021. p. 1-144. further: ‘Treaty of Amsterdam’.

- 11 Sometimes it happens that the EU Regulation indicates the international agreement which has to be applied on the basis of EU Regulation in EU Member States (UNIÃO EUROPEIA. (2009) *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*. Bruxelas. Disponível em: [http://data.europa.eu/eli/reg/2009/4\(1\)/oj](http://data.europa.eu/eli/reg/2009/4(1)/oj). Acesso em: 26 nov. 2021. p. 1–79 .further: ‘Maintenance Regulation’ in Art. 15 indicates that the law applicable to maintenance obligations shall be determined in accordance with the Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations.).
- 12 E.g. Art. 2 Rome I ‘Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.’ Private International Law in ‘broad sense’ has different scope of application. UNIÃO EUROPEIA. (2012) *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*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2012/1215/oj>. Acesso em: 26 nov. 2021. p. 1–32 . further: ‘Brussels I Recast Regulation’ as a rule applies when the defendant has the seat or domicile in the EU countries – Art. 4. Exceptions to this rule are mentioned in Art. 6 (1) Brussels I Recast Regulation: Art. 18(1), Art. 21(2), Art. 24 and 25 of Brussels I Recast Regulation.
- 13 There is no clear notion of ‘private international law’ in provisions of European Union. (See, RÜHL, Giesela. *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed.. v. 2. Cheltenham, Northampton: Edward Elgar Publishing, 2017. p. 1381.
- 14 UNIÃO EUROPEIA.(2007) *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2007/864/oj>, further: ‘Rome II Regulation’. Acesso em: 26 nov. 2021. p. 40–49.
- 15 Hague Protocol of 23 November 2007 on the law applicable to maintenance obligations which is referred to by Art. 15 of Maintenance Regulation.
- 16 UNIÃO EUROPEIA. *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2012/650/oj>. Acesso em: 26 nov. 2021. p. 107–134. further: ‘Succession Regulation’.

to such third state. Moreover in the counties of European Union that accepted the enhanced cooperation also occurs the unification in the subject matter of the law applicable to divorces and separations¹⁷ and property relations between spouses and partners¹⁸. Additionally, in national laws of EU Member States there are national legal acts (usually statutes) that complement such areas of private international law that are not covered by conflict of law rules regulated in EU private international law¹⁹. Moreover some EU Member State's legislators broaden the scope of EU Regulations to the situations not covered in such legal acts but such broadening has to be respected only by the courts of such Member State²⁰. The subject matter of this article – the law applicable to consumer contracts concluded via Internet - is entirely unified in European Union by Rome I Regulation.

- 17 Enhanced cooperation in the area of the law applicable to divorce and legal separation concerns the following EU Member states: Austria, Belgium, Bulgaria, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, Portugal, Romania, Slovenia and Spain. If the court of those states rules the case concerning divorce in order to find the applicable law applies UNIÃO EUROPEIA. (2010) *Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2010/1259/oj>. Acesso em: 26 nov. 2021. p. 10–16.
- 18 Enhanced cooperation in the area of law applicable to matrimonial property regimes and the property consequences of registered partnerships concern the following Member States: Austria, Belgium, Bulgaria, Croatia, Cyprus, Czech Republic, Finland, France, Germany, Greece, Italy, Luxembourg, Malta, Netherlands, Portugal, Slovenia, Spain and Sweden. If the court of those states rules the case concerning matrimonial property in order to find the law applies UNIÃO EUROPEIA. (2016) *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2016/1103/oj>. Acesso em: 26 nov. 2021. p. 1–29. If the court of those states rules the case concerning registered partnership's property in order to find the law applies UNIÃO EUROPEIA. (2016) *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2016/1104/oj>. Acesso em: 26 nov. 2021. p. 30–56.
- 19 E.g. in Poland – Act on Private International Law dated 4th February 2011, Journal of Laws of the Republic of Poland of 15 April 2011 (No 80, item 432) (see translation into English of ZACHARIASIEWICZ, Maciej. In: *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 4. Cheltenham, Northampton: Edward Elgar Publishing, 2017. p. 3621-3633 or in Germany –Introductory Act to the Civil Code of 18 August 1896 in version promulgated on 21 September 1994, Federal Law Gazette I p. 2494, last amended by Article 17 of the Act of 20 November 2015, Federal Law Gazette I p. 2010 (see translation into English of MÖRSDORF-SCHULTE, JULIANA. In: *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 4. Cheltenham, Northampton: Edward Elgar Publishing, 2017. p. 3226-3236.
- 20 E.g. in Poland the application of Rome I Regulation was broadened in Art. 28 (2) Act on Private International Law dated 4th February 2011 to the contractual obligations that under Art. 1(2)(j) are excluded from the scope of Rome I Regulation.

2.2 Notion of Consumer Contract

The notion of consumer contract (*contrato de consumidor, contrat de consommation, Verbrauchervertrag*) may vary from one country to another. In some countries (like France) consumer contracts concerns also contracts with small entrepreneurs. On the other side in Poland consumer accordingly to Art. 22 (2) of Polish Civil Code²¹ is treated as a natural person that concludes the contract outside of its scope of business of profession. Therefore the notion of consumer contract (and consumer itself) should not be interpreted only by referring to substantive law of the EU Member State²².

In EU private international law there is the definition of consumer contract in Art. 6(1) Rome I²³. According to Art. 6(1) Rome I it is '[...] a contract concluded by a natural person 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) [...]'. This definition should be applied in order to decide if a particular contract is treated as the consumer contract for the purpose of finding the applicable law. Also Brussels I Recast Regulation²⁴ has the consumer contract definition²⁵ which corresponds to the notion from Art. 6(1) Rome I. The judgments of European Court of Justice (ECJ) concerning Brussels I Recast Regulation and its predecessors²⁶ can be used for interpretation of Art. 6 (1) Rome I according to recital 7 of Rome I Regulation.

21 Polish Civil Code dated 23rd April 1964, unified version Journal of Laws of the Republic of Poland of 2020 item 1740.

22 See JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 663-666. JAGIELSKA, Monika. In: *Prawo prywatne międzynarodowe. System Prawa Prywatnego, Private international law. The system of private law*. v. 20B, p. 280-282, 2015.

23 See more about the notion of 'consumer contract' in Private International Law in WILDERSPIN, Michael. In: *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 1. Cheltenham, Northampton: Edward Elgar Publishing, 2017. p. 464-472.

24 UNIÃO EUROPEIA. (2012) *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*. Bruxelas. p. 1-32. Disponível em: <http://data.europa.eu/eli/reg/2012/1215/oj>. Acesso em: 26 nov. 2021. further: 'Brussels I Recast Regulation'.

25 Section 4 of Brussels I Recast Regulation 'Jurisdiction over consumer contracts' (Art. 17- 19) concerns consumer contracts. In French language version „Compétence en matière de contrats conclus par les consommateurs” and in German language version „Zuständigkeit bei Verbrauchersachen”. Those language versions are not entirely equivalent.

26 The predecessors of Brussels I Recast Regulation are 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters, Consolidated version CF 498Y0126(01), OJ L 299, 31.12.1972, p. 32-42, further: 'Brussels Convention' which was replaced by UNIÃO EUROPEIA. (2000). *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2001/44/oj>. Acesso em: 26 nov. 2021. p. 1-23.

On the basis of Art. 6(1) Rome I consumer may only be a natural person²⁷. But it is not enough to ascertain that one of the parties of the contract is a natural person to assume that this is a consumer contract²⁸. Such natural person should conclude a contract ‘for the purpose of satisfying an individual’s own needs in terms of private consumption’²⁹. It is important to make the reference ‘to the position of the person concerned in a particular contract’³⁰. Surely this definition does not include contracts concluded in professional trading (between professionals (B2B)) or in general trading (between non-professionals)³¹. But there are also so called “mixed” contracts for which it is difficult to assess if they are consumer contracts or professional ones as they include both private and business purpose³². Such contracts are as a rule treated as non-consumer contracts unless the business purpose plays only a negligible role³³. However, if there are several contracts concluded between a natural person and a professional it is necessary to assess the purpose of each contract separately³⁴.

27 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 253.

28 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 253.

29 Cit. Judgment of the Court (Sixth Chamber) of 3 July 1997, Francesco Benincasa v Dentalkit Srl, Case C-269/95, European Court Reports 1997 I-03767, ECLI identifier: ECLI:EU:C:1997:337, at 17. This judgment concerned the term ‘consumer’ in Art. 13(1) of Brussels Convention but the considerations about the notion of consumer apply also to Art. 6(1) Rome I. See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 253.

30 Cit. Judgment of the Court (Sixth Chamber) of 3 July 1997, Francesco Benincasa v Dentalkit Srl, Case C-269/95, European Court Reports 1997 I-03767, ECLI identifier: ECLI:EU:C:1997:337, at 16.

31 See more JAGIELSKA, Monika. In: *Prawo prywatne międzynarodowe. System Prawa Prywatnego*, Private international law. The system of private law, v. 20 B, p. 280-282, 2015. Compare, GNELA, Bogusława. *Prawo prywatne międzynarodowe. Komentarz*. POZOBUT, Jerzy. ed. Warszawa: Wolters Kluwer, 2017. p. 525-527. Example of contract between two non-professionals is the *Fineschi v Bouchired* Cour d’appel, Rouen, 1 September 2005.

32 E.g. the case where farmer bought roof tiles and some of them used for his house and some for his farm buildings (Judgment of the Court (Second Chamber) of 20 January 2005 *Johann Gruber v Bay Wa AG*, Case C-464/01., European Court Reports 2005 I-00439, ECLI identifier: ECLI:EU:C:2005:32, further: ‘Case Gruber’. See other examples in PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 253.

33 *Case Gruber*, at 54; Similarly the ECJ stated that only in case if ‘[...] in the light of the context of the transaction, regarded as a whole, for which the contract has been concluded, that contract has such a tenuous link to that professional activity that it appears clear that the contract is essentially for private purposes’ there is a consumer contract. See Judgment of the Court (Second Chamber) of 14 February 2019, *Anica Milivojević v Raiffeisenbank St. Stefan-Jagerberg-Wolfsberg eGen*. Case C-630/17, ECLI identifier: ECLI:EU:C:2019:123, at 94.

34 E.g. in case Judgment of the Court (Third Chamber) of 25 January 2018, *Maximilian Schrems v Facebook Ireland Limited*, Case C-498/16, ECLI identifier: ECLI:EU:C:2018:37, at. 36.

Definition from Art. 6 (1) Rome I does not specify what kind of contracts, concluded by the professional³⁵ with the consumer it concerns³⁶. Some contracts are however expressly excluded from the material scope of Art. 6 Rome I in Art. 6(4) Rome I. First of all ‘consumer contract’ is not ‘a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence’ (Art. 6(4)(a) Rome I). Supply of services requires active conduct or activity of the part of provider³⁷. A good example of contract that is not regarded as consumer contract according to Art. 6(4)(a) Rome I is the hotel accommodation³⁸.

The second exclusion concerns ‘a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours’ (Art. 6(4)(b) Rome I). Therefore a contract of carriage of persons and of goods as a rule is not a consumer contract and should be examined according to Art. 5 Rome I. Such relation is also emphasised in recital 32 of Rome I Regulation. However there are also exceptions to this rule which concern contracts of ‘package travel’, ‘package holidays’ and ‘package tours’³⁹, which means that ‘all packages’ fall within the scope of Art. 6(1) and (2) Rome I.⁴⁰

35 For the notion of the professional see: PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 258-260.

36 In 1980 Rome Convention on the law applicable to contractual obligations (consolidated version), OJ C 27, 26.1.1998, p. 34–53, further: ‘Rome Convention’ that is the predecessor of Rome I Regulation in Art. 5 (1) consumer contracts were only contracts that the object of which is the supply of goods or services to a consumer and contracts for the provision of credit for that object.

37 Granting a license or a loan of the money is not a service. See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 262. On the other hand a contract relating to the storage of goods is a service (See Order of the Court (Tenth Chamber) of 14 November 2013, Krejci Lager & Umschlagbetriebs GmbH v Olbrich Transport und Logistik GmbH., Case C-469/12, ECLI identifier: ECLI:EU:C:2013:788, at 30.

38 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 261, 263.

39 E.g. a voyage by freighter is a contract of transport which, for an inclusive price, provides for a combination of travel and accommodation and that the voyage is for a period of more than 24 hours fulfils the necessary conditions for a ‘package’. Judgment of the Court (Grand Chamber) of 7 December 2010. Peter Pammer v Reederei Karl Schlüter GmbH & Co. KG (C-585/08) and Hotel Alpenhof GesmbH v Oliver Heller (C-144/09). Joined cases C-585/08 and C-144/09., European Court Reports 2010 I-12527, ECLI identifier: ECLI:EU:C:2010:740, further: ‘Case Pammer and Hotel Alpenhof’, at 45-46.

40 For this interpretation: PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 264. See also about an interpretation problems of ‘package’ in Directive (EU) 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and linked travel arrangements, amending Regulation (EC) No 2006/2004 and Directive 2011/83/EU of the European Parliament and of the Council and repealing Council Directive 90/314/EEC, OJ L 326, 11.12.2015, p. 1–33 in PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 264.

The third exception concerns ‘a contract 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 Directive 94/47/EC’ (Art. 6(4)(c) Rome I). This exception is emphasised in recital 27 of Rome I Regulation. This exception is not to be analysed further as usually contracts concluded via Internet do not concern rights in rem in immovable property or a tenancy⁴¹. Also timesharing which is in scope of a consumer contract definition usually is not concluded via Internet as it is necessary to satisfy a written form⁴² requirements or similar⁴³.

The fourth exception concerns ‘rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service’ (Art. 6(4)(d) Rome I) and ‘a contract concluded within the type of system falling within the scope of Article 4(1)(h)’ (Art. 6(4)(e) Rome I)⁴⁴. However the financial services itself are in the scope of the consumer contracts as defined in Art. 6(1) Rome I. The examples of such financial services are mentioned in recital 26 of the Rome I Regulation⁴⁵.

The last exception concerns the contract of insurance (Art. 7 Rome I) which as a rule is not treated as a consumer contract. Such relation is emphasised in recital 32 of

41 However the sale of land is not covered by Art. 6(4)(c) Rome I. (PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 265). The same applies to the loan of the money to buy an immovable but already if there is a mortgage to secure the loan the mortgage itself is a contract relating to a right in rem. (See MANKOWSKI, Peter. *Consumer Contracts under Article 6 of the Rome I Regulation in Le nouveau règlement européen “Rome I” relatif à la loi applicable aux obligations contractuelles: actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne*. BONOMI, Andrea; RITAINE Eleanor Cashin. ed. Geneve, Zurich, Bale: Schulthess 2008. p. 149).

42 The law applicable to form of consumer contract is always the law of habitual residence of the consumer according to Art. 11(4) Rome I.

43 Art. 5 (1) of UNIÃO EUROPEIA. (2008). *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*. Bruxelas. Disponível em: <http://data.europa.eu/eli/dir/2008/122/oj>. Acesso em: 26 nov. 2021. EU directives for their binding force in relation to individuals have to be implemented to national laws of Member States.

44 See examples in PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 267-268.

45 According to recital 26 of Rome I Regulation financial services are ‘as investment services and activities and ancillary services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS)’.

Rome I Regulation. There is also exceptions to this rule which is the insurance contract relating to mass risks situated outside the territory of a Member State⁴⁶.

After mentioning the exceptions to the definition of a consumer contract in the meaning of Art. 6(1) Rome I it is time to list the most important examples of what is the consumer contract for the purposes of applicable law. Among the consumer contracts that are most often concluded via Internet is the contract for the sale of goods (e-commerce), if one party is professional and the other - consumer. Another example is the contract for the supply of services⁴⁷ such as the contract for electronic communication services (e.g. e-mail). In such a case if a contract is concluded by natural person with the professional for the purpose of private consumption, it is the consumer contract in the sense of Art. 6(1) Rome I. But if over a time such e-mail is being used for professional purposes the contract may be treated as losing the feature of consumer one⁴⁸. However as a rule the law applicable to a contract is stated at the moment of conclusion of the contract and if then this contract was for the private consumption purposes and needs, so it should be as a rule treated as consumer contract⁴⁹. Another example of the contract for the supply of services is the contract for marriage brokering services⁵⁰.

Also the example of the contract for supply of services concluded via Internet is a financial service contract between a natural person and professional. This interpretation is in line with recital 26 of Rome I Regulation which mentions services provided by a professional to a consumer, as referred to in sections A and B of Annex I to Directive 2004/39/EC, and contracts for the sale of units in collective investment undertakings, whether or not covered by Council Directive 85/611/EEC of 20 December 1985 on the coordination of laws, regulations and administrative provisions relating to undertakings for collective investment in transferable securities (UCITS). Those should be the contracts where the investment by a natural person of personal property in hope to get income or capital growth is a private consumption need⁵¹.

46 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 312.

47 Apart from those excluded in Art. 6(4)(a) Rome I.

48 See about 'dynamic' approach in PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 257-258.

49 See, PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 258; CALLIESS, Graf-Peter. In: *Rome Regulations* CALLIESS, Graf-Peter. ed. Alphen aan den Rijn: Wolters Kluwer, 2015. p. 172.

50 *Plinert v Philippen* Cour de cassation Chambre Civile I, 12 July 2005 Bulletin Civil 2005 I No 322 p. 287.

51 See judgment *Ang v Reliantco Investments* [2019] EWHC 879 (Comm). Differently *Polimedes Protodikeio Athens*, reported [2003] I.L.Pr 29. See other judgments concerning financial services contracts in PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 254-255.

Next example is a contract for the loan of money for the purpose of building works in consumer's home⁵².

Other type of consumer contracts concluded via Internet are the contracts of package travel. They are not treated as the contracts of carriage. The same applies to contract for the rental of the car which is supposed to be driven in another country⁵³.

3 Law applicable on the basis of conflict of law rules

3.1 The law of the country of the consumer's habitual residence

If the parties of the consumer contract – as defined above- do not conclude a choice of law (see point 4), the law applicable to such contracts is indicated by the conflict of law rule expressed in Art. 6 (1) Rome I. Pursuant to this rule the applicable law is 'the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) 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' (Article 6 (1) Rome I). This rule is also emphasised in recital 25 of Rome I Regulation.

The condition for the application of the law of the consumer's habitual residence is - apart from the fact that the parties have not chosen the other law – either the pursuit of the commercial or professional activities of the professional in the country where the consumer has his habitual residence or directing this activity to that country or to several countries including that country and the particular contract has to fall within the scope of such activities⁵⁴. The purpose of introducing this requirement is to ensure predictability of the applicable law for the professional. In other words, the entrepreneur should not be surprised by the law applicable to the consumer contract⁵⁵. While the criterion of conducting business (pursuing the commercial or professional activity) in a given country should not raise special doubts⁵⁶ (it is indicated, for

52 *Commerzbank AG v Knopf* Cour d'appel Metz, 16 January 2007.

53 *Gondallier de Tugny v Hertz Alisa Car Rental* Cour d'appel Paris 29 April 2003

54 The contract should fall within the scope of business activity that is directed. (See MANKOWSKI, Peter. *Consumer Contracts under Article 6 of the Rome I Regulation in Le nouveau règlement européen "Rome I" relatif à la loi applicable aux obligations contractuelles : actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne*. BONOMI, Andrea; RITAINE Eleanor Cashin. ed. Geneve, Zurich, Bale: Schulthess, 2008.p. 136).

55 See JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian Pazdan.ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 668.

56 See also PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 269.

example, by having a seat or a branch in a given country)⁵⁷. The requirement of directing such activity requires some explanation.

3.2 Commercial or professional activities – directed to the country of the consumer’s habitual residence

The notion of ‘directing’ commercial or professional activities is essential to define for consumer contracts concluded via Internet which most fall into the scope of Art. 6(1)(b) Rome I in case if there was no choice of law. This notion is not defined in Rome I Regulation. Some indications of the understanding of the notion of ‘directing’ can be found in recital 24 of preamble of Rome I Regulation⁵⁸. According to this recital ‘[...] concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Regulation (EC) No 44/2001 and this Regulation⁵⁹ [...] it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities’. It also state further that ‘the mere fact that an Internet site is accessible is not sufficient for Article 15⁶⁰ to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.’ It seems that Art. 6(1)(b) Rome I covers such consumer contracts that the professional makes itself known to consumers in a particular country by internet websites or television broadcasts, but does not have a presence in that country nor contacts consumers directly via telephone calls or e-mail nor distributes paper advertising⁶¹.

In case of consumer contracts concluded via Internet there arises the question if for application of the law of habitual residence of the consumer it is enough that the site of the professional is accessible in the country of habitual residence of consumer or among other countries in that one⁶². The ECJ correctly gave negative answer for that question. In case Pammer and Hotel Alpenhof ECJ stated that the commercial or professional activities should be directed to the country of consumer’s habitual residence. Only accessibility of the activity (e.g. accessibility of website, language of website, domain) is not enough to apply the law of the habitual residence of the consumer.

57 Compare, JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 668.

58 Motives of the preamble of EU Regulations do not have such a legal binding force.

59 Now, Brussels I Recast Regulation.

60 Art. 15(1)(c) Brussels I Regulation, now it is Art. 17(1)(c) of Brussels I Recast Regulation.

61 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 269.

62 See CALLIESS, Graf-Peter. *Rome Regulations*. 2. ed. Alphen aan den Rijn: Wolters Kluwer, 2015. p. 145.

However professionals in order to protect themselves from application of Art. 6(1)(b) Rome I started to include on their websites a disclaimer⁶³ that the goods or services mentioned on their website are not directed to consumers having habitual residence in particular countries. Nevertheless some of those professionals accepted orders from such countries. Therefore the national jurisprudence of EU Member States stated that only if business practice of the professional confirms the website disclaimer Art. 6(1)(b) Rome I does not apply⁶⁴.

In cases *Pammer and Hotel Alpenhof* ECJ states that in order to determine whether a given entrepreneur is directing his activities in the territory of a given country, it is necessary to examine both the factual circumstances of concluding the contract under assessment and the organization of the entrepreneur's activities before concluding the contract⁶⁵. The aim of the analysis is to find out whether the entrepreneur has expressed the will to conclude a contract with a consumer from a given country⁶⁶. Important factors of expressing such a will are the following: listing a given country among those in which the entrepreneur offers his goods or services; concluding a contract with a web browser operator so that consumers from that country can see the entrepreneur's website among the search results⁶⁷. In addition, the directing is indicated by the provision of an international telephone area code; the use of neutral domains such as ".com", ".eu" or the use of a different Internet domain than the domain of the state of the entrepreneur's seat (eg. domain ".de" for German consumers although the seat is in Luxembourg); presentation of the opinions of consumers from various countries; providing routes from another country (or different countries) to the country of professional seat⁶⁸. Also using the language and currency of a given country is a factor that should be taken into account in the context of the contract.⁶⁹ In addition, if the website belongs to an intermediary whose services are

63 See about the disclaimer PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 275.

64 See a judgment of Bundesgerichtshof of 30 March 2006, JZ 2006, 1187.

65 See JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 670. JAGIELSKA, Monika. *Prawo prywatne międzynarodowe. System Prawa Prywatnego*, Private international law. The system of private law, v. 20 B, p. 285-290, 2015.

66 See, JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 668, 669.

67 See JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 669.

68 JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 669, 670; Case *Pammer and Hotel Alpenhof*, at 83.

69 For example an English version of Polish professional website would not evidentially prove that this website is directed to UK. But the English professional website with the Polish language version of its website and additionally with the Polish 'ZLOTY' currency would give strong suggestions that the site is directed to Polish customers (See similar examples in PLENDER, Richard; WILDERSPIN, Michael.

used by the entrepreneur, this does not preclude the statement that the entrepreneur directs his activities to that country⁷⁰. It is also important to notice that there should be a causal link between ‘directing’ of the business activity into the country of consumer’s domicile and concluding the contract⁷¹.

However if the professional did not pursue his commercial or professional activities in the country of consumer’s habitual residence or did not direct it to that country, and the parties concluded a contract (e.g. a sale contract), it is assumed that such a contract is not treated a consumer contract from EU private international law perspective. In the case of such contracts, the application of Art. 6 sec. 1 Rome I is excluded, and the applicable law is indicated, in principle, by the conflict of law rule expressed in Art. 4 (1) or (2) Rome I as the law of the habitual residence of the party required to effect the characteristic performance of the contract (e.g. the seller’s habitual residence in case of the sale contract – Art. 4(1)(a) Rome I)⁷². Such agreements are not to be discussed due to the scope of this study.

3.3 Consumer’s habitual residence

The law that is the closest to consumer and consequently, the law best known to him and at the most serving to protect him is supposed to be the law of the consumer’s habitual residence⁷³.

The law of the country where the consumer has his habitual residence is the connecting factor that indicates the applicable law for consumer contracts concluded via Internet. Therefore the notion of ‘the consumer’s habitual residence’ should be explained. The concept of habitual residence of natural persons not acting in the course of business activity, which is the case in consumer contract, is not defined in Rome I Regulation⁷⁴. This notion is not unified in EU private international law. The habitual residence is the centre of a person’s life (*life centre, centre de vie, Daseinmittelpunkt*). However comparing to domicile the habitual residence requires only an intention to

The European Private International Law of Obligations. London: Thomson Reuters, 2020. p. 273). See also JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. ed. Maksymilian Pazdan. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 669, 670. Case Pammer and Hotel Alpenhof, at 84.

70 See JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 670.

71 See PLENDER, 2020, p. 277. Differently on the case concerning Art. 15(1)(c) Brussels I Regulation, Judgment of the Court (Third Chamber), 17 October 2013, Lokman Emrek v Vlado Sabranovic, Case C-218/12, ECLI identifier: ECLI:EU:C:2013:666, at. 21-25.

72 In addition, it is possible to designate another applicable law on the basis of Art. 4(3) or Art.(4) Rome I.

73 See, GNELA, Bogusława. *Prawo prywatne międzynarodowe. Komentarz*. POCZOBUT, Jerzy. ed. Warszawa: Wolters Kluwer, 2017. p. 523.

74 The definition of habitual residence from Art. 19 of Rome I applies only to legal persons, incomplete legal persons or the natural persons acting in the course of his business activity.

continue to reside in a particular country⁷⁵. In order to establish the place of habitual residence, it is necessary apart for the intention to stay permanently in that country, to be physically present there. The intention is understood objectively, i.e. based on the actual state of affairs, the behavior of a person is assessed in terms of whether his personal, social and professional life is focused in a given country⁷⁶. Habitual residence does not occur if the person concerned has been deprived of freedom of movement or has accidentally entered the country. The set period of time of presence in a particular country is not a condition of habitual residence⁷⁷.

In each case, it is possible to establish one habitual residence, one centre of life of a given person at a given moment in time⁷⁸. The habitual residence may change. Therefore, in order to determine the applicable law, the habitual residence must be determined at the time the contract is concluded⁷⁹.

4 Law applicable on the basis of choice of law

4.1 Choice of law for consumer contracts

The choice of law is allowed for consumer contracts according to Art. 6 (2) Rome I. The choice of law is a legal action of private international law where the parties to it determine the law applicable to a given scope of matters⁸⁰. The choice of law is the emanation of the autonomy of will, given to parties by the legislator. This is the case in consumer contracts pursuant to Art. 6 (2) Rome I.

75 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 85-86.

76 See, PAZDAN, Maksymilian. Prawo prywatne międzynarodowe. *System Prawa Prywatnego*, Private international law. The system of private law, v. 20 A, p. 232-236, 2015. Compare concerning the domicile in MAĆZYŃSKI, Andrzej. *Zamieszkanie jako podstawa łącznika normy kolizyjnej*. Zeszyty Naukowe Uniwersytetu Jagiellońskiego: Prace Prawnicze, 1978.

77 See, Judgment of the Court (Fifth Chamber) of 25 February 1999. *Robin Swaddling v Adjudication Officer*. Case C-90/97. European Court Reports 1999 I-01075, ECLI identifier: ECLI:EU:C:1999:96, at. 30. See discussion if this ECJ judgment applies to consumer's habitual residence in PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 87.

78 Compare JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 674; PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 88.

79 See, JAGIELSKA, Monika. *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 674.

80 See more about the choice of law in SKĄPSKI, Józef. *Autonomia woli w prawie prywatnym międzynarodowym w zakresie zobowiązań z umów*. Kraków: Państwowe Wydawnictwo Naukowe Oddział w Krakowie, 1964. p. 198 with bibliography, summary in French by JAKUBOWSKI Jerzy. *Contemporary Central & East European Law*, 1968. p. 47-48.

In case of consumer contracts an unlimited choice of law is allowed on the terms set out in Art. 3 Rome I. However, such a choice may not deprive the consumer of the protection afforded to him by ‘provisions that cannot be derogated from by agreement’⁸¹ by virtue of the law of the country of the consumer’s habitual residence - Art. 6(2) Rome I. This article introduces the so-called ‘alternative corrective indication’⁸². This provision modifies the effects of the choice of law of the parties in such a way that the mandatory provisions of the habitual residence of the consumer apply in place of the provisions of the chosen law which are less favourable for a consumer. As a result, the law governing the consumer contract is a ‘hybrid’ of the chosen law and the more favorable mandatory provisions of the law of the state of the consumer’s habitual residence. The comparison of the provisions in terms of the consumer’s benefit test should be carried out with regard to the application of the provisions to assess a specific case (e.g. damages), and not abstractly⁸³.

4.2 Limits to choice of law for consumer contracts

In the case of consumer contracts, the provisions of the contract are most often prepared by a professional, and the consumer only agrees to it. Under such a contract, the choice of law is included as one of the provisions of the general terms of contracts. The most common choice is the law of the state where the professional has the seat. The ECJ ruled on both the law applicable to the assessment of such a general term of contract and the admissibility of making a choice of law in this way in the Amazon case⁸⁴. In this case, Amazon EU (a part of an international group of mail order companies) having seat in Luxembourg addressed an offer to consumers residing in Austria via a website with the domain ‘.de’. Until mid-2012, the general terms of contracts included provision 12 on the choice of law, which was worded as follows: ‘Luxembourg law shall apply, excluding [the United Nations Convention on the International Sale of Goods].’ This general term of contract became interesting for the Austrian Association for Consumer Information (*Verein für Konsumenteninformation*), which brought an injunction against Amazon EU as provided for in Directive

81 Those are such provisions that the parties cannot opt out in a purely domestic situation. Provisions mentioned in Art. 6(2) Rome I are different from overriding mandatory provisions from Art. 9 Rome I (See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 280).

82 Concerning ‘alternative corrective indication’ see MAĆZYŃSKI, Andrzej. Wskazanie kilku praw przez normę kolizyjną prawa prywatnego międzynarodowego. *Rozprawy z polskiego i europejskiego prawa prywatnego*. MAĆZYŃSKI; PAZDAN, Maksymilian; SZPUNAR, Adam.ed. Kraków: Secesja, 1994. p. 236-242.

83 See JAGIELSKA, Monika. In: *Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 671-673.

84 Judgment of the Court (Third Chamber) of 28 July 2016, Verein für Konsumenteninformation v Amazon EU Sàrl., Case C-191/15, ECLI identifier: ECLI:EU:C:2016:612, further: ‘Case Amazon’.

2009/22⁸⁵. The case reached the Austrian Supreme Court (*Oberster Gerichtshof*), which referred a several questions to the ECJ for a preliminary ruling.

One of them concerned the question of the law applicable to such a consumer contract. In response to this question, the ECJ stated that ‘the law applicable to the assessment of a particular contractual term must always be determined pursuant to the Rome I Regulation, whether that assessment is made in an individual action or in a collective action’⁸⁶. In this case, the ECJ considered that the general term of contracts no. 12 on the choice of Luxembourg law, as ‘the law applicable to the assessment of the terms must be determined in accordance with the Rome I Regulation’⁸⁷. In the opinion of the ECJ, the general term of contracts no. 12 is a contractual obligation within the meaning of Art. 1(1) Rome I⁸⁸. One of the reasons why the ECJ qualified the assessment of general terms of contracts in this way is the need to ensure uniformity of decisions regarding the assessment of GTC, regardless of whether it is performed as part of individual or collective proceedings.

In the Amazon case, the ECJ also assessed whether the choice of law in the general terms of contract is not an abusive clause. In the opinion of the ECJ: ‘[...] Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, under which the contract concluded with a consumer in the course of electronic commerce is to be governed by the law of the Member State in which the seller or supplier is established, is unfair in so far as it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term [...]’⁸⁹.

However, ECJ in Amazon Case does not say what is the effect, if the standard term of choice of law in consumer contract does not apply to the abovementioned requirements. Such choice of law should not bind the consumer and to such contract consumer’s habitual residence law should apply⁹⁰.

85 Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers’ interests (Codified version), OJ L 110, 1.5.2009, p. 30-36.

86 Cit. Case Amazon, at 60.

87 Cit. Case Amazon, at 49.

88 Case Amazon, at 50.

89 Cit. Case Amazon, at 71.

90 See PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020. p. 280.

5 The meaning of the law of place of performance for consumer contract

In the case of consumer contracts, if the parties have not made a choice of law, the applicable law is the law of the country of the consumer's habitual residence in accordance with Art. 6(1) Rome I. The consumer's habitual residence coincides in principle⁹¹ with the place of performance of the contract. Therefore, the law of the place of performance will be at the same time the law applicable to the consumer contract.

Also, if the parties chose the law of another country, the provision of Art. 6 (2) Rome I provides for a much wider 'operation' of the law of the consumer's habitual residence than Art. 12 (2) Rome I. However, Art. 6(2) Rome I concerns only mandatory provisions more favourable for consumers. Whereas Art. 12(2) Rome I addresses all the provisions. Therefore it is also important to remember that pursuant to Art. 12(2) Rome I the law of the country in which performance of the consumer contract takes place is to be 'taken into account'⁹² with regard to 'the manner of performance'⁹³ and the 'steps'⁹⁴ to be taken in the event of defective performance⁹⁵.

6 Conclusion

The consumer contracts concluded via Internet in case when there is no choice of law in such contracts are governed by the law of the country of habitual residence of a consumer. The condition necessary for such law to be applicable is that the professional pursues or at least directs its commercial or professional activities to that country and that this contract falls within the scope of such activities. European Union legislator

91 The exception concerns 'package travel', 'package holidays' or 'package tours'.

92 The court only 'takes into account' the law of the state in which the obligation is performed which means that the provision - Art. 12 (2) Rome I does not prescribe the application of this law. (See POPIOŁEK, Wojciech. *Wykonanie zobowiązania umownego a prawo miejsca wykonania*. Zagadnienia kolizyjnoprawne, Katowice: Uniwersytet Śląski, 1989. p. 116-117. 'Taking into account' may mean the application of the law of the place of performance or only considering the provisions of this law, which means that the law of the place of performance 'comes to the fore' as a fact within the substantive law. (See WOJEWODA, Michał. *Prawo prywatne międzynarodowe. System Prawa Prywatnego*, Private international law. The system of private law, v. 20 B, p. 579-581, 2015.

93 Examples of 'the manner of performance' are: performance time (holidays, official business hours), place of performance, debtor's diligence, third party use to fulfil the obligations, receipts, and pecuniary obligations (including the issue of currency). (See more WOJEWODA, Michał. *Prawo Prywatne Międzynarodowe*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 782-785.

94 Examples of 'the steps' are: the consumer's obligation to examine the goods and notify the seller of its defects, and the technical aspects of the consumer's behaviour. WOJEWODA, Michał. *Prawo Prywatne Międzynarodowe*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 786-788.

95 See more WOJEWODA, Michał. *Prawo Prywatne Międzynarodowe*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018. p. 777-789.

chose the connecting factor of consumer's habitual residence as being the closest to the consumer and therefore should suit the consumer's protection. On the other hand the condition that the professional should at least direct the commercial or professional activities to the country of consumer's habitual residence should counterbalance the protection of consumers in the name of predictability of applicable law.

It is also important to notice that under Rome I Regulation it is possible to choose any law applicable for consumer contracts concluded via Internet. However there is a protection of consumers also introduced in this matter. The mandatory provisions (*ius cogens*) of the habitual residence of the consumer anyway apply instead the provisions of the chosen law, if the former ones protect consumer in the more favourable way than the latter ones.

The regulation of the conflict of law rule for consumer contracts in which there is no choice of law clause (Art. 6 (1) Rome I) complies with the consumer protection as the law of habitual residence of the consumer is the one that is best known to consumer. However the provision that regulates choice of law for such contracts seems to be very difficult in application as it requires the comparison of the law chosen and the law of habitual residence of the consumer and then leads to creation of 'hybrid' of provisions from both legal systems that supposed to be the best for a consumer.

References

- CALLIESS, Graf-Peter. *In: Rome Regulations* CALLIESS. Graf-Peter. ed. Alphen aan den Rijn: Wolters Kluwer, 2015.
- CZEPELAK, Marcin. *Umowa międzynarodowa jako źródło prawa prywatnego międzynarodowego*. Warszawa: Wolters Kluwer Polska, 2008.
- DOLINGER, Jacob. *Private International Law in Brazil*. Alphen aan den Rijn: Wolters Kluwer 2012.
- GNELA, Bogusława. *Prawo prywatne międzynarodowe. Komentarz*. POCZOBUT, Jerzy. ed. Warszawa: Wolters Kluwer, 2017.
- GNELA, Bogusława. *Prawo prywatne międzynarodowe. Komentarz*. POCZOBUT, Jerzy. ed. Warszawa: Wolters Kluwer, 2017. p. 523.
- JAGIELSKA, Monika. *In: Prawo Prywatne Międzynarodowe. Komentarz*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018.
- JAGIELSKA, Monika. *In: Prawo prywatne międzynarodowe. System Prawa Prywatnego, Private international law. The system of private law*. v. 20B, p. 280-282, 2015.
- JAKUBOWSKI, Jerzy. *Contemporary Central & East European Law*, 1968.
- JURYK, Anna. *Alimenty w prawie prywatnym międzynarodowym*. Warszawa: Lexis Nexis, 2012.
- MAĆZYŃSKI, Andrzej. Wskazanie kilku praw przez normę kolizyjną prawa prywatnego międzynarodowego. *Rozprawy z polskiego i europejskiego prawa prywatnego*. MAĆZYŃSKI; PAZDAN, Maksymilian; SZPUNAR, Adam. ed. Kraków: Secesja, 1994.
- MAĆZYŃSKI, Andrzej. *Zamieszkanie jako podstawa łącznika normy kolizyjnej*. Zeszyty Naukowe Uniwersytetu Jagiellońskiego: Prace Prawnicze, 1978.
- MANKOWSKI, Peter. *Consumer Contracts under Article 6 of the Rome I Regulation in Le nouveau règlement européen "Rome I" relatif à la loi applicable aux obligations contractuelles : actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne*. BONOMI, Andrea; RITAINE Eleanor Cashin. ed. Geneve, Zurich, Bale: Schulthess, 2008.
- MÖRSDORF-SCHULTE, JULIANA. *IN: Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 4. Cheltenham, Northampton: Edward Elgar Publishing, 2017.
- MOSTOWIK, Piotr. *Bezpodstawne wzbogacenie w prawie prywatnym międzynarodowym*. Warszawa: Lexis Nexis, 2006.
- PAZDAN, Maksymilian. *Prawo prywatne międzynarodowe. System Prawa Prywatnego, private international law. The system of private law*, v. 20A, p. 17-18, 2015.
- PLENDER, Richard; WILDERSPIN, Michael. *The European Private International Law of Obligations*. London: Thomson Reuters, 2020.

PRZYBYŁOWSKI, Kazimierz. *Prawo prywatne międzynarodowe. Część ogólna*. Lwów: Gubrynowicz, 1935.

PRZYBYŁOWSKI, Kazimierz. *Zagadnienie definicji prawa prywatnego międzynarodowego*. Komunikat: Sprawozdania Wrocławskiego Towarzystwa Naukowego, 13A, 1958.

RÜHL, Giesela. Germany. In *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 2. Cheltenham, Northampton: Edward Elgar Publishing, 2017.

RYSZKOWSKI, Karol. New technologies in the Polish commercial arbitration. In *EKONOMIKA, Právo obchod. Zborník vedeckých prác*. SUCHOŽA, Jozef; HUSÁR, Ján; HUČKOVÁ, Regina. ed. Košice: Univerzita Pavla Jozefa Šafárika Vydavateľstvo Šafárik Press, 2020.

SKĄPSKI, Józef. *Autonomia woli w prawie prywatnym międzynarodowym w zakresie zobowiązań z umów*. Kraków: Państwowe Wydawnictwo Naukowe Oddział w Krakowie, 1964.

TRAMMER, Henryk. *Zasięg obowiązywania prawa prywatnego międzynarodowego*. Państwo i Prawo, 1966.

UNIÃO EUROPEIA. (2012). *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*. Bruxelas. p. 1–32. Disponível em: <http://data.europa.eu/eli/reg/2012/1215/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (1997). *Treaty on European Union, the Treaties establishing the European Communities and certain related acts*. Bruxelas. Disponível em: <http://data.europa.eu/eli/treaty/ams/sign>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2000). *Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2001/44/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2008). *Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations*. Bruxelas. p. 6–16. Disponível em: <http://data.europa.eu/eli/reg/2008/593/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2008). *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*. Bruxelas. Disponível em: <http://data.europa.eu/eli/dir/2008/122/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2009). *Council Regulation (EC) No 4/2009 of 18 December 2008 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations*. Bruxelas. Disponível em: [http://data.europa.eu/eli/reg/2009/4\(1\)/oj](http://data.europa.eu/eli/reg/2009/4(1)/oj). Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2010). *Council Regulation (EU) No 1259/2010 of 20 December 2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2010/1259/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2012). *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*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2012/1215/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2016). *Council Regulation (EU) 2016/1103 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2016/1103/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2016). *Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2016/1104/oj>. Acesso em: 26 nov. 2021. p. 30-56.

UNIÃO EUROPEIA. *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2012/650/oj>. Acesso em: 26 nov. 2021.

UNIÃO EUROPEIA. (2007). *Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II)*. Bruxelas. Disponível em: <http://data.europa.eu/eli/reg/2007/864/oj>, further: 'Rome II Regulation'. Acesso em: 26 nov. 2021.

WILDERSPIN, Michael. In: *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 1. Cheltenham, Northampton: Edward Elgar Publishing, 2017.

WOJEWODA, Michał. *Prawo Prywatne Międzynarodowe*. PAZDAN, Maksymilian. ed. Warszawa: Wydawnictwo C.H.Beck, 2018.

WOJEWODA, Michał. *Prawo prywatne międzynarodowe. System Prawa Prywatnego, Private international law. The system of private law*, v. 20 B, p. 579-581, 2015.

ZACHARIASIEWICZ, Maciej. In: *Encyclopedia of Private International Law*. BASEDOW, Jürgen; RÜHL, Giesela; FERRARI, Franco; ASENSIO, Pedro de Miguel. ed. v. 4. Cheltenham, Northampton: Edward Elgar Publishing, 2017.