Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I Regulation): with particular focus on the principal changes from the Rome Convention

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This article compares the Rome I Regulation with its predecessor, the Rome Convention, with respect to four key aspects: party autonomy and its restriction by the mandatory rules, special rules for certain categories of contracts to protect the weaker parties, legal predictability and certainty, and the simplicity of the rules. It examines in particular the following provisions: Article 3 (freedom of choice), Article 4 (applicable law in the absence of choice), Article 6 (consumer contracts), Article 8 (individual employment contracts) and Article 9 (overriding mandatory provisions).

Besides presenting the comparative analysis, this article considers a number of issues concerning those provisions. Among them, the following two points seem worth highlighting in this English version.

Under the Rome I Regulation, the special rules for consumer contracts are applicable only where the professional either (a) pursues its commercial or professional activities in the country where the consumer has his habitual residence or (b) directs such activities to that country (proviso to Article 6 (1)). The same phrase in the Brussels I Regulation (Article 15 (1) (c)) was interpreted by the European Court of Justice in Peter Pammer v Reederei Karl Schlüter and Hotel Alpenhof GesmbH v Oliver Heller (joined cases C-585/08 and C-144/09 (7 Dec. 2010)). It follows from that ruling that, where a professional merely makes its website globally accessible and does nothing more in terms of directing its activities to the country of the consumer with whom it has concluded a contract, the contract is not subject to the special rules for consumer contracts. In other words, the mere fact that a professional has concluded a contract with a consumer who had consulted the professional's website in the country of his habitual residence is not enough to bring the contract within the special rules for consumer contracts. This is at variance with the position under the Japanese choice-of-law Act since its special rules for consumer contracts (Article 11) would be applicable in such a situation. The Japanese Act makes its special rules for consumer contracts applicable irrespective of whether the professional directs its activities to

the consumer's country. It instead excludes the application of those special rules in certain cases by reference primarily to the consumer's behaviour. For example, where the consumer concludes the contract in the professional's country, those special rules are inapplicable (For details, see K. Takahashi, "A Major Reform of Japanese Private International Law" [2006] 2 Journal of Private International Law 311, 323). The Rome Convention also relied partly on the consumer's behaviour to delineate the scope of application of its special rules for consumer contracts. However, that approach seems to have been consciously abandoned by the Rome I Regulation. The origin of that policy is traceable to the Commission's Green Paper (COM (2002) 654 final 2003) which stated that the approach of the Rome Convention was not well adapted to the era of the new distance selling techniques (Pay-TV, Internet) as it required the localisation of measures taken by the parties (paras. 3. 2. 7. 2 and 3. 2. 7. 3). This reasoning is hardly convincing. Private international law cannot shield itself from the need of localisation whatever communication technique is used. That is indeed demonstrated by the fact that the criterion adopted in lieu, *i. e.* whether the professional directs its activities to the consumer's country, is in need of elucidation with respect to electronic trading, a difficult challenge which was not met with great success by the Court of Justice in the aforementioned cases.

The second point worth noting is the dearth of interest shown in the Rome I legislative process in bringing it closer in line with the laws of third countries. Thus, nowhere in the Council documents made in the course of Rome I negotiations (numbering almost 100), is it possible to find reference to the law of Japan, the United States, or Switzerland as a possible model. The present author is aware of only one exception: in the draft report of the Committee on Legal Affairs of the European Parliament (2005/0261 (COD)), concern was raised about adopting a proposed rule which would deviate from the position prevailing in third countries. The inward-looking attitude may be attributable to the fact that it is hard enough to obtain consensus among the Member States. But the responsibility may also lie with third countries as no effort seems to have been made to make their voice heard in the context of the Rome I preparation. It would be preferable if more conscious effort were made on both sides to promote greater harmonisation on a global scale.