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EDITOR’S COMMENTS

Welcome to the combined Spring and Summer issue of the California International Law Journal!

This issue marks a change in both our Section’s Executive Committee as well as our Journal’s editorial team. As Brent Caslin, our Section’s current chair, mentioned in his letter, Jeff Daar will assume the role of Section Chair after the 85th Annual Meeting of the State Bar, held in Monterey this year. Jeff is highly reputed and well-known for his tireless effort and great leadership on the Executive Committee over the years. Special thanks go to Brent for the time he dedicated to overseeing our Section and continuing its mission. Most dear to the heart of the Journal are Dena Cruz, our outgoing Editor in Chief, and Lisa Earl, who held the same position before Dena. Dena and Lisa did an excellent job of shepherding the Journal over the past years, and deserve special thanks for keeping the publication on track.

The articles in this issue cover a range of international law subjects, and differ in format from our most recent issues. Here, we return to an emphasis on shorter articles that cover a broad range of topics – a move away from lengthier pieces previously used as the mainstay of our latest issues. We hope that this shift provides our readers a greater variety of subjects, set forth in a manageable format.

Greg Berk, one of our newest Executive Committee Members, starts us off with a discussion of recent developments in immigration policy. Greg specializes in immigration law, and his addition is welcome both on the Executive Committee and within the Journal. Other articles include selections on the Global Financial Crises and its effect on the Eurozone economy, changes in European data privacy protection, local laws on secondments in the Middle East, and an opinion piece on international arbitration in California.

As always, we hope that you find the content assembled here insightful and useful to your practice, analysis and application of international legal issues. I encourage you, and all our readers, to continue submitting articles to the Journal for consideration. Our publication depends on your generous sharing and expression of insight gained in practice, as it intersects with international concerns. The Journal provides a unique platform to our members, its readers and contributors, and we hope to continue bringing issues to light for our reader’s benefit.

Yours truly,
Mark J. Wakim
LETTER FROM THE CHAIR

Dear Members of the International Law Section,

The Executive Committee of the International Law Section, especially the lawyers and staff who put in long hours to create this fine publication for the Section’s membership, are proud to present to you another issue of the California International Law Journal. Particular thanks to Mark Wakim and Julie Martinez for their hard work on this Journal. We all hope you find it interesting and helpful to your practice.

As you enjoy the Summer and look forward to the Fall, take a moment to consider involving yourself in the many interesting endeavors of the International Law Section. The Section has seven programs at the Annual Meeting on a wide range of popular topics, including intellectual property, human rights, litigation, social media, regulatory matters, ethics, and immigration. The speakers at each program are impressive. The quality and number of the Section’s Annual Meeting programs reflect the increasingly important role international issues play in the practice of law in California.

If you are not able to make it to Monterey for the Annual Meeting, or even if you are, there are other ways to enjoy the benefits of your Section membership. The Section has regular webinars, which provide topical and timely discussions along with the benefit of education credits. We also continue to work with foreign bar associations to schedule quality country-specific events, and the always popular networking events (aka cocktail mixers) invariably bring together a fascinating group of lawyers with international practices. Events are announced in the Section’s E-Newsletter, on the website at http://international.calbar.ca.gov/, and on the Section’s Facebook page (which I’m told has more “likes” than any other Section of the California State Bar). Hope to see you at one of the events soon!

Finally, please join me in welcoming the new Advisors, Members, and Officers of the International Law Section. Jeff Daar will succeed me as Chair at the close of the Annual Meeting, a certain improvement at the top. And, while it will be difficult for the Section’s new leadership to surpass the dedication and success of those who volunteered their time in years past, if there was ever a group who could do it the incoming group is it. The quality of their credentials and practices is only surpassed by the strength of their stated commitment to support the Section. They come from across the state, with wonderfully diverse backgrounds and practices, and they are sure to improve the International Law Section. Please welcome them and greet them with your own commitment to contribute to the good work of the Section.

Best wishes to everyone,
Brent Caslin
International Migration to the U.S.

THE U.S. DEPARTMENT OF LABOR HOLDS THE KEY TO RESOLVING THE DEADLOCK OVER COMPREHENSIVE IMMIGRATION REFORM

By Greg Berk, Esq.

I. CONGRESSIONAL STALEMATE

The current stalemate in Congress over comprehensive immigration reform (CIR) has been a source of frustration for Americans on all sides of the political aisle. There are many competing issues: the U.S. Department of Labor seeks to protect U.S. jobs, employers cannot find U.S. workers to take many unskilled jobs, millions of foreign nationals struggle to legalize their status, and policy makers in Washington grapple with how best to verify employment authorization and control the border.

Immigration policy has always been a contentious issue in this country. It has also been a great source of talent and workers. It is unfortunate that beginning in the 1970’s when the demand for unskilled labor began to outpace the supply of unskilled U.S. workers, Congress chose to look the other way rather than formulate a practical guest worker program. Doing so would have prevented much of the difficult issues that we face today. There are many countries that have established guest worker programs, and some of them build-in an earned permanent residency program as well.

II. WE CAN’T WAIT FOR PERFECTION

As a starter to immigration reform, Congress should abandon CIR and instead seek piecemeal legislation that has bipartisan support. Some legislation is better than none. Abandoning CIR doesn’t mean abandoning those goals, it merely means that a step-by-step approach is more politically feasible and preferred to no action at all.

Congress has been unsuccessfully trying to pass CIR for almost two decades. The stark reality is that the majority of American voters simply do not have the appetite to pass legislation that would enhance immigration benefits without a concurrent effort to curtail illegal immigration and protect U.S. jobs.

Congress has already taken numerous steps to beef up our border protection over the last few years – by providing more walls, manpower and technology. While the border is by no means sealed, it is far better than in years past. Nonetheless, further action is necessary to control illegal migration, and immigration reform will not happen until the conservative right is convinced that we have a handle on this. As discussed below, a smart social security card could be very helpful in this regard.

III. JOBS ARE THE MAGNET

Susan Westerberg Prager, the former Dean of UCLA Law School and now the Executive Director of the Association of American Law Schools, aptly noted that the prospect of working in the U.S. is the main magnet driving illegal immigration. What Is Comprehensive Immigration Reform? Taking the Long View, 63 Ark. L. Rev. 225 (2010).

The last time Congress passed anything resembling comprehensive immigration reform was in 1986 with the passage of the Immigration Reform and Control Act (IRCA) (PL 99-603, 100 Stat. 3359). As part of a quid pro quo for legalizing millions of undocumented workers, Congress added into IRCA an employment verification requirement for employers. The then legacy Immigration & Naturalization Service (INS) created the I-9 Form to effectuate that requirement. The I-9 Form is the document that every employee and employer is required to fill out at the time of hire. The employer then signs under penalty of perjury that they have examined original work authorization documents that appear to be real and therefore the individual is presumed to be authorized to work in the U.S. (8 C.F.R. Section 274a.2(b)(1)(i)).

Unfortunately, in the ensuing years, several developments occurred which prevented the statutory I-9 requirement from accomplishing what Congress had intended, namely: demand for unskilled labor soared without any new legislation to assist employers, Mexico’s proximity to the U.S. made illegal entry quite easy, the availability of authentic-looking fake documents was rampant, and both border and I-9 enforcement was lax.

IV. 2012 TECHNOLOGY OPENS THE DOOR TO NEW OPTIONS IN THE I-9 PROCESS

Fast forward 26 years, and we now finally have the technology to produce a smart social security card (with digital biometric information) that could be swiped through a small scanner machine at an employer’s worksite. The new hire could
then be instantly verified by the Department of Homeland Security (DHS) database. This would take the guess work out of the I-9 process. Senator Schumer, Chair of the Senate Subcommittee on Immigration has proposed just such a card. In essence, this would be a major enhancement to E-Verify. Currently, E-Verify is dependent on the new hire and employer filling-out a paper I-9, and the new hire presenting various documents, some of which may not be authentic. With the smart social security card, a simple swipe of one small piece of plastic would produce a green light or red light. Most of the guess work and fraud in the I-9 process would be eliminated.

As a result, for the first time in modern history, the technology and systems are in place to actually drastically reduce illegal immigration. Employers could no longer hide behind plausible denial, and I-9 penalties for the knowing hire of an unauthorized worker could be stiffened. The proper procedure available to an employer would be to sponsor the individual as a temporary guest worker. Once the approval notice was issued from U.S. Citizenship & Immigration Services (U.S. CIS), the individual could be hired and placed on the payroll. This would greatly facilitate employers in such industries as: agriculture, construction, restaurant, janitorial, and hospitality.

V. SPONSORING UNSKILLED WORKERS – THE BUREAUCRACY CAN CRUSH YOU

As a benchmark, Congress has already created several visa categories where employers can sponsor and petition for a temporary worker. The most notable is the H-1B visa for skilled professionals such as software developers and engineers. (8 U.S.C. 1101(a)(15)(H)(i)(b). Employers file an I-129 petition for a worker for up to 3 years at a time with a total of 6 years maximum. As part of the I-129 petition, the employer promises to pay the worker the prevailing wage and treat them in all aspects like U.S. workers. The individual could work beyond the 6 years if the employer initiated a case to sponsor the individual for a green card (known as PERM labor certification). For labor certification, the employer must prove there is a shortage of U.S. workers.

Therefore, Congress should expand the I-129 petition process for unskilled workers in a large and seamless way. A smaller version is already in place for certain agricultural workers (H2A), and non-agricultural workers (H2B), but it is fraught with quotas and cumbersome filing procedures (8 U.S.C. Section 1101(a)(15)(H)(ii)(a)-(b)). Most employers find these two visa categories to be of little help in meeting their staffing needs.

VI. U.S. DEPARTMENT OF LABOR – WE NEED YOUR HELP

It would actually be quite easy for the U.S. Department of Labor (DOL) to determine which jobs should be designated as “unskilled” and which geographic areas have a shortage of U.S. workers willing to take on such work. DOL has a sophisticated database which tracks both unemployment rates and prevailing wages by occupation and metropolitan statistical areas (MSA).

Furthermore, years ago, DOL created a “Schedule A” which is a list of occupations where the agency acknowledges that there is a known shortage of permanent U.S. workers. Ironically, the current Schedule A includes only nurses, physical therapists, and certain individuals of exceptional ability. The list is noticeably missing many important occupations involving unskilled labor. Employers wishing to sponsor foreign nationals for a green card for occupations listed on Schedule A do not need to advertise the position or prove to DOL that there is a shortage of U.S. workers (20 C.F.R. Section 656.5). DOL has already cleared the way. However, there is no Schedule A for temporary workers, only permanent ones.

VII. SCHEDULE T – A PROPOSED LIST OF SHORTAGE OCCUPATIONS FOR TEMPORARY WORKERS

By analogy, Congress could ask DOL to create a “Schedule T” for employers who seek to sponsor unskilled workers for temporary work. If the occupation and MSA where the job site is located are already included on Schedule T, then the employer could immediately file an I-129 Petition with U.S. CIS to employ the person for 3 years at a time, for a total of 6 years. So, whether it’s a hotel business, car wash, restaurant, or janitorial service that needs to file the I-129 in order to fill temporarily vacant positions involving unskilled labor, a quick, organized process would exist to make that a reality. Congress could retain the same alphabet-soup visa label: H2A for agricultural workers and H2B for nonagricultural workers. The difference would
be that the revised program would make it much simpler for employers to sponsor the individual since the occupation and job site location would already be pre-certified on Schedule T as a shortage occupation.

VIII. A BRIDGE FROM SCHEDULE T TO GREEN CARD

Congress could step-in and legislate, such that if an Employer has sponsored a foreign worker on Schedule T for 5 years, then the Employer could directly sponsor the worker for a green card by filing an I-140 Immigrant Petition. The Petition would still be subject to annual quotas, but it would allow the worker to continue in temporary worker status until such time that his priority date to file for permanent residency was current.

IX. WE’VE BEEN HERE BEFORE

As Prager points out, Congress didn’t get it right in 1986 when it passed IRCA. We legalized millions of undocumented workers, and then another 12 million crossed the border in the years since IRCA. Therefore Congress needs to think everything through carefully before attempting CIR. Merely passing a blanket amnesty every 25 years hardly seems like a pro-active immigration policy. Prager, supra at 226.

Clearly, CIR involves issues that are extremely complex and involve balancing many competing interests, including determining: how long should someone work in temporary non immigrant status before being eligible for permanent residence, what are the future labor needs of the country, the annual quotas for sponsoring siblings and parents of U.S. Citizens, etc.

In the interim, Congress would best serve the nation by focusing on step-by-step reform that has bipartisan support including: creating a smart social security card to assist employers in the I-9 hiring process and reduce the magnet for illegal immigration, taking additional steps to seal the border, and creating a practical temporary worker program where U.S. employers could petition for unskilled workers in occupations that are pre-certified by DOL as having a shortage of U.S. workers.

X. AMNESTY FOR ANOTHER DAY

Eventually, Congress will have to address the most contentious issue – legalization for part or all of the 12 million undocumented individuals currently in the U.S. However, legalization should be left for last, since we will otherwise never move beyond the stalemate and gridlock in Congress. Unlike the 1986 Amnesty, which didn’t stop illegal immigration, the technology now exists to prevent a repeat if we take advantage. Furthermore, even though most Americans do not approve of the fact that the undocumented either illegally crossed the border or overstayed their authorized stay in the U.S., the reality is that most have contributed to our economic success and integrated within our society. As Prager points out, to not provide a path towards citizenship, even if it is a long path, would be to relegate permanently these individuals to “second-class” status. Prager supra at page. Such a result would be reminiscent of darker chapters in our nation’s history – ones we have a moral imperative not to repeat.

XI. PLAN THE ROLL OUT

It is very important that Congress phase in these changes. For example, if the smart social security card is implemented before the temporary worker program is rolled out, then employers will be forced to layoff millions of essential unskilled workers who will undoubtedly not pass the new electronic I-9 verification system.

A practical solution is to first roll out the simplified temporary worker program, and then roll out the blanket use of the smart social security card to replace the current I-9 process. U.S. CIS and the Social Security Administration would need some lead time to ramp up staffing, but 18 months should be sufficient.

XII. THE TIME IS NOW

The decade-long stalemate in Congress over CIR is untenable. Congress needs to show some courage and act. DOL can facilitate immigration reform by producing a Schedule T List of shortage occupations by MSA.

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The Eurozone Financial Crises: The Effect of a Eurozone Breakup on Private International Obligations Denominated in Euros

by James Campbell and Samuel Pearse

The financial crisis in the Eurozone shows no signs of abating. After the Greek rescue packages and fears of defaults on sovereign debt obligations, other issues have come to the fore. In each of France, Greece and Germany there have been significant shifts in political power and the mighty have fallen or very exposed. In Spain, borrowing costs continued to rise and the anticipated application for bailout money was submitted. Cyprus too applied for monetary aid. With no signs of recovery and an overvalued currency, those struggling economies remain vulnerable to Eurozone exit. Furthermore, there is a real risk of contagion spreading throughout the Eurozone and beyond, giving rise to concerns for the wider global economy.

For banks and businesses who are parties to contracts which are to be performed in euros there should be deep concern about the uncertain future of the Eurozone. It cannot be taken for granted that the Eurozone will remain intact, in whole or in part, and one of questions that must be considered is: what effect would a Eurozone breakup (of whatever form) have on private international obligations denominated in euros? The following is a look at some of the English law and private international law issues that will shape the answer to this question.

I. **LEX MONETAE PRINCIPLE**

It is a long upheld principle that a sovereign state has the freedom to choose its currency, and it is the law of the relevant country in force from time to time which gives the meaning to the currency in which a debt is expressed. This is the *lex monetae*.

II. **LANGUAGE USED FOR DEBT OBLIGATION**

There is a key distinction between the “money of account” (also known as the money of contract or the “money of measurement”) and the “money of payment”. The former is the measure of the obligation whereas the latter is the money in which that measured obligation must be satisfied.

A private contract, which states that the money of payment is “the currency of X”, is a clear obligation to make that payment in whatever currency that country has declared as legal tender at the time of payment. This is a straightforward application of the *lex monetae* of that particular country and there is no uncertainty as to what the correct currency of payment is.

However, many contracts will not contain wording along such lines; instead they simply use a generally recognised symbol or word e.g. dollars, euro, £. In this instance, case law and the Contracts (Applicable Law) Act 1990 have established that where there is doubt as to the currency of a debt then we look to the governing law of the contract to determine the money of account, irrespective of where the money is to be paid. So, if an American has agreed to pay an Australian “$100” the law governing the contract will determine whether the obligation is to pay American dollars or Australian dollars or the dollars of any other country.

Using the example of a contract between an English company and a German company in which it is stated that the debt expressed (the money of account) is in euros (or EUR or €), it follows that the measure of that obligation will be determined by applying the governing law. One then has to ascertain the effect of the governing law and, if the governing law is the laws of England and Wales, its application. In this case, a court would ascertain that euros are the relevant currency for measuring the obligation. But this is not the complete story as, if the money of account is not clear, English law requires us to presume that the country most closely connected to the contract will be the applicable country for the measurement of the obligation. This in turn is commonly assumed to be the same as the country of the money of payment. Accordingly, in the example given above, to determine the money of payment, in the absence of clear contractual language English law requires us to look to the governing law of the country in which the debt must or may be discharged, and for debts payable in England the law provides that sterling can be used to satisfy the debt. If the debt is expressed in a foreign currency, then it must either be paid in that foreign currency or in sterling having been converted into sterling by reference to the rate available on that day in a recognised and accessible market (the rate of
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which may differ from an official exchange rate). So in the example above, if the debt is that of the English company and the payment is to be made in the UK, then the English company would be able to meet its debt by either paying euros or sterling.

III. ENGLISH LAW: FRUSTRATION AND IMPOSSIBILITY, AND CHOICE OF GOVERNING LAW

English law places great emphasis on the enforcement of contractual obligations and it is a principle of English law that monetary obligations cannot be argued to be impossible to perform because the currency in which they are expressed have ceased to exist. The law views an obligation to pay a debt as an obligation to pay that debt in such currency as the applicable lex monetae determines to be the currency at the time of payment. The obligation remains but the method of settling the obligation changes.

Using the earlier example of an English party which owes a debt to a German company which is payable in England, it therefore follows that the English party cannot claim that it cannot make the payment in the event that euros cease to exist. Instead consideration of the governing lex monetae (in this example that of the UK) would be required to determine the relevant currency of payment.

IV. CONSEQUENCES OF A EUROZONE BREAK-UP ON EURO DENOMINATED OBLIGATIONS

When considering private international contracts in the context of the euro, there are three linked questions that must be considered. First: what is the manner of the Eurozone break-up? Second, what is the extent of the Eurozone break-up? Last, but not least: what would be the effect of a country exiting the Eurozone on contracts which have a connection to that country?

V. POTENTIAL MANNER OF THE BREAK-UP

When the euro was introduced on 1 January 1999 the 12 Member States entering into monetary union each passed domestic legislation which replaced their national currencies with the euro. From that point, the exchange rate between each of the 12 national currencies and the euro was fixed by way of a European Community Regulation. The 12 national currencies were fully phased out on 1 January 2002. The European Council issued directives designed specifically to ensure the continuity of contracts denominated in those domestic currencies which ceased to be in circulation following the introduction of the euro.

The introduction of the euro was very carefully structured and, importantly, intended to be irreversible. The treaties constituting the Eurozone do not envisage, provide for or permit an exit from it. A structured exit from the Eurozone agreed by all Member States, backed by appropriate European directives and regulation, is currently the only way of lawfully breaking up the Eurozone.

If a structured exit of one of more Eurozone countries occurred, then the surrounding legal framework would give the national courts clear law to follow when determining issues such as the substitution of the euro in private international contracts because: the withdrawal would be lawful; the relevant national government would introduce a new currency, as is its right; that currency would be internationally recognized; and the recurrent link between the euro and the new currency would be clearly established such that foreign exchange rates would be without dispute.

Conversely, it is arguable that a unilateral exit from the Eurozone is by definition unlawful. There would be scope for argument as to whether the lex monetae of the exited country would be consistently recognised and the relevant national courts of the EU members could each come to different conclusions on the same set of facts. Even the domestic outcome could assume a political dimension. For example, the English courts could on the face of it have strong reasons for not recognising a new currency established in these circumstances on the basis (a) that recognising a lex monetae is contrary to English public policy and EU public policy binding on the UK or (b) that in establishing the new currency the relevant country was in breach of EU law. But whether an English court would be prepared to disregard a sovereign state’s right of lex monetae in the absence of clear direction or judgement by an appropriate authority (such as the European Court of Justice) is not clear and it is likely that Parliament would have to legislate. Indeed the situation could potentially become further complicated as for countries outside the EU there is a higher likelihood that they would recognise the sovereign state’s right of lex monetae on the basis of comity which could in the event of a
partial collapse of the euro lead to different results within and outside the EU.

VI. POTENTIAL EXTENT OF THE BREAK-UP

If there is a partial collapse but the euro continues to exist amongst a group of Member States, then there remains an internationally recognised, traded and valued currency with which to calculate and satisfy monetary obligations. The question, as discussed above, is whether the courts will enforce a contract on its terms given that there is a readily available currency or, if the obligation is to be satisfied within the borders of an exited country, whether the lex monetae of that country prevails. There are strong arguments that the obligations should continue to be expressed in euros, for as long as the currency exists, but there are considerable risks that these arguments may be disregarded.

In contrast, in the event that the euro ceases to exist in its entirety, all contracts with obligations denominated in euros will need to be considered as it will not be possible to satisfy the obligations in euros. And if the contract does not provide a solution, which is unlikely, then one must look at the governing law of the contract, the lex monetae principle and the intentions of the parties at the time of settling the terms of the bargain represented by the contract.

VII. POTENTIAL EFFECT ON EURO DENOMINATED CONTRACTS

Bringing together all that has been discussed and considered, it is plain that there are a large number of different possible scenarios caused by the number of variables, namely: the location of the respective contractual parties; the denomination of the debts; the place of performance of satisfying the debt; the governing law of the contract; the courts expressed to have jurisdiction; the extent of a Eurozone break-up; and the manner of a Eurozone break-up.

Once each of those variables is established, each contract must then be examined on its particular terms and with regard to the circumstances of its creation and the intention of the parties. It is not possible or practical to analyse each possible combination and fact pattern in this Advisory, but we will examine a few scenarios by way of illustration only.

Example 1: English company A contracts with German company B for the supply of goods by B to A. The place of performance of the delivery is England. The debts of A are denominated in euros and must be settled in payment to a bank account of B in London. The governing law is English law.

Germany has negotiated withdrawal from the Eurozone, introduced the New Deutsche Mark (NDM) as its national currency and established a fixed exchange rate between the euro and the NDM. A has failed to pay its debts and B commences proceedings for recovery.

In these circumstances, it is difficult to see how, whether the case is brought before the German courts or the English courts, the money of account and the money of payment would not be euros. The lex monetae of Germany would not have application to the contract and, as it is capable of being performed in accordance with its terms, any judgement given against A should be quantified and payable in euros.

Example 2: Let us consider the same circumstances as Example 1, save that the place of settlement of the debt is a bank account in Germany.

If the dispute is brought before the German courts, would the courts recognise the NDM as the relevant currency of the obligation? Although A is English, the place of settlement is Germany and so German monetary law would have some application. The question is how much. Given the continued existence of euros presumably the German courts would recognise euros as the money of account. As the place of settlement is Germany, it will fall to German law will determine whether the debt can be payable in Germany in euros or in NDM, notwithstanding that the contract is governed by English law. On that basis it is assumed that the German courts would recognise the NDM as a valid currency for the settlement of the loan, but it is also possible the court also rules that the contract can be fulfilled in accordance with its terms and permit A to pay its debts to B in euros.

Notwithstanding A is English, the English courts would presumably take the same view as a German court; it would defer to German monetary law to determine the correct currency of the money of payment.

Example 3: A further variation on Example 2 would be that the contract is a long-standing contract and the debts are denominated in the “old” Deutsch Mark.
If brought before the German courts, it is not automatically clear that German monetary law will apply. After all, A is an English company. If a German court sought to apply its national monetary law, such law would recognize that Deutsch Marks were without question replaced by euros, and subsequently replaced by NDM. It would presumably issue judgement against A to pay its debts in NDM (with euros still being the money of account), the amount of the money of payment to be calculated by reference to the two recurrent links of Deutsche Marks to euros and euros to NDM. If the facts were further varied such that B was the debtor, then there is less doubt that the *lex monetae* of Germany has valid application and it is therefore more likely that a German court would rule in this way.

How would an English court consider the matter? Again, as the place of performance is Germany an English court might look to German monetary law as to how the money of payment would be determined.

If the facts are varied such that the place of payment was England, the English court would have a different set of considerations. It would note that A is an English company, and this would be weighed in the balance. It is without question that the old Deutsche Mark was legally and validly replaced by the euro. However, notwithstanding the legality of the introduction of the NDM, the court would need to closely examine the intentions of the parties when the contract was formed. Did they, when referring to Deutsche Marks, mean the currency of Germany as it may be from time to time? Or was the *lex monetae* of Germany superseded by the *lex monetae* of the Eurozone at 12.01am on 1 January 2002? On these facts, it is suggested that it might be some stretch for the court to establish that the intention of the parties was for the *lex monetae* of the Eurozone to prevail. Consequently, the debt would be measured in euros (for it still exists as a currency) but the money of payment would be NDM or sterling.

Example 4: Reverting to Example 1, what if the Eurozone has ceased to exist in entirety? Our conclusions in Example 1 were that both courts would presumably view the *lex monetae* of Germany as not having application to the dispute and consequently uphold the euro as the relevant currency. So we need to consider again the principles described in “Language Used for Debt Obligation” above to determine the appropriate currency or currencies. However, in doing so we would conclude that the *lex monetae* of the UK applies as that is the place of performance, but it would be highly unrealistic to claim that the parties always intended to contract by reference to the *lex monetae* of the UK for if they did the debts would have been expressed in sterling all along.

There is clearly a debt owing, and as English law places great emphasis on upholding contractual obligations it would initially seem that a debtor cannot claim discharge of its obligations because of impossibility. The courts might look for nexus to another country, but this does not appear possible in the this example. So the presumption that a debtor cannot claim frustration is weakened, but if a court upheld such a claim that would be decision of great consequence.

VIII. IMPACT OF CURRENCY CONTROLS

An additional aspect to the issue is that although an exiting country would in principle be prohibited by EU law from introducing capital controls or a moratorium on the movement of capital or payments, there is every likelihood that they would seek to do so on the grounds of public policy to prevent payments in euros being made abroad. In this eventuality the English courts are highly likely as a matter of domestic law, and as a result of the country’s IMF obligations, to recognize the capital controls or moratorium if the contract is governed by the law of the exited country, and potentially also if the place of payment is in the country concerned, on grounds of illegality.

IX. FINANCIAL SECTOR CONTRACTS AND FUTURE CONTRACTS

Many financial sector contracts are based on standard forms developed by the Loan Market Association and the International Swap Dealers Association or on other market standard forms. In the eventualities described above these templates include some potentially helpful features but they were not drafted in anticipation of a euro collapse and will be subject to the principles of *lex monetae* and illegality, and are likely to become difficult to interpret with unpredictable outcomes. There is therefore good reason to review these contracts and see whether they are capable of amendment.

It does not seem long ago that corporate and finance documentation was being revised for the euro becoming legal tender but with the prospect of a partial or complete collapse of the currency there
are a number of suggestions that we would make on how documentation should be further revised to address the payment contingency, namely:

Jurisdiction and governing law. These plainly require thought.

Specify an alternative currency. If a contract is denominated in euros consider whether the contract should specify an alternative currency of settlement and a mechanism for calculating the exchange rate. This could be a different currency like sterling, US dollars or Swiss francs, or another national currency, and could include a definition of the euro.

Specify a place of settlement. Contracts may not necessarily specify where payments are to be made; although it is not uncommon for contracts to specify the destination bank account and this would be indicative. Consider making it express where the obligation is to be satisfied if a particular country’s currency is intended to be the currency of settlement. For example, it could be specified that payments in sterling are to be paid in the UK, thereby helping avoid redenomination.

Exchange control. Consider what happens in the event of exchange controls being introduced by a country relevant to the contract. For example, should exchange control be specified as a force majeure event?

Specify a dispute resolution mechanism. A dispute resolution mechanism may avoid the cost and uncertainty of prosecuting claims in a court and assist with reaching a negotiated settlement.

Eurozone exit triggers renegotiation. The contract could specify that in the event a country connected with the contract (e.g. the specified country of payment) exits the Eurozone, the parties will renegotiate a new pricing structure for future supplies of goods or services or the contract will be terminated.

X. CONCLUSION

It is clear that the answer to the question of what impact a Eurozone collapse would have on private contracts with euro denominated obligations is potentially as complex as the financial and political issues surrounding the financial crisis. External factors, such as the manner of a Eurozone exit by a member state, will be of critical importance to determining the impact on contractual obligations. Factors within a contract party’s knowledge and control, such as the terms of the contract, are more immediately determined but nevertheless each contract must be considered on its terms and in the context of its creation. Another variable beyond the scope of this article is the possible introduction of a parallel or replacement currency for the euro as has been suggested by some commentators. A parallel currency may assist in some respects, such as providing a recurring rate of exchange, but it may well further cloud the issue in terms of measurement and settlement. For contract parties, the temptation is to do nothing and instead run with the herd, but this risks being overwhelmed and underprepared when the dislocation that will accompany a euro collapse hits markets. Should a Eurozone collapse come to pass, nobody could claim that they could not see it coming, and inaction by parties now could mean some of the newsprint is dedicated to them in the future.

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Sovereign Debt Restructuring and Mass Claims

*Abaclat and Others v. Argentine Republic*

By Sam Rezai*

I. “MASS CLAIMS” IN INTERNATIONAL ARBITRATION

The global financial crisis not only engulfed—and in some cases dispensed with—major private institutions, but also now challenges sovereign states to the brink of their financial resolve. As witnessed in May 2012, an anti-austerity political party catapulted to victory in the Greek elections, and financial markets were left with a feeling of unyielding uncertainty, distress over Greece’s short term ability to service debt, and fear of the long term impact that a Greek default would have on other teetering states such as Spain, Portugal and Italy. The sheer magnitude of sovereign defaults threatening the Eurozone re-ignited the topic of ‘mass claims’, while simultaneously redefining the meaning of ‘mass’ as used in this context.

A discussion of ‘mass claims’ in the field of international arbitration must include the 2011 case of *Abaclat v. Argentina*. That matter was heard before the World Bank’s International Center for the Settlement of Investment Disputes (“ICSID”) in Washington DC. The facts of this colossal ICSID arbitration are generally and briefly discussed below.

II. ARGENTINIAN BOND ISSUANCE AND THE TFA

In the early Nineties, Argentina issued thousands of sovereign bonds to obtain much needed capital for its ailing economy. A large portion of these bonds were directly purchased from Argentina by investment banks acting as underwriters. The bonds then moved through multiple intermediaries and eventually ended up being held by thousands of Italian citizens and companies. Argentina’s devastating economic crisis in 2001 resulted in its default under the bonds. This led to a number of major Italian banks establishing an association, Task Force Argentina (“TFA”), to act as the claimants’ agent in seeking compensation. The TFA initiated an ICSID arbitration under the Argentina–Italy Bilateral Investment Treaty (“BIT”). Initially, the claimants consisted of 180,000 bondholders.

However, that number was reduced to 60,000 after a group of claimants accepted an Argentinean bond exchange offer in 2010. In a much anticipated majority decision, a highly respected tribunal consisting of Professor Albert Jan van den Berg, Professor Pierre Tercier and Professor Georges Abi-Saab (“Tribunal”), accepted jurisdiction over the mass claims.

This article highlights the Tribunal’s findings, and discusses relevant concerns that counsel involved in mass financial claims may face in arbitration. This article does not, in any way, deal comprehensively with all aspects and relevant arguments of the award, but focuses on some that are of interest to the practitioner, without meaning to downplay the rest. We start with the Tribunal’s approach to the always difficult exercise of separating treaty claims from contract claims.

III. TREATY CLAIMS AND CONTRACT CLAIMS

Financial instruments, such as bonds, are often included as protected investments in BITs. This allows investors, i.e. bondholders, to invoke the protection of a BIT’s (ICSID) arbitration clause when the BIT’s protective standards are violated. However, the same bonds also are issued on the basis of contracts executed between the bondholders and the bond-issuing states, which agreements may provide for their own protective standards and fora of dispute resolution. The question of whether a state’s presumed violation of obligations emanates from contract or from a BIT may pose some difficulty to counsel engaged in investment disputes.

An ICSID arbitral tribunal may only exercise jurisdiction over claims when (i) a dispute arises from alleged violations of the BIT, and not necessarily a contract between the investor and the host-state of investment, or (ii) a state violates both the terms of the investment contract and the terms of the BIT. Also, as an exception, a so called ‘umbrella clause’ may trigger the jurisdiction of a tribunal by equating breaches of a contract with breaches of the BIT. The latter exception is not of great concern and will not be addressed in this article.

In the *Abaclat* claims, Argentina argued that the Tribunal lacked jurisdiction because defaults under the bondholder contracts merely qualified as contract violations, and did not trigger protective provisions in the BIT. The Tribunal rejected
Argentina’s argument by examining the nature and origin of the state act that lead to the default. The Tribunal determined that the act in question was the issuance of an emergency law that unilaterally altered Argentina’s payment obligations.

The enacting of laws is obviously a sovereign act. It is an exercise of a state’s powers and is not derived from any contractual mechanism. Though such exercise of sovereign power may affect contractual undertakings, its nature and origin are foreign to any contract. Argentina did not justify its non-payment based on any contractual terms, such as a force majeure clause, but solely on its dire financial situation. Consequently, the Tribunal ruled that the claims were not pure contract claims, but treaty claims based on sovereign acts. Therefore, when assessing whether a claim is based on a contract or treaty, it is necessary to examine the nature and origin of the contested state act.

The BIT system rests on the basic premise that states will adhere to the terms of the BIT vis-à-vis investors who make an investment within the host territory. The investor must prove that he or she invested funds into the territory of the state. In Abaclat, Argentina sought to dispose of the claims by alleging that the bondholders had not invested in Argentina, and therefore should not enjoy any protection under the BIT. Argentina argued that the purchase price paid by the claimants was never made to the state, and only the lump sum initially and directly paid by the investment banks (the underwriters) should be considered as an investment under the BIT. A multitude of non-Argentinean intermediaries lay between the investment banks and the claimants, and arguably only those intermediaries—not Argentina—received the purchase price.

The Tribunal held that the criteria for localization of an investment depend on the investment’s nature. That criteria cannot be the same for financial instruments as for conventional investments involving property and manpower. According to the Tribunal, the criteria for financial instruments should be where and for whose benefit the funds are ultimately used. Focusing on the nature of the bond issuance process, the Tribunal held that—though the funds initially paid to Argentina consisted of lump sum payments made by investment banks—it was the purchases by subsequent individual bondholders (the claimants) that constituted the basis for the initial sums paid by the investment banks. The investment banks would not have paid the lump sum payments to Argentina without knowing that they would collect funds from subsequent individual bondholders. In other words, the Tribunal viewed the lump sum payments by the investment banks to Argentina as an advance on future payments made by the individual bondholders. This linkage between the lump sum payments of the investment banks and the subsequent purchases by the individual bondholders enabled the Tribunal to view both as part of the same economic operation, with the same place of investment, Argentina.

IV. CONSENT TO ICSID ARBITRATION

The analysis of the fundamental question of whether both parties to a dispute have consented to ICSID arbitration is arguably one of the most important aspects of the Abaclat case. Consent is the cornerstone of the ICSID and BIT system, without which no arbitral tribunal can exercise jurisdiction. It is widely accepted that a state consents to ICSID arbitration through the inclusion of a dispute resolution clause in a BIT. The investor, on the other hand, usually consents to ICSID arbitration by filing a ‘Request for Arbitration’, which may be viewed as the investor’s acceptance of the state’s standing offer in the BIT to arbitrate disputes before an ICSID tribunal. Did Argentina and the claimants both consent to arbitration of such a ‘mass-claims’ dispute? Let’s start with the claimants.

One can imagine that the arrangement of declarations of consent from (initially) 180,000 claimants can be a daunting task. Nevertheless, they were collected and the Tribunal had to assess whether the claimants’ consent to ICSID arbitration was valid. Since it was the claimants’ attorney, White & Case, which filed the ‘Request for Arbitration’, the Tribunal had to acknowledge the validity of the power of attorney issued to White & Case by their clients, the claimants.

The Tribunal distinguished between the formal validity of the power of attorney, and the validity of the consent embodied therein. With regard to the former, the Tribunal qualified the question of the formal validity of the power of attorney as a matter of procedure (and therefore of admissibility), which is regulated in the ICSID Arbitration Rules and does not affect the issue of consent. Such an issue is assessed pursuant to the BIT and the ICSID framework, without attributing relevance.
to the requirements of national (Italian) law (e.g., the national law’s requirement of notarization). Nothing in the BIT or ICSID framework rendered these given powers of attorney invalid.

With respect to the validity of the consent—as embodied in the power of attorney—the Tribunal similarly held that this validity should not be assessed pursuant to any national legal regime, but on the basis of international law and general principles of law. As such, such consent is sufficient when given genuinely and free from coercion, fraud, or any essential mistake. It is paramount that claimants who give consent understand what ICSID arbitration is, and that they wish to initiate ICSID arbitration. It is thus up to counsel to provide the claimants with the necessary information to form this understanding. The Tribunal concluded that the claimants were duly informed and that they provided valid, ‘informed’ consent to ICSID arbitration.

Argentina further asserted that the envisaged manner of conducting the mass arbitration invalidated any presumed consent to ICSID arbitration. The claimants were informed by the TFA that their consent would include a waiver of any rights to instruct White & Case on how to conduct the arbitration. Argentina alleged that such a waiver of the claimants’ fundamental rights went too far and was inadmissible; meriting the conclusion that the claimants were not legitimately represented in the proceedings and therefore could not have consented validly to arbitration. The Tribunal approached this issue as a matter of admissibility and not of consent, since the claimants knew what they were doing when they waived their procedural rights. The Tribunal, acting pragmatically, conveyed its understanding that it would be impossible to conduct such a mass arbitration in a way that allowed all claimants to exercise influence over the course of the arbitration, and declared that the claimants’ conscious acceptance of a restriction of their procedural rights to benefit from collective treatment did not render the claims inadmissible.

Having established the claimants’ consent to ICSID arbitration, the Tribunal examined Argentina’s contention that its consent to ICSID arbitration in the BIT did not extend to mass proceedings concerning sovereign debt restructuring since, inter alia; (i) the admissibility of ICSID arbitration with respect to sovereign debt restructuring would be counterproductive to current state endeavors to modernize foreign debts and (ii) the ICSID Convention is intentionally silent on the issue of mass claims, indicating the ICSID framework’s incompatibility with mass claims proceedings. In other words, Argentina’s consent to ICSID arbitration could not encompass mass claims proceedings because the ICSID system does not allow for such proceedings.

Argentina’s argument that ICSID arbitration should not be allowed in disputes relating to sovereign debt restructuring was not convincing from a legal standpoint. The Tribunal held that the ICSID Convention, under Article 42, allows states to designate classes of disputes that they do not wish to subject to arbitration. In the absence of such a designation, ICSID arbitration should proceed in any dispute involving investments that fall within the confines of the ICSID Convention and relevant BIT provisions. Argentina’s first argument therefore failed.

The Tribunal then turned to Argentina’s related contention the Tribunal lacks jurisdiction to hear the claims because consent did not extend to mass claims proceedings. The Tribunal cogently held that when it has jurisdiction to hear one (or several) claims of the kind in question, it would be illogical to conclude that it could lose jurisdiction through an increase in the amount of claims. The ‘mass’ aspect of the claims could not lead to a subsequent loss of an established jurisdiction.

The Tribunal further held that the nature of the protected investments under the BIT (the bonds) merited the conclusion that Argentina’s consent, as embodied in the BIT, extended to mass claims disputes. Bonds are issued en masse in the same economic operation and are therefore susceptible to mass claims. The effective protection of such investments requires the provision of collective judicial relief, and thus the possibility of mass proceedings. To determine that a mass claims dispute would fall outside of Argentina’s consent in the BIT would run counter to the BIT’s framework and spirit.

The assessment that the BIT covers mass claims proceedings must be separated from the pivotal question of whether the ICSID framework allows for mass claims proceedings. This questions whether the Convention’s silence on the matter is a ‘qualified silence’—an intentional silence evincing
a rejection of an inclusion of mass proceedings within the Convention’s framework—or whether the silence is an unintentional ‘gap’ to be filled by the Tribunal. Contrary to Argentina’s position, the Tribunal seemingly did not regard the question of the ICSID Convention’s compatibility with mass claims proceedings as a matter of jurisdiction but rather one of admissibility. The question touches on a very interesting and difficult exercise of treaty interpretation, namely: the interpretation of silence. The analysis of the proper approach to this exercise is outside the scope of this article. For our purposes, it is sufficient to state that the Tribunal considered the ICSID Convention’s silence on the possibility of mass claims proceedings to be a ‘gap’. The Tribunal reached this conclusion through the same reasoning mentioned above; to hold otherwise would not accord with the spirit of the ICSID Convention when the BIT includes an ICSID arbitration clause for the settlement of disputes made by multiple claimants, and effective protection of the investments requires collective judicial relief.

Finally, the Tribunal argues that the fact that the current ICSID (procedural) framework may need to be adapted by the arbitrators in order to accommodate mass claims proceedings does not mean that the ICSID Convention disallows such proceedings, but it simply follows from the fact that the ICSID Convention’s drafters could not have possibly foreseen all types of investments, especially those that could result in mass claims (a non-existent phenomenon at the time).

V. CONCLUSION

So what lessons may one take from the Abaclat case? We have seen that the Tribunal offered useful, specific insights for counsel to deal with issues such as the distinction between treaty and contract based claims, the localization of the place of investment in relation to bonds, and the relevant norms to mind when collecting mass declarations of consent. Generally, if there ever was any doubt, Abaclat clarifies that states may trigger investors’ ICSID arbitration rights under BITs in case of a default under sovereign debt restructuring efforts. If the BIT provides protection to financial instruments that are susceptible to mass claims, a tribunal is likely to conclude—as in Abaclat—that the state’s consent to ICSID Arbitration does extend to mass claims, and that the ICSID Convention’s silence on the matter is no impediment for a tribunal to make the necessary adaptations to allow for the mass proceedings to take place.

Endnotes

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1 Abaclat & Others v. The Argentine Republic, ARB/07/5 ICSID, 4 August 2011 (formerly known as Giovanna a Beccara and Others v. The Argentine Republic).
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The New European Data Protection Regulation

by Nick Graham and Chris White

On January 25 2012, the European Commission published a new General Data Protection Regulation (the “Regulation”) which proposes to comprehensively reform data protection rules across the European Union. If approved by the European Parliament and Council of Ministers, the Regulation will be “directly applicable” and impose a single set of data protection standards in all the European Union’s 27 member states. The Regulation aims to improve harmonisation in privacy law across Europe. The European Commission estimates that introducing a single law will save businesses approximately €2.3 billion per year. However, the new rules also will impose substantial, additional regulatory burdens on organizations. This represents a real “sea change” in data protection and privacy law compliance risk.

There is no doubt that the current proposals will change the risk benchmarks for any company, group or other organization that handles personal data. The proposals affect any business which either operates in Europe or sells products or services to EU customers. As discussed below, the new Regulation includes extra-territorial effect, and directly impacts any US or other non EU-based businesses who sell into any EU member state. This article examines the key proposed changes in those regards.

I. A NEW SINGLE SET OF RULES

The Regulation will repeal and replace the current Data Protection Directive (96/46/EC). It also will be “directly applicable”. In EU law, this means that the new rules will apply across all EU member states without the need for individual member states to implement local law. So, the new privacy landscape will be much more harmonized that the current one. The current position is that there has been a real lack of harmonization across member states as they introduce their own legislation, which inevitably results in different jurisdictional interpretations of the provisions of the Directive. Despite the push toward uniformity in the new rules, there still may be differences in the way the local data protection regulators (“supervisory authorities”), such as the Information Commissioner’s Office in the United Kingdom, interpret the Regulation.

II. EXTRA-TERRITORIAL SCOPE

The Regulation will apply to any organization operating in the EU, but also to any non-EU organization if it offers goods or services to EU residents (or monitors the online behaviour of EU residents). Therefore, US and global companies may fall within the ambit of the Regulation even if they have no physical presence in the EU. In many instances, the Regulation also requires that non-EU organizations appoint a representative in one of the EU jurisdictions. That representative will be responsible for compliance with the Regulation, although the representative’s appointment will be without prejudice to a legal action that may be initiated directly against the relevant organization.

III. REMEDIES AND SANCTIONS

EU Data Protection Regulators are given the power to impose significant fines on those that violate the new Regulation. In the worst instances, these fines may be up to 1 million or (in the case of an enterprise engaged in economic activity) up to 2% of the offender’s global annual turnover. This is more in line with anti-trust enforcement and penalties. Data privacy is now a “top table” issue.

IV. SCOPE OF “PERSONAL DATA”

The Regulation provides for a broad interpretation of “personal data,” which includes any information relating to living individuals. This underlines the continuing disconnect between the scope of EU data protection law and the narrower/different scope of data privacy laws in other jurisdictions, particularly the US, where “personally identifiable information” is a term of art. It also leaves the position of IP addresses, and equivalent online data, unclear. The new Regulation does deal specifically with “genetic data” and “biometric data”.

V. SUPRA-NATIONAL DATA PROTECTION REGULATION

The Regulation introduces the concept of a “one stop shop” with regard to EU data privacy regulation. Both data controllers and data processors will be regulated by the supervising authority in the EU country where they have their “main establishment”. The main establishment will be where the main
decisions about data processing are taken, or failing that, where in the EU the main processing activities take place. However, this does not restrict the right of an individual to refer complaints to either the supervising authority in their own country, or to the supervising authority having jurisdiction over the data controller or data processor against whom the complaint is being made.

VI. DATA SECURITY BREACH NOTIFICATION

Companies must notify the supervisory authority of a “personal data breach” without undue delay and where feasible, not later than 24 hours “after having become aware of it”. The notification to the data protection regulator must include details of the nature of the personal data breach, outline the consequences of the breach, and set out the measures taken by the organization to mitigate against possible adverse effects. The need to gather this information in the permitted timeframe will be very challenging and the concern is that attempting to satisfy the notification requirements may present an unwelcome diversion away from the efforts being made to contain the data breach.

In cases where notification is not made within 24 hours, the subsequent notification to the regulator must be accompanied by a reasoned justification for the delay. In addition, once the regulator has been notified, there also is a requirement to notify the individuals concerned “without undue delay” if the personal data breach is likely to “adversely effect” the protection of the individuals’ personal data, unless the data controller can demonstrate that it has implemented appropriate technological protection measures such as encryption.

The new “24-hour breach notification “ rule is a huge change for EU privacy law and imposes a need to “go public with the bad news, and fast”. This may create reputational risk as well as damage to a company’s share price and brand.

VII. EXPLICIT CONSENT

The Regulation clarifies the meaning of consent for the processing of data. Consent must be “freely given, specific, informed and explicit”. The inclusion of a reference to consent being “explicit” is new compared to the current Directive. This will require consent to be transparent as to the data being collected, and the purposes for which it will be used and disclosed. Therefore, one cannot properly rely on such consent unless it clearly sets forth the relevant purposes and scope. This may create difficulties in, for example, digital media, where data collection and usage is difficult to explain in simple terms for new products and offerings. The Regulation also provides the data subject with the right to withdraw consent at any time. This will pose a real challenge for data controllers to ensure that consent is valid and user-friendly under the new rules.

VIII. DATA PROTECTION OFFICERS

The Regulation requires any company employing 250 or more staff to formally appoint a data protection officer to ensure compliance. The data protection officer will be responsible for monitoring the data controller’s compliance with both its own policies and the Regulation. The data protection officer also is tasked with notification and communication of any data security breach notification. The Regulation also will apply to public authorities.

IX. THE NEW “RIGHT TO BE FORGOTTEN” RIGHT

This right gives data subjects the right to require a data controller to delete personal data relating to that data subject. The Regulation particularly targets information made available by the data subject while he or she was a child. The Regulation also goes on to provide that where the data controller has made personal data relating to that data subject public it must take all reasonable steps (including technical measures) to inform third parties which are processing such data and request them to erase any link to or copy of that data. The requirement may be particularly relevant to businesses operating in the social media sector.

X. THE NEW “DATA PORTABILITY” RIGHT

Data subjects will have the right to obtain from a data controller a copy of the data, which that data controller holds in an electronic and structured format and the individual may then transmit that information to another electronic system. This will impact, for example, digital media, digital vaults and any products which store customer information. No mention is made as to who will be responsible for the cost of producing this data. The data portability provision is without prejudice to the right of individuals to obtain access to their information from the data controller through a subject access request. This will continue to cause challenges for
data controllers where individuals try to use subject access request rights to circumvent court disclosure and/or to go on a “fishing expedition” for a possible cause of action.

XI. CHILDREN

There are new rules for processing data relating to children under 13. These new rules provide that the processing of personal data relating to a child below the age of 13 is only lawful if, and to the extent that, consent is given by the child’s parent or guardian, and the data controller must make reasonable efforts to obtain verifiable consent.

XII. NEW “ACCOUNTABILITY” REGIME: A GROUND BREAKING CHANGE

Data controllers must adopt policies and systems to ensure compliance with the new Regulation. This is, in effect, a new principle of “accountability” and requires a much more prescriptive “control framework” to be put in place to ensure data protection compliance. To demonstrate such compliance, data controllers will be required to show that they have undertaken regular data protection audits and carried out privacy impact assessments using recognised industry standards before processing certain classes of data. This is much more prescriptive that the current rules. Global data privacy audits are becoming an essential tool in the chief privacy officer’s armoury.

XIII. INCREASED RESPONSIBILITY FOR DATA PROCESSORS

Data processors (any party who processes data on behalf of the data controller, e.g. outsourced payroll providers / IT vendors or cloud computing providers) are largely unregulated by the current Directive. The new Regulation provides that new obligations will apply directly to data processors. These include the right for data subjects to claim compensation from data processors and the need for data processors to implement appropriate security measures to protect personal data. This will be of concern to data processors who have previously argued that it was for the data controller, and not the data processor, to decide the appropriate level of security to be applied with respect to data processing supplied by the data controller. Under the Regulation, data processors assume direct legal liability to the data subject whose data is processed if inappropriate security measures are adopted. Therefore data security will become a fundamental issue for both data controllers and data processors.

XIV. INTERNATIONAL DATA TRANSFERS

The current options available to permit international data transfers will be bolstered by the explicit incorporation of Binding Corporate Rules (an EU “data passport” to legitimise the international transfer of data across a corporate group).

XV. WHAT’S NEXT?

Companies are expected to lobby the European Parliament and national governments heavily for amendments to these far-reaching proposals. The legislative text will be debated by the European Parliament and Council of Ministers as part of the Ordinary Legislative Procedure (formerly known as the Co-Decision Procedure). The public will have to wait to see the extent to which the more controversial elements of the Regulation survive the lobbying process. Once finally approved, there will be a two-year period before the Regulation takes effect.

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The Law Applicable To Contracts In The European Union

A COMPETITION BETWEEN ROME I REGULATION, OTHER SOURCES OF EU LAW AND DIRECTIVE LAW AS IMPLEMENTED

Tamas Dezso Czigler, Izolda Takacs

I. INTRODUCTION

Beyond any doubt, the last few years brought a wonderful evolution, a “Private International Law (conflict of laws, PIL) boom”1 to the European Union.2 Several new regulations were adopted in this regard:

• The Rome I Regulation on the law applicable to contractual obligations (hereinafter referred to as: “the Rome I Regulation” or “Rome I”),3

• The Rome II Regulation on non-contractual obligations (i.e. a regulation on the law applicable to torts),4

• The Rome III Regulation on the law applicable to divorce proceedings,5

• Regulation (EC) No 4/20096 and the related Hague Protocol7 on the law applicable to maintenance obligations.

These new regulations created a common regime for the choice of applicable law to several international relations in Europe, with unified rules and common foundations. Before this keen activity, there were no community instruments that would have covered a broader scope of international relationships regarding applicable law. The Member States (MSs) concluded the Rome Convention on the Law Applicable to Contractual Obligations (hereinafter referred to as: “the Rome Convention” or “Convention”)8 in 1980, but as an international agreement, it never became part of community law. Moreover, even though MSs had planned to create a convention with broader material scope—the draft of the convention included rules on non-contractual obligations—the Rome Convention only dealt with the question of the law applicable to contractual obligations. Incidentally, the convention also contains a number of similar rules such as the Restatement (Second) of Conflict of Laws of 1971 (hereinafter referred to as: “Second Restatement”)10 and of the Inter-American Convention on the Law Applicable to Contracts.11 It was some time later (from 2004) that the European Court of Justice gained competency to make preliminary decisions related to the application of the Rome Convention.12

In the early days then, there had been only fragmented and miscellaneous conflict-of-laws provisions in the acquis communautaire, focusing on specific areas. Most provisions were to be found in directives dealing with substantive law, i.e. the conflict-of-laws rules were merely extensions to the regulations in certain areas. Adopting such rules was common in the fields of consumer protection (i.e. consumer contract law) and insurance law.

Numerous authors had criticized this earlier technique, which resulted in the disintegration of Community conflict-of-laws rules.13 There were indeed several disadvantages of the early approach. Firstly, the PIL body of law adopted for particular areas became opaque and convoluted. Secondly, in several cases the European legislator only provided a kind of “supra-collisional” rule, or to be more precise, a rule defending some provisions of Community law.14 That is to say, the Community PIL rules were only to be applied if doing otherwise, some substantive rules of EU/Community law would have been violated. This approach made the system unpredictable. Thirdly, the solutions for implementing these rules into MSs’ national statutes seem rather diverse and sometimes inconsistent with each other.15 Fourthly, EU/Community rules also disrupted existing and functioning national systems. This was the case for insurance law: EU/Community law reinvented effective national insurance law and in some places, rewrote the rules using ill-chosen constructs.

Due to the above, the PIL aquis on insurance contracts became almost chaotic. Adopting regulations with a wider scope or the assembling of such regulations as was done in the Rome I Regulation can be considered to be a great leap forward, even if the methods of codification in the Regulation warrant some criticism.16 Last but not least, some “hidden” PIL rules were codified in directives: this made their application even more difficult, since the direct effect of directives not implemented by MSs is ambiguous.17
The issue was partially resolved by the adoption of the Rome I Regulation on the law applicable to contracts, which replaced the rules of the Rome Convention concerning contracts concluded after December 17, 2009. At the time of writing, the Rome I Regulation functions as the most important legal source for choosing the law applicable to contracts in Europe. The major part of the body of law governing contracts has been unified, and—as a result of the Rome Convention—the rules on insurance contracts have been built into the Regulation.

However, Art. 23 attempts to settle the relationship of the Regulation with other sources of EU law in just one complex sentence: this is the core of the problem examined in the present paper. According to the text,

*with the exception of Article 7 [i.e. the provisions on insurance contracts—the authors], this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-laws rules relating to contractual obligations.*

This effectively means that—excepting provisions on insurance contracts—all EU legislation containing choice-of-law rules precede the application of the Regulation. Rules governing consumer protection and everything else—again, except for provisions on insurance contracts—remain in force. If a conflict arises between a piece of EU legislation and the Rome I Regulation, the general rule is to apply the provisions of said legislation instead of the Regulation. In most cases, Rome I functions as a fundamental source of law: it may only be cast aside if there is a conflict between the law chosen on the basis of its rules and another piece of EU legislation and when the provisions of the latter have the attributes to ascertain its direct effect, or when the latter has been transcribed into national law.

It is important to highlight that Europeans are sometimes very proud of their conflict of laws system, knowing that—compared to the US—they boast a transparent, unified body of law governing the choice of law of contracts, used throughout MSs. Of course this can be debated, but in the authors’ view, it is a commonly held opinion in Europe that the way the Europeans managed to assemble unified rules can be a lesson for the “chaotic” “after conflicts revolution” legal system of the US. However, we only partly agree with this view since—once we scratch the surface—we find that the EU conflict system is itself fragmented. Moreover, beside the fragmentation, its relationship with national (MS) rules and international rules (i.e. international agreements) sometimes makes finding the applicable provisions very difficult. The latter problem can cause serious challenges in everyday legal practice, and in certain instances the system is extremely problematic.

In this article, beyond concentrating on EU rules and analyzing the European background, the objective is to show the particulars of implementing the EU system’s fragmented rules into the Hungarian legal system. The authors have written elsewhere on the issue of fragmentation of PIL rules in Europe. The issue above has theoretical and practical importance even though Hungary is only a mid-sized European country: it is a good example of EU legal system fragmentation seeping into a MS’s legal system. Consequently, the way Hungary has implemented the rules may have lessons for other nations as well. Hence, in the first part of the article we review the EU provisions that alter the application of the Rome I Regulation. In the second part of the paper, we will examine the transition of these provisions into Hungarian law.

II. EU LEGAL SOURCES AMENDING THE APPLICATION OF THE ROME I REGULATION

In this section, we will examine the legislation laying down conflict-of-laws rules related to the application of the Regulation. Two groups of such legal sources can be distinguished:

- Non-consumer legislation and
- Legislation (mostly directives) governing consumer protection.

It is important to mention that because of fragmentation, other legislations containing PIL provisions may also exist. However, in the authors’ opinion the following rules have the greatest importance.

A. Non-Consumer Legislation

1. Directive on Commercial Agents

The first directive to review is Directive 86/653/EEC on self-employed commercial agents. The main purpose of this Directive was to provide protection
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to commercial agents *vis-à-vis* their principals, to facilitate concluding commercial representation contracts and to safeguard associated commercial transactions. In the context of the Directive, the concept of a “commercial agent” means a self-employed intermediary who has the right to negotiate or negotiate and conclude the sale or the purchase of goods on behalf of and in the name of another person (the principal). The law sets out the rights and obligations of the parties, the remuneration of the agents and the process of conclusion and termination of their contract.27

The Directive itself does not contain any *expressis verbis* PIL rules. Furthermore, we find no guidelines concerning its scope of application either. Therefore for this purpose, MSs have had to include in their legal systems additional governing rules, which are applied when a MS’s court rules in a case involving a commercial agent contract. However, in certain areas, the law articulates that the parties are not allowed to apply conditions in their agreement that are different (detrimentally to the commercial agent) from those set out in the Directive. Such provisions affect the following articles:

- Articles on the rights and obligations of the parties (Art. 3 and 4)
- Rules on commission for the agent (Art. 10 and 11)
- Information given to the agent and the information relevant for establishing the amount of commission (Art. 12)
- Indemnity of the agent (Art. 17 and 18).

In these cases, either the parties are not permitted to derogate the provisions of the Directive (for Art. 3 and 4) or, in the case of the other articles, must not conclude an agreement to the detriment of the commercial agent.

There have been several proceedings conducted before the ECJ concerning this Directive. The first, well known and controversially interpreted matter is the so called *Ingmar* case:28 a Californian company called Eaton Leonard Technologies Inc. concluded a commercial agent contract with Ingmar GB Ltd, a company established in the UK. They chose California law to apply to their contract: this would have harmed Ingmar’s rights (derived from the Directive) to receive compensation for damages suffered because of termination of the contract.29

Art. 19 of the Directive expresses that “the parties may not derogate from Articles 17 and 18 [from the rules on compensation for damages—the authors] to the detriment of the commercial agent before the agency contract expires. Consequently, the ECJ ruled that the Directive’s relevant provisions have an internationally mandatory nature and therefore must be applied even if the law chosen by the parties would set it out differently. This also applies to cases in which there was no choice-of-law made by the parties. These fundamental principles have been affirmed in other cases30 such as *de Zotti*.31

Thus, the rules of the Directive are considered to override internationally mandatory (imperative) rules that fall under Art. 9 of the Rome I Regulation and have to be applied irrespective of choice-of-law rules, even against the substantive rules specified by Rome I.


The second directive we examine is Directive 93/7/EEC, on the return of cultural objects unlawfully removed from the territory of a MS. The aim of the Directive is to protect national cultural treasures and to specify a mechanism if cultural objects have been taken unlawfully. Types of cultural objects may vary and can include archaeological finds, elements forming an integral part of artistic, historical or religious monuments, pictures and paintings, mosaics or drawings, original posters, sculptures, photographs, films and negatives thereof, incunables (i.e. books as well as artifacts from an early period), manuscripts, early maps and musical scores. The protection also extends to collections and specimens from zoological, botanical, mineralogical or anatomical collections, collections of historical, paleontological, ethnographic or numismatic interest and means of transport more than 75 years old.33

According to Art. 2 of the Directive, cultural objects unlawfully removed from the territory of a MS shall be (must be) returned. The Directive also describes the specific procedure (filing of action, etc.)

Though the Proposal of Rome I specifically mentions this Directive among its exceptions, the wording of the Directive does not contain any reference to PIL rules governing contract law—no wonder, since an act of unlawful removal cannot be considered to be a contractual relationship. However, the Directive does contain a handful of PIL provisions. According
to these, an arbitration procedure is available to the parties. The burden of proof shall be governed by the legislation of the petitioned MS (i.e. where the object is located).\textsuperscript{34} On the other hand, based on Art. 12, ownership of the cultural object after return shall be governed by the laws of the requesting MS.

Upon closer examination, the PIL links regulated by the Directive don’t conflict with those of Rome I, since the material scope of the two regulations is different. Consequently, appraising this Directive may be unnecessary in the Proposal.\textsuperscript{35} Contracts on unlawfully removed treasures may be governed by the Rome I Regulation provided that such contracts are considered valid. The Regulation contains rules on applicable law supporting this option: Art. 10 and 11 on material or formal validity may be considered as such. Still, the law governing the return procedure and the law of ownership after return is regulated by the Directive. Since the Directive evades the question, we assume that the ownership rights law of the petitioned MS is applicable during the period between the illegal removal and subsequent return of the object.\textsuperscript{36}

3. Directive on the Posting of Workers\textsuperscript{37}

Before entering into a detailed exposition of Directive 96/71/EC on the posting on workers, some auxiliary notes regarding the general provisions of the Rome I Regulation for employment contracts are useful. According to Art. 8(1) of the Regulation, the law governing employment contracts is the one chosen by the parties. The choice of law does not allow for depriving the employee of the protection afforded to him by the law that would have been applicable in the absence of a choice of law pursuant to the Regulation.\textsuperscript{38} Further, Art. 8(2) stipulates that in the absence of a choice of law, the contract shall be governed by the law of the country in which country or, failing that, from which country the employee habitually carries out his work.\textsuperscript{39} Where the law applicable cannot be determined in accordance with the above, the contract shall be governed by the law of the country where the employer’s business is located. In case it is observed that the contract is more closely connected with a country other than the aforementioned states, the law of that other country shall apply.

Beyond the rules of the Regulation, the Directive sets new provisions concerning the posting of workers in the framework of the free movement of services. The Directive is to be applied to companies located in a MS sending employees to another MS within the scope of providing transnational services. Posting may refer to relocation, employee rental or even posting to a subsidiary or branch office of a parent company.\textsuperscript{40}

The key rules for this article’s focus are found in Art. 3 of the Directive, according to which, and contrary to Rome I, certain issues are governed by the law of the MS where the work is carried out. In other words, in certain matters the location of the employee’s regular workplace or the location of the employer is irrelevant. On these matters the law of the location where work is carried out should be applied. Such matters are: maximal work periods and minimal rest periods, minimal annual paid leave, minimum wages, the conditions of hiring-out of workers, especially in case of staffing agencies, health, safety and hygiene rules at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, protective provisions for young people, equality of treatment between men and women and other articles on non-discrimination.\textsuperscript{41} These provisions may not be applied if the law set in Rome I or in other rules is more favorable to workers.\textsuperscript{42}

If the rules of Rome I are compared to those of the Directive, one notices that the Directive contains specific rules which in some cases lead to the application of a different country’s law than the one set out in the Regulation. In compliance with the Regulation—in the absence of a choice of law by the parties—the employment contract is governed by the law of the employee’s regular work location or the employer’s location (i.e. the law applicable is based on the permanent factors of the employment relationship). According to the Directive, the contract shall be governed by the law of the temporary workplace (i.e. the temporary factor receives importance). Surprisingly, the law applicable to the permanent workplace may also override the law chosen by the parties.

4. Regulation on the Rights of Sea and Inland Waterway Passengers\textsuperscript{43}

Rome I also has special rules applying to contracts for the carriage of passengers and goods in its Art. 5. The Regulation allows choice of law by the parties narrowed to certain states’ law. In the absence of
such a choice, the “law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.” If no choice of law was made and it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than the above mentioned, the law of that latter country shall apply.

However, beyond the rules of Rome I, Regulation No 1177/2010/EU (hereinafter referred to as: (“Regulation on Waterway Transport”) establishes special rules for sea and inland waterway transport. Its main purpose is to ensure non-discrimination between passengers, non-discrimination and assistance for disabled persons, to set out the rights of passengers in case of cancellation or delay, to specify minimal information to be provided to passengers and to require a system for handling complaints. The regulation applies in three cases:

- Firstly, to passengers travelling on passenger services where the port of embarkation is situated in the territory of a MS.

- Secondly, if the service is operated by an EU carrier, to passenger services where the port of embarkation is situated outside the territory of a MS but the port of disembarkation is situated within the territory of a MS.

- Thirdly, on a cruise where the port of embarkation (i.e. the starting point of the cruise) is situated inside the territory of a MS.

In the regulation there is a sentence similar to the earlier—outdated—consumer law directives (see later). It states that “rights and obligations pursuant to this Regulation shall not be waived or limited, in particular by a derogation or restrictive clause in the transport contract.” This should also be valid when the parties elect to choose the law of a third state.

It follows easily that the application of Rome I and the Regulation on Waterway Transport may drive us to use differing substantive rules in certain cases. For instance, even if a third state’s law has to be applied to carriage according to Rome I, the provisions of the Directive on Waterway Transport must still be applied. Consequently, the rules of the latter overwrite the third state’s laws before the courts of MSs.

5. Regulation on the Liability of Carriers of Passengers by Sea

Regulation No 392/2009/EC also has some rules that may have an effect on the law applicable to contracts, even if the relationship governed by the Regulation itself is to be interpreted as a non-contractual obligation arising out of a contract. The Regulation must be applied if two circumstances are met:

- Firstly, when a dispute involves both international and domestic carriage. Carriage is considered international if, according to the contract of carriage, the place of departure and the place of destination are situated in two different States, or even in a single State if there is an intermediate port of call in another State.

- Secondly, there must exist a connection with the EU: either the ship has to fly the flag of or must be registered in a MS, or the contract of carriage must have been signed in a MS, or the place of departure or destination must be in a MS.

Regarding the carrier’s responsibility, the Regulation refers to the International Convention on Limitation of Liability for Maritime Claims of 1976 and its implementation into national laws. In the absence of any applicable national legislation, it states that only Art. 3 of this Regulation shall govern the liability of the carrier. Art. 3 refers to parts of the Regulation and to the Convention. Consequently, in respect of claims for loss of life or personal injury to a passenger, the rules of the above-mentioned Convention are to be applied. Art. 3 of said Convention sets strict rules for carriers, Art. 7 specifies liability for death and personal injury and Art. 8 limits liability for loss of or damage to luggage and vehicles.

The rules of the Regulation and the Agreement have to be applied even if a choice of law has been made. This may limit the scope of, or more precisely, alter the usage of the substantive law designated by Art. 5 of Rome I.
B. Consumer Law Legislation

1. Provisions of the Rome I Regulation on Consumer Contracts

Beside the substantive law background, the question of which law to apply to international consumer contracts has great relevance: according to statistics, the frequency of occurrence of choice of law clauses on European international business (e-trade) websites is between 30–40% a year. Before the relevant provisions of directive law are discussed, it is important to briefly review the rules of Rome I on consumer contracts; more thorough analyses of these provisions can be found in numerous international publications.

The rules on consumer protection in the Regulation are specific provisions in contrast to the general rules of Articles 3 and 4. Therefore, they create exceptions from the general rules. There are two important necessary conditions for such contracts to fall under Art. 6:

- The contract between the professional and the consumer has to fall under the material scope of consumer contracts, and also
- The activity of the professional must be directed to the MS where the consumer has his/her habitual residence.

The material scope of consumer contracts is drawn wider than in the Rome Convention, where Art. 5 applies its consumer rules only to the supply of goods or services. Fortunately, Art. 6 of Rome I departs from that disputed solution and defines a broader scope for consumer contracts. According to the Regulation, a consumer contract is a contract concluded by a natural person for a purpose that 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). Based on the Regulation, the contract between them may even be concluded and executed via the Internet. The law applicable to contracts for downloading software, music and films from the web is generally the law of the country where the consumer has his/her habitual residence, if that is the location of the download process and if the site includes a request to conclude a contract. A passive website, through which concluding a contract is not possible, cannot be considered to be activity in that country. Moreover, contracts of carriage and contracts offering a service outside the state of the consumer's habitual residence don't fall under the scope of consumer contracts. Neither do contracts on real estate, on rights embodied by financial instruments or securities, and—as detailed in the general provisions—contracts concluded in a multilateral system.

As a general rule, the law applied to consumer contracts is the one chosen by the parties. However, similar to employment contracts, stipulation of law by the parties does not exclude the application of substantive national laws that would protect the consumer in the absence of such stipulation. If the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence, the law applicable will be determined by the general provisions, i.e. the rules of Art. 3 and 4. Even though we will not attempt a detailed analysis of said articles here, it is important to note that resulting from them, the law applicable in most cases will be the law of the professional's habitual residence. In such cases, the consumer will likely not be familiar with the regulations designed to ensure his/her protection.

2. Methods Applied in Consumer Law Directives

The first directives on consumer law did not contain rules on their applicability. Neither did the Directive on Product Liability, nor the Doorstep Selling Directive, nor the Directive on Unfair Terms in Consumer Contracts. Therefore the scope of these directives was determined by the implementing MSs. Another problematic issue was that some of these rules did not contain explicit conflict of laws provisions either. Later, other regulations applied varying methods and the directives' subject and scope became better defined.

In all sources, both early ones and those adopted later, PIL or rules that have an effect on PIL appear as a level above regular PIL provisions, creating a kind of supra-PIL, restricting the parties' rights to choice-of-law or—in certain cases—even the law applicable in the absence of choice made by the parties. One may
perceive in these provisions a kind of anti-foreign law mentality: most of them were enacted to protect the consumer from a third state's law. There are several approaches used in such legislation:

- Firstly, in certain instances it is emphasized that the consumer may not waive the rights conferred on him by the directive. This phrase has an effect on the choice of law made by the parties and on the law applicable in the absence of choice as well.

- In the second case, as long as the consumer contract falls within the scope of the directives and has a close connection to the EU or one or more of its MSs, the MSs have to ensure that the consumer does not lose the protection granted by the directives by virtue of the choice of the law of a non-member country. As seen in these cases, a close connection is enough to apply the rules of the EU and their national implementations. Thus, not all of the relevant elements have to fall within the territory of EU. In some of these rules, there is no explicit provision for what one should do in the absence of a choice of law.

- In the third instance, all aspects of the relevant situation at the time of the choice of law must be located in one or more MSs and the contract must also fall under the scope of the directive. Thus, in these cases, all elements of the contract have to be related to the EU in order to provide protection to the consumer. Usually, this protection is given against a choice of law by the parties. In the absence of this, just as in some of the above-mentioned cases, not all directives provide clear guidance on whether the rules of the directives should be applied or not.

- Finally, the simplest and most elegant approach used was to explicitly vest these provisions with an imperative, internationally mandatory character in the presence of certain elements (e.g. real estate located in the EU).

There are numerous approaches used in the provisions of consumer law directives. If one considers them to be imperative (overriding mandatory) regulations, their implementation has to be applied even in the absence of choice of law, and their rules can be seen as provisions falling under Art. 9 of Rome I (overriding mandatory provisions). According to certain authors, this seems to be affirmed by the aforementioned Ingmar judgment of the ECJ. However, there are doubts about whether this interpretation of imperative—internationally mandatory—provisions would hold true for all the directives, since the authors share the view that “the mere fact that a rule serves to protect the interest of the weaker party to the contract does not attribute overriding effect to such a rule.” Still, the authors certainly agree that many EU consumer provisions as implemented have the attributes of overriding mandatory rules in the sense of Art 9 of Rome I. What follows is a discussion of the relevant rules in chronological order.

3. **Product Liability Directive**

Since Directive 85/374/EEC is about product liability, which is a non-contractual obligation and falls within the scope of the Rome II Regulation, we only recap its relevant provisions that may also have an effect on contract conclusion. As is well known, this directive is one of the main sources in the EU of product liability and sets the substantive fundamental rules (minimal requirements) for the liability of producers and manufacturers.

Art. 12 of the Directive states that the producer's liability may not, in relation to the injured person, be limited or excluded by a provision limiting his liability or exempting him from liability. In the author's opinion, this rule is also applicable if one applies the laws of a third country before the court of a MS. The rule is binding when a choice of law is stipulated and also to the law applicable in the absence of choice of law.

A conflict between the law chosen by the Rome I Regulation and that by the Directive may occur if the law allows the limitation or exclusion of the producer's liability: such a clause inserted into a contract in the EU is ineffectual and cannot be defended before European courts.

4. **Doorstep Selling Directive**

Directive 85/577/EEC protects the consumer in contracts negotiated away from business premises—or more precisely, will protect them until it is repealed by the new Directive on consumer rights (see next section). Its most important provision is the securing of cancellation rights for consumers (which shall be at least seven days long, and still varies among MSs).
The Directive lays down only a few rules that effect PIL. Similarly to the Product Liability Directive, Art. 6 states that the consumer may not waive the rights conferred on him by the Directive. Accordingly, the rights of consumers (including the right of cancellation) may not be limited or waived in a contract. In the authors’ opinion, this also stands in the case of applying a third state's law. Furthermore, the Directive also lays down an auxiliary rule which is more muddling than useful. Based on its Art. 7, “if the consumer exercises his right of renunciation, the legal effects of such renunciation shall be governed by national laws, particularly regarding the reimbursement of payments for goods or services provided and the return of goods received.” Of course, this rule has to be interpreted in the context of Art. 6 detailed above.

It is important to mention that some of the well-known Gran Canaria cases were also in connection with this Directive, while other disputes occurred concerning the application of the Timeshare directive (see below). In all cases, the problems arose because Spain had not implemented the Directive by the time Germany was done with the implementation. In the first group of cases related to the Doorstep selling directive, German tourists on the Spanish island of Gran Canaria were the victims of a German company manufacturing bed linen. The German company had an agreement with a local Spanish company that organized free bus excursions. During the trip, the Spanish company gave the tourists a sales contract, which they signed without paying anything. After returning to Germany, some of these tourists wanted to exert their right of withdrawal under German law, enacted under the Directive. According to Spanish law, there was no withdrawal period available. In the end of the procedures, the German courts have refused the protection of the consumers and found the choice of law clause to be valid.

If one compares the rules of the Directive and those of Rome I, one may state with certainty that if Rome I were to not designate the law of a MS, the Directive itself may be still applied. Hence, the Directive is able to change the substantive applicable rules. Of course, this solution does not conform to the rules of Rome I; nevertheless, it may advantage consumers.

5. Directive on Unfair Terms in Consumer Contracts

One of the first—second-generation—directives governing PIL alongside consumer protection was Directive 93/13/EEC on unfair terms in contracts. Its purpose was to approximate the rules of MSs on unfair terms in contracts concluded between a seller (or supplier) and a consumer. The Directive focuses on contractual terms lacking individual negotiation and defines the concept of unfairness and related legal consequences, sanctions and compensatory redress. A contractual term shall be regarded as unfair if, contrary to the requirement of good faith, it causes significant imbalance in the parties’ rights and obligations to the detriment of the consumer. The Directive governs only unfair terms in contracts. In this regard it shall be considered as special legislation beyond the fundamental rules of Rome I.

If examined closer, the Directive turns out to contain a special PIL rule in Art. 6(2). It states that:

Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States.

The rule above is a unilateral choice-of-law rule for consumer protection: here, the Community is trying to protect consumers. The consumer shall not lose the protection of EU law by virtue of a choice of a non-MS’s law. Even though it places the stipulation of laws within definite bounds, the Directive does not include provisions for the case where no choice of law is made by the parties. In such cases, general PIL provisions shall apply and the consumer can only be protected if a court finds that the applicable third country law would harm imperative MS provisions including transcribed measures of EU directive law.

The relationship and differences between this rule and Rome I are quite complex. We have to examine several provisions, namely Art. 3 (4), Art. 6(2) and Art. 9 of Rome I.

Firstly, Art. 3(4) of the Regulation (the so called “internal market clause”) says:
Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties’ choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.

This rule applies only in cases of a choice of law having been made by the parties. The Rome I Regulation orders all mandatory provisions to be applied, while the Directive focuses only on matters that fall under its scope. However, the main difference between the internal market clause and the provision of the Directive is that for applicability of the internal market provision of the Regulation, all relevant elements have to be within the MSs.

Secondly, we have to examine the relationship between the rules of the Directive with Article 6(2) of Rome I. The Regulation declares with respect to consumer contracts that:

A choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable.

This rule differs in several aspects from the solution used in the Directive. It implies the use of national law instead of EU law or EU instruments and does not prescribe a close relationship with a MS.

Thirdly, the rules on mandatory provisions found in Art. 9 of the Regulation may also have importance. Recall that overriding mandatory provisions are provisions which are regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization. Thus, they are applicable irrespective of the law otherwise applicable to the contract under the Regulation. The first rule on mandatory provisions in the Regulation allows the forum to use its overriding mandatory provisions [Article 9(2)]. The second rule allows the forum to consider the usage of the mandatory provisions of another country where the obligations arising out of the contract have to be or have been performed. Such provisions may only be adverted in so far as they render the performance of the contract unlawful [Regulation, Article 9(3)]. Here, the Regulation refers only to rules with major importance. These rules have international mandatory effect, and they are applied regardless of a choice of law. Moreover, they must also be applied in the absence of a choice of law clause. Furthermore, the Regulation refers only to national rules, not those (either generally or specifically), of the EU.

In summary, again we have found that the application of the Directive may lead to a different law (or, more precisely, to the usage of different provisions) than that set out in Rome I. It is also important to mention, that—as indicated before—no written guidance is provided as to what should be done in case the parties elected not nominate any law as the proper law for their contract when the applicable rules of the third country would harm consumers’ rights set out in the Directive. Nevertheless, we can certainly state that such clauses cannot be applied, since the mandatory system of the MS would not permit them to be used.

6. Directive on Distance Selling

Directive 97/7/EEC on the minimal requirements for distance contracts also contains choice-of-law regulations. It is important to mention that after the adoption of the Directive on Consumer Rights (see next section), the Distance Selling Directive will also be repealed (see later). The aim of the Distance Selling Directive was to approximate the legal standards of MSs for distance contracts (contracts that make exclusive use of one or more means of distance communication) between consumers and suppliers. Those means include unaddressed printed matters, addressed printed matters, standard letters, press advertising with order forms, catalogues, phone calls, radio, email, fax and television (teleshopping). The Directive sets out the circumstances of the trade: it defines the criteria for mandatory prior information to be given, the scope of information, the conditions and time limit for exercising the right of withdrawal, the scope for inertia selling, manners of redress for the consumer, addressing of complaints, etc.

Art. 12 of the Directive asserts that

1. The consumer may not waive the rights conferred on him by the transposition of this Directive into national law.
2. Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract if the latter has close connection with the territory of one or more Member States.

As we can see, similarly to the above-mentioned rules, the Directive includes limitations only in regard to its applicability: the consumer stays protected and cannot lose the protection. This solution is similar to the earlier methods we have seen.

The provisions of the directive—again similarly to others mentioned above—differ from those of Rome I and may lead to (partial or complete) differences in application.


Directive 1999/44/EEC on the sale of goods to consumers is certainly one of the most important pieces of EU legislation adopted in the field of consumer law, since it “concerns one of the core areas of every private law.” The purpose of its adoption was to harmonize the rules of the MSs on the sale of consumer goods by ensuring a uniform minimum set of fair rules governing such relationships. In the interpretation of the Directive, consumer goods shall mean any tangible movable item with a narrow scope of exceptions. Among others, even sales at auction or electronic sales such as those on eBay are covered. The Directive regulates the responsibility of the seller and the rights of the buyer, the minimum criteria for conformity in the contract, the rights and sanctions for the consumer, the reasonable time frame for legal remedies, as well as the required content for warranties offered by the seller.

Art. 7 of the Directive sets out a choice of law similar to that of above-mentioned directives:

1. Any contractual terms or agreements concluded with the seller before the lack of conformity is brought to the seller’s attention which directly or indirectly waive or restrict the rights resulting from this Directive shall, as provided for by national law, not be binding on the consumer.

2. Member States shall take the necessary measures to ensure that consumers are not deprived of the protection afforded by this Directive as a result of opting for the law of a non-member State as the law applicable to the contract where the contract has a close connection with the territory of the Member States.

According to Art. 7, we discover that after notifying the seller of a lack of conformity in the contract, it is permitted to reduce the consumer’s rights below the protection level set by the Directive. On the other hand, if there is a close connection between the contractual relationship and the territory of the EU, the parties do not have the right to lower the level of protection below that of the Directive, not even through the technique of choosing a non-MS’s law. Consequently, these provisions are binding in situations with or without the existence of choice of law. Nevertheless, the second sentence of Art. 7(1) permits an exception: in the case of second-hand goods, MSs may allow seller and consumer to agree on contractual terms which contain a shorter time period for the liability of the seller than that set down in the Directive. However, such a period may not be less than one year. The motivation behind this phrasing is that in the case of second-hand goods, the quality of wares is not easy to prove.

There is nothing new to say about the relationship between the Directive and the Rome I Regulation compared to what was noted for earlier directives: the two systems differ. According to Rome I, the law of the buyer’s habitual residence would be applicable. If this law is the law of a third state, the Directive automatically kicks in to protect the consumer. The rules of the Directive can be considered imperative rules (overriding mandatory provisions) in the sense of Art. 9 of Rome I, provided they are properly implemented into the MS’s law.

8. Directive on E-Commerce

The next interesting piece of legislation to have been adopted was the Directive on the legal aspects of e-commerce. Since the problem in this Directive is not a classical conflict-of-laws question and there are numerous publications available providing deeper analysis, we will only briefly discuss its provisions. As is well known, the Directive contains the principal rules for contracts concluded in the EU in an electronic fashion. According to the clarification, the term “electronic” means that the
service request is initially sent and received at its destination by means of electronic equipment for the processing and storage of data, and entirely transmitted, conveyed and received by wire, by radio, by optical means or by other electromagnetic means, which also includes the Internet. There are rules on information requirements, conclusion of contracts, remedies and dispute settlement.

From a PIL point of view, the most debated part of the Directive is the one declaring the usage of the country-of-origin principle (Herkunftslandprinzip). It is important to note that besides several articles of the Treaty on the Functioning of the European Union having an equivalent effect,83 some sources of secondary legislation84 also contain similar rules. However, since this issue is closely related to the regulation of the inner market,85 we hereby only wish to briefly review the rules of the E-commerce Directive. Its—very awkwardly formulated—Art. 3 states that:

1. Each Member State shall ensure that the information society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

However, Art. 1(4) of the Directive declares that the Directive does not establish additional rules on private international law. Similarly, Recital (23) of the Preamble says that:

This Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of Courts; provisions of the applicable law designated by rules of private international law must not restrict the freedom to provide information society services as established in this Directive.

Additionally, Recital (55) of the Preamble is also interesting. It states that:

This Directive does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence.

We agree with the view that the statement “the Directive... (does not) aim to establish additional rules on private international law relating to conflicts of law” is misleading, since the provisions of the Directive have powerful effects on PIL.86 However, as we review different authors on the subject, we note that there are several differing ways to approach the effect of the country of origin principle:

- It is not a PIL principle and deals only with public law, especially with issues of the inner market
- It is a choice of law principle, and as such, belongs to PIL
- It refers to substantive internationally mandatory (imperative) standards,87 or
- It is a principle for the recognition and enforcement of another state’s law.

There is little evidence so far as to how the ECJ will interpret the rules, or even how they should be interpreted in practice. In the authors’ opinion, without ruling on it explicitly, there is a good chance that the court will find that the principle has a PIL effect.88 As such, it can override the provisions of Art. 6 of Rome I concerning consumer contracts. The only help the consumer may receive is in Recital (55) of the Preamble of the Directive that won’t allow protection to be set to a lower level than regulated by the law applied on the basis of the Rome I Regulation.

9. Directive on Distance Marketing of Consumer Financial Services89

The aim of Directive 2002/65/EEC is to approximate the laws of the MSs for the distance marketing of consumer financial services (meaning any service of a banking, credit, insurance, personal pension, investment or payment nature). Thus, the directive focuses on a narrow segment within consumer services provided at distance, namely financial services. It deals with issues such as providing information to the consumer, legal remedies, practicing the right of withdrawal, payment for the
service given before withdrawal, unsolicited services and communications, sanctions and judicial redress.

Art. 12 of the Directive has a similar phrase as detailed above in other directives. It states that Consumers may not waive the rights conferred on them by the Directive. Moreover, according Art. 12(2) Member States shall take the measures needed to ensure that the consumer does not lose the protection granted by the Directive by virtue of the choice of the law of a non-member country as the law applicable to the contract, if this contract has a close link with the territory of one or more Member States.

In its essence, this structure is similar to the others detailed above. Consequently, its relation to Rome I is also similar to those. Yet, in certain MSs the imperative character of the Directive’s provisions is not recognized by the courts to its full extent.90

10. Timeshare Directive91

One of the latest examples of relevant consumer law legislation is Directive 2008/122/EC on timeshare, long-term holiday product, resale and exchange contracts (hereinafter referred to as: “New Timeshare Directive” or “Directive”). The New Timeshare Directive has replaced the former Directive 94/47/EC on aspects of contracts relating to the purchase of the right to use real estate properties (hereinafter referred to as: “Former Timeshare Directive”)92 as of February 2011. Some of the most cited cases of EU PIL—a part of the infamous Gran Canaria cases—have also involved the Former Timeshare Directive: as mentioned before, in these cases problems arose because of the failure of Spain to implement the rules of the Directive into its national legislation. The first group of such cases related to the Doorstep selling directive (see the earlier). In the second set of cases, German consumers travelling in the Canary Islands signed contracts for the purchase of timeshares in holiday apartments. The contracts—some subject to the law of the Isle of Man, others to Spanish law—contained a non-withdrawal clause although withdrawal was possible in German law and also in Community law. The question was whether the consumers could rely on German law against the law chosen. However, the German Federal Court ruled out any attempt to justify the application of the protective German law, even as a mandatory rule of the forum within the scope of Article 7 of the Rome Convention, a Convention which was applicable at the time the cases arose.93

Similarly to the earlier timeshare rules, the aim of the New Timeshare Directive is to approximate the minimal standards of timeshare contracts and of contracts for long-term holiday products. Among others, it specifies the attributes of mandatory information to be supplied to the buyer, the components of the contract, the rights of the buyer and conditions of the right of withdrawal.94

However, there is something novel in this Directive not encountered in other directives. Art. 12 is called “Imperative nature of the Directive and application in international cases.” This title clears up perfectly any questions arising out of the Directive’s usage. The rules have an imperative, internationally mandatory character: they have to be applied both in the presence or absence of choice of law. In Art. 12(1), the Directive lays down that:

Member States shall ensure that, where the law applicable to the contract is the law of a Member State, consumers may not waive the rights conferred on them by this Directive.

Beyond its substantive law effects, this provision has—just as Art. 9 of the Former Timeshare Directive does—an effect on the law applicable in the absence of choice of law and of course it also limits the scope of the parties’ choice of law.

Furthermore, there’s another rule in Art. 12(2) that may be of importance. The directive states that:

Where the applicable law is that of a third country, consumers shall not be deprived of the protection granted by this Directive, as implemented in the Member State of the forum...

According to the Directive, this can happen in two cases:

• If any of the real estate properties concerned is situated within the territory of a MS, or
• In the case of a contract not directly related to real estate, if the trader pursues commercial or professional activities in a MS or directs such activities to a MS.

A good question is what to do if the directive is not implemented in the law of a MS and the rights of
the consumer would be harmed if a third-state’s law were applied. In this area, Art. 12 of the directive will need further interpretation. However, we find the expression “as implemented in the Member State” especially problematic, since it suggests that without implementation, no protective provisions need to be applied.

Comparing the system of the Rome I Regulation and the Directive, one notes significant differences. The provisions on consumer contracts of the Regulation do not allow the non-application of the law that would apply in the absence of choice of law of the parties if the habitual residence of the buyer (tenant) is the same as the place of activity of the professional (landlord). If they differ, the law applicable is governed by the general rules of the Regulation. As Article 4(c) of the Regulation states:

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

Article 4(d) creates an exception for this rule, pronouncing that:

A tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country.

The provisions of the Directive play a role above (i.e. contrary to) latter rules of the Regulation if the real estate property is located within the EU. Consequently, there are different choices of law principles applied in the two pieces of legislation:

- The habitual residence of the consumer—Art. 6(1) Rome I
- The country where the property is situated—Art. 4(c) Rome I: if the contract does not fulfill the criteria set by the Regulation for consumer contracts
- The habitual residence of the landlord—Art. 4(d) Rome I: under certain conditions
- EU law (as transcribed into a MS’s law)—Art. 12 New Timeshare Directive: contrary to the above-mentioned rules, before a MS’s courts, if a non-MS’s law would provide a lower level of protection.

One may observe that the protection of consumers is better formulated than in the Former Timeshare Directive, but it still “fades” at a certain point. If the habitual residence of the consumer differs from that of the professional and if the real estate property lies outside the EU, the parties may choose, without restriction, any law for timeshare contracts. Unfortunately, neither the Regulation nor the Directive protects consumers in such a case. The situation is the same even if the consumer is a citizen of a MS. In these cases, the consumer may only be protected if the contract is not directly related to real estate property and the trader pursues commercial or professional activities in the EU.

The next directive of interest to us is Directive 2005/29/EC on Unfair Commercial Practices. This Directive was adopted in order to harmonize rules for unfair commercial practices that harm consumers’ economic interests. According to Art. 3(1), it shall apply to unfair business-to-consumer commercial practices before, during and after a commercial transaction in relation to a product. A commercial practice shall be unfair if it is contrary to the requirements of professional diligence and it materially distorts or is likely to materially distort the economic behavior with regard to the product of the average consumer whom it reaches or to whom it is addressed.

The Directive—unlike its Proposal—does not contain explicit conflict of laws rules. Furthermore, most of its provisions would only be relevant in connection with the European rules on non-contractual obligations, i.e. in the context of the rules of the Rome II (and not Rome I) Regulation. Moreover, Art. 3(2) stipulates that the Directive is without prejudice to contract law and, in particular, to the rules on the validity, formation and effect of a contract. Consequently, the Directive neither contains remedies to invalidate a contract, nor limits the general contract law remedies available to the consumer who has entered into a contract having been misled.
In summary, the Directive does not touch upon contract law or conflict-of-laws rules in contractual issues in most cases. If it were to do so, according to Art. 9 of Rome I, its provisions as implemented could be interpreted as overriding mandatory rules.


It may be relevant in discussing this topic that a review of European consumer law has started beginning in 2008. The European Commission has adopted a Proposal that was planned to unify and review the provisions of the following four directives:

- Directive on unfair terms in consumer contracts
- Directive on distance contracts
- Directive on consumer sale of goods
- Directive on consumer contracts negotiated away from business premises.

The purpose of the document was to create unified substantive rules on these issues, i.e. to create unified rules on consumer protection. The technique used in the directive was total harmonization, instead of the formerly employed minimal harmonization. Since total harmonization has received harsh criticism, the rules on unfair contract terms and consumer sales have been removed from the Proposal and a mixed approach of minimal and maximal harmonization was later adopted in the text. Consequently, the forthcoming legislative processes include only the following two directives:

- Directive on distance contracts
- Directive on consumer contracts negotiated away from business premises.

In our opinion—despite the validity of some criticism of the full harmonization method—as regards PIL, unifying the rules would have been more useful than reducing the scope of the effort. If the directive is adopted, according to the test, MSs will have 2 years to have it fully implemented in their legal systems. After the narrowing of its focus, the scope of the Directive will not cover consumer contracts in general, only some of the specific ones detailed above. In the amended proposal, the main goal was to protect consumers’ digital rights and position in distance contracts.

The Directive will contain several provisions on PIL. Recital (58) of the Proposal states that:

The consumer should not be deprived of the protection granted by this Directive. Where the law applicable to the contract is that of a third country, 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) should apply, in order to determine whether the consumer retains the protection granted by this Directive.

In the authors’ interpretation, this part is rather unnecessary, especially in light of article 25, which establishes the imperative nature of the Directive, stating that:

If the law applicable to the contract is that of a Member State, consumers may not waive the rights conferred on them by the national measures transposing this Directive.

Any contractual terms which directly or indirectly waive or restrict the rights resulting from this Directive shall not be binding on the consumer.

There are several options related to the application of this Directive.

Firstly, the question arises about what to do if the Directive has not been properly implemented by a MS. In the authors’ opinion, the first sentence of Art. 25 is clear: the consumer may not waive the rights that were granted to him by the national implementation of its provisions. In case there is no such implementation, and—according to the Rome I Regulation—the MS’s law should be applied, there is no real legal right transposed. Consequently, in a contractual relationship, the consumer may not be protected based only on the Directive, since the Directive has no direct effect (or, more precisely, no horizontal direct effect) in the absence of implementation.

Secondly, after implementation, the consumer is protected from multiple sides: the parties cannot set a lower level of protection than the minimal requirements of the Directive. Moreover, they also cannot choose any country’s law that would lower the consumer’s protection. Whether that law is one of the MSs or that of a third state is irrelevant.
III. TRANSPosing EU PIL PROVISIONS INTO HUNGARIAN LAW

A. General Notes About the Hungarian Legal System

As mentioned in the introductory notes of this article, the way the law of a mid-size MS reflects EU legislation has lots of lessons for other MSs—and indeed for US MSs104 as well. This is the reason why EU MSs usually examine each other’s rules when making amendments to their own PIL systems or when they are adopting a new PIL code.105 Hungary, with its approximately ten million inhabitants, is one of the ten countries that joined the EU in 2004.106

In Hungary, the main source of PIL is the Hungarian PIL Code (hereinafter referred to as: “PIL Code” or “Code”).107 This approach is common in Europe: in most of EU (i.e. in the majority of the civil law legal systems) PIL provisions were and in partly are traditionally codified in national codes on PIL.108

Alongside the PIL Code, just like in most civil law countries, Hungary has an independent Civil Code (hereinafter referred to as: “Civil Code”).109 The Civil Code contains the most important substantive provisions of substantive private law, including contract law.110 Moreover, there are some important related acts such as the Introductory Act of the Civil Code (further on: “Introductory Act”), and the Code on Civil Procedure.111

The Hungarian PIL Code is constructed similarly to most other European codes. Hence it is divided into the following parts:

• Chapter I: General Rules
• Chapter II: Persons
• Chapter III: Rights Attached to Intellectual Property
• Chapter IV: Proprietary Rights and Other Real Rights
• Chapter V: Contract Law and Liability for Damage Caused Outside Contracts
• Chapter VI: Inheritance Law
• Chapter VII: Family Law
• Chapter VIII: Labor Law
• Chapter IX: Jurisdiction
• Chapter X: Provisions of Procedural Law
• Chapter XI: Recognition and Execution of Decisions Passed Abroad

B. Harmonization with the Rome I Regulation: repealed provisions of the PIL Code

Besides using several appropriate approaches, it must be noted that the fragmentation of EU PIL has posed some particularly difficult challenges for Hungarian legislators. The problems arose around two questions:

• Firstly, there are numerous EU regulations dealing with PIL. We have already discussed the regulations of the applicable law, but there also exist a number of rules on jurisdiction, recognition and enforcement of court decisions.
• Secondly, the implementation of the fragmented directive law and directive PIL also pose several questions: should these rules be implemented in the substantive rules on these areas, or somewhere else?

In Hungary’s legal system, the first major change to the conflict of laws system in the area of applicable law was the joining of the Rome Convention in 2006.112 However, due to EU legislation and general legal improvement, the PIL Code has been modified several times. The first of such modifications was in connection with EU procedural rules: Hungarian rules on jurisdiction, recognition and enforcement of foreign judgments were amended in order to conform to European developments.113

After the adoption of the Rome I and Rome II Regulations, several provisions of the Code had to be amended again; otherwise the Code would have contained rules which were not applicable, since the newer provisions of EU regulations were to be applied instead.114 Hungarian lawmakers made further changes to the Code in 2009, adopting Act No. IX. of 2009 on the amendment of the Hungarian Private International Law Code (hereinafter referred to as: “Amendment”).115 The amendment erased the majority of rules governing contract law from the domestic body of law. The rules on consumer contracts (formerly Art. 28/A of the Code) and on labor contracts (formerly Art. 51 of the Code) were also set aside. Additionally, the provisions on torts
were changed as well.116 The amendments related to contracts have been in effect since December 17, 2009.117

In contrast to labor law standards, erasing the provisions of consumer contracts may raise some questions. On one hand, the deletion of the rules on consumer contracts was certainly reasonable. On the other hand, some rules remain in the Introductory Act of the Civil Code regarding consumer law. These rules were protecting the consumer in case he/she concludes a contract with a foreigner, and do not allow the choice of foreign law if it would harm the consumer’s rights as set in Hungarian law in case—according to Art 28/A (rules on consumer law) of the PIL Code—Hungarian law were applicable to the contract [see Art. 5/C(1) Introductory Act]. The method of codifying PIL rules in the Introductory Act was strange, even for Hungary.118 The official clarification of the Introductory Act states that

Our law protects the rules of consumer protection in contractual law with so-called mandatory rules, i.e. with rules requiring unconditional application regardless of the law chosen for the contract by the parties. However, these rules don’t completely exclude the application of the law of choice; they do so only as far as certain provisions of that law are contradictory to the Hungarian rules on consumer protection. In case of such partial collisions, the rules affected by the chosen law of another State shall be replaced with Hungarian rules on consumer protection. The aim of this rule is to ensure that the domestic consumer may not be deprived of the high protection afforded him by the domestic body of law. With respect to this goal, applying the rules on consumer protection laid down in the law of another State chosen by the parties is not impossible provided those rules are more in favor of the consumer. (Translation by the authors)

The aim of this provision was clearly to protect the consumer, and most importantly: to protect the Hungarian consumer against foreign law. The problem in this case is more of a technical one. Firstly, we may instantly notice that because the relevant rules of the Introductory Code were not erased, and only the main rules governing consumer contracts were deleted from the PIL Code, in its present state, the Introductory Code refers to rules that no longer exist. There is reference to Article 28/A of the Code, which was erased by the latest amendment after the adoption of the Rome I Regulation (as mentioned earlier). Secondly, if we ignore this anomaly, we may notice that the provision, although roughly “Hungarized” (composed from a Hungarian point of view), is similar to the choice-of-law limitations laid down in Rome I in the scope consumer contracts, but with a more nationalist edge: the provisions of the mandatory Hungarian law shall not be evaded by the choice of law. Fortunately however, EU legislators enacted a wider scope, prohibiting the evasion of the mandatory rules of any MS if that results in a less favorable position for the consumer. We may state that after the deletion of the rules on consumer contracts from the Code, it would have been useful to also delete the aforementioned provision from the Introductory Act, since its presence there is unsettling and unnecessary.

The first lesson all MSs can learn from this problem is that keeping PIL provisions in PIL laws and not in any different law is simply a must: after amendments to the law in a specific field, the chance of making mistakes and leaving behind irrelevant provisions is smaller.

In the following section, we will summarize the implementation of the aforementioned EU directives.119


1. Directive on Commercial Agents

The Directive on commercial agents was implemented in the Hungarian legal system by Act No. CXVII of 2000 on independent commercial agency contracts (hereinafter referred to as: “Act on Commercial Agents”) four years before Hungary’s accession to the EU. Furthermore, the Civil Code of Hungary is also applicable to the general questions of contracts as a fundamental source. As we have also mentioned before, the Directive itself does not contain PIL provisions, and consequently, neither does the Hungarian act on commercial agents. However, the European restrictions on contracts were also implemented in Hungarian law. There are several sections to be found that cannot be derogated by the agreement of the parties. In these
areas Hungarian legislators have generally copied the European provisions mechanically and used one of the following phrases:

the parties’ agreement may not defer from paragraphs...

or

the parties agreement may not defer from paragraphs... to the detriment of the commercial agent.

Such important provisions can be found in the following Articles:

- Art. 7 describes the Principal’s obligations such as paying the compensation to the agent [Art 7(1)], informing the agent about important circumstances [Art 7(2–3)], and the fact that the Principal must solely carry the risk of damage to objects passed to the agent [Art. 7(4) ],
- Art. 9–13 describes the Agent’s entitlement to commission,
- Art. 18–19 describes the indemnity granted to the Agent after termination of the agreement.

2. Directive on the Return of Unlawfully Removed Cultural Objects

The Directive on the return of unlawfully removed cultural objects was transposed into Hungarian law by Act No. LXXX of 2001 on the return of unlawfully removed cultural objects—just as in the aforementioned case, several years prior to joining the EU. The Act lays down some very similar rules to those set out in the Directive. According to these, ownership of the cultural object after return shall be governed by the law of the requesting MS. The return proceedings may not be conducted if removal from the territory of the requesting MS is no longer unlawful at the time of initiation the proceedings (Art. 5). The fundamental rules on the procedure outside the Act can be found in the general laws of Hungarian procedural law, particularly in the Code of Civil Procedure.

3. Directive on the Posting of Workers

The example of the Directive on the posting of workers also demonstrates why it may be dangerous to put PIL provisions into different EU laws. Astonishingly, the relevant conflict-of-laws rules of the Directive were not implemented into the PIL Code, but were placed among the substantive provisions of the Hungarian Labor Code121 (hereinafter referred to as: “Labor Code”). Consequently, in a rather bizarre way, for a time—before the erasure of the rules on Labor Law from the PIL Code—there existed PIL rules on labor contracts in the PIL Code and PIL rules on the posting of workers in the Labor Code. In Hungary, the latter law governs the relationship between employer and employee and therefore contains, or more precisely, should contain only substantive law provisions.

The Labor Code approaches the issue of interim work from two sides: it governs the case of an employee from abroad posted to Hungary and the case of a posted or hired Hungarian employee carrying out work in another MS. In regard to the first instance (employee from abroad in Hungary), Art 106/A of the Code states that whereas an employee of a company from abroad performs his work within the territory of the Republic of Hungary, the rules applicable shall be the provisions of the Hungarian Labor Code.”123 Such questions are maximal working hours and minimal rest periods, minimal paid annual holidays, minimal rates of pay, the conditions for hiring-out of workers, health, safety and hygiene at work, protective measures with regard to the terms and conditions of employment of pregnant women or women who have recently given birth, protective measures for children and young people, and equality of treatment and other provisions on non-discrimination. Moreover, the Code declares that these provisions shall not be applied if there are more favorable rules which would govern the status of the posted (or hired-out) employee in the country of work or if the parties choose a law with a more favorable law [Art 106/A(1)].

With regard to the status of a Hungarian employee working abroad temporarily, the Code follows the provisions of the relevant Directive, and states that the provisions mentioned above shall be “duly applied to the foreign posting (assignment, hiring out) of workers employed by Hungarian employers if these aspects are not covered by the laws of the country where the work is performed.” In other words, in such cases, it is mainly the foreign (and not Hungarian) law that should be applied.
D. of Directives on Consumer Law Issues

The largest part of Hungarian consumer law including substantive contract law, can be found in Act No. CLV of 1997 on Consumer Protection, while in questions of fundamental private law, the primary source is the Civil Code. Additionally, there are special rules contained in other acts which may have relevance. It is important to mention that most of EU consumer law has been implemented into the Civil Code. As mentioned before, although the Hungarian legal system is heavily influenced by German law, we do not formally follow the German approach of combining substantive rules (BGB) and private international law (EGBGB) into one single act, or—more precisely—into an act and its introductory statute. Consequently, before erasing them upon adoption of the Rome I Regulation, general PIL rules on Consumer contracts had traditionally been codified in the PIL Code.

Despite this “neat” system, most directives have not been implemented into the PIL Code, but are diffused throughout the European legal system. At the present time, there are no general rules on consumer contracts, since all such issues are regulated in Rome I. There are only have fragmented special rules implemented due to the pressure of the directives. We will now review the implementation of Directive law into the Hungarian legal regime.

1. Product Liability Directive

The provisions of the EU product liability directive were implemented mainly in Act No. X of 1993 on Product Liability (hereinafter referred to as: “Product Liability Act”). In addition, fundamental rules on damages can be found in the Civil Code. Just as its European counterpart, the Product Liability Act does not contain precise rules on its scope or any conflict of laws provisions. However, it does have explanatory provisions regarding its application, as did the Directive when it declared that the parties may not lower the level of consumer protection as set in the Directive. Art. 9 of the Product Liability Act states that

*The exclusion or limitation of the responsibility of the producer is invalid.*

Thus, the rules of the Act can be viewed as internationally mandatory (imperative) provisions that must always be applied before the Hungarian courts, irrespective of any other law chosen.

2. Doorstep Selling Directive

After some changes, at the time of writing the implementation of the Doorstep selling directive can be found in Government Decree No. 213 of 2008 on contracts negotiated away from business premises. The Decree also contains most of the provisions of Directive 85/577/ECC for protecting the consumer. Art. 3 of the Directive states that the consumer may cancel a contract—without any kind obligation other than to take reasonable care of goods—within a period of at least seven days after the receipt of goods. In other words, the Hungarian decree grants the consumer eight days to cancel after receiving the goods or in case of a service contracts, after the conclusion of the contract.

The Decree does not contain any special PIL provisions. However, Art. 5 states that consumers may not waive the rights conferred on them by the Decree.


If we observe the transposition of the Directives on consumer law, we may state that the Directive on unfair terms in consumer contracts and the provisions of the Directive on sales of goods to consumers suffered the most unjust treatment as regards the implementation of choice-of-law rules of directives in Hungary. The PIL rules of these two Directives were incorporated into the Introductory Act of the Civil Code of Hungary (hereinafter referred to as: “Introductory Act”). Introductory acts are unique tools used in a legal system such as Hungary’s to introduce a complex act or code. The Introductory Act of the Civil Code included several provisions on the application of the Code, together with some explanatory notes. Subsequently, substantive rules of the abovementioned regulations were implemented in our Civil Code. Consequently—and we believe, wrongly—legislators decided to put the related PIL regulations into the introductory provisions of the related act. It would have been a better solution to incorporate them into European PIL Code, since this is the proper way of codifying PIL provisions in Hungary.
Furthermore, the two Directives are referenced in the Act in one complex sentence, despite the fact that these two issues are separate and also needed to be handled separately. In connection with the directives, Art. 5/C lays down the following provision:

(2) If a contract or standard contract term previously made publicly available, or offered for application is in close relation with a Member State of the European Economic Area, the choice of a third state’s law by the parties as the law applicable to the contract is invalid, if the aforementioned third state’s law is in opposition with the implementation act transplanting Council Directive 93/13/EEC and Council and European Parliament Directive 1999/44/EC of the related Member State prohibiting divergence.

In regard to the related questions, the law applicable to the contract shall be the law of the aforementioned Member State instead of the law chosen by the parties.

These provisions—like other acts adopted to transplant other directives, see below—settle the issue of choice of law in the simplest possible matter: with reference to the related Directives themselves. The disadvantage of this solution is that legislators need to look up and study the Directives and review the provisions based on them. However, if the Act were to refer only to domestic law, reviewing the related provisions would be far more complicated, since the provisions have been incorporated alongside other substantive rules on contracts.

It is important to mention that not all choice of law is invalid: only those provisions which are contrary to the MS’s law cannot be applied.

4. Directive on Distance Contracts

The PIL provisions on distance contracts were transplanted into Government Decree No. 17 of 1999 on Distance Contracts. The Decree contains similar substantive rules to those of the Directive on Distance Contracts. Pursuant to Art. 11 of the Decree, if a contract that falls under the scope of the Decree is in close relation with a MS of the European Economic Area, the choice of a third State’s law by the parties as applicable law to the contract is invalid if the third state’s law is contrary to the law prohibiting divergence of the aforementioned MS transplanting Directive 1997/7/EC. In such cases, the law applicable to the contract shall be the law of the aforementioned Member State in place of the law chosen by the parties. The effects of these provisions are similar to those mentioned earlier for other directives.

5. Directive on E-Commerce

The main part of the E-Commerce Directive was implemented by Act No. CVIII of 2001 on Certain Issues of Electronic Commerce Services and Information Society Services. Just like the Directive, the Act builds a framework for electronic commercial services. Thus it is a combination of substantive contractual law and public law provisions (i.e. provisions related to and inspired by such matters).

The relevant Art. 3 of the Directive containing the country of origin principle was implemented in Art. 3/A of the Act. It states the following:

The service provided by a service provider established in the territory of a Member State of the Agreement on the European Economic Area targeting the territory of the Republic of Hungary may not be restricted, unless the relevant authority or court needs to take measures

a) for protecting any of the following interests:

aa) the public order, in particular, the prevention, investigation and prosecution of criminal offences, including the protection of minors and actions against incitement based on race, sex, religion or nationality and the violation of the human dignity of individuals;

ab) public health;

ac) public safety, including the interests of national safety and national defense;

ad) consumer interests, including the interests of investors; and

b) against a specific information society service that injures or seriously threatens the interests mentioned in subparagraph a) above; and
c) which is proportionate to the injury of the interest or the threat.

(Translation by the authors)

As is evident, Hungary has added some explanatory provisions to the application of the exceptions of the Directive. Furthermore, all the (dubious) effects of the provision are the same as those of the rules of the Directive.

6. Directive on the Distance Marketing of Consumer Financial Services

The main provisions of the Directive on the Distance Marketing of Consumer Financial Services have been implemented through Act No. XXV of 2005 on Distance Marketing of Financial Sectorial Contracts. Pursuant to Art. 12 of the Act, if a contract offering services of the financial sector settled through distance marketing is in close relation with a Member State of the European Economic Area, the choice of a third State’s law by the parties as governing law for the contract is invalid, if the aforementioned law is contrary to the act prohibiting divergence of the mentioned Member State implementing Council Directive 2002/65/EC of the European Parliament. In such cases, the law applicable to the contract shall be the law of the aforementioned Member State in place of the law chosen by the parties.

As can be seen, these provisions are similar to those set out by the previously mentioned acts and decrees.

7. Timeshare Directive

The provisions of the earlier timeshare directive were implemented into a 1999 Government Decree. Later, the decree was repealed and a new law, Government Decree No. 141 of 2011 was adopted in 2011 (henceforth: “New timeshare decree” or “Decree”), which also incorporates the provisions of the New timeshare directive. The new law entered into force on September 21, 2011.

Art. 14(1) of the Decree declares that if the contract has an international element and the law applicable would be the law of a EU MS, the consumer may not disclaim its rights as set in the New timeshare directive or in the New timeshare decree.

Moreover, Art. 14(2) states that if the law applicable is a third state’s law, the consumer may not be deprived of the protection of the New timeshare directive and the New timeshare decree if:

- the real estate lies in a MS (or, more precisely: in a State of the European Economic Area), or
- even if the contract is not related to real estate, but the contract which is in dispute belongs to the business activity related to real estate of a company, and
  - this activity is conducted in a MS of the European Economic Area, or
  - this activity is targeted at a territory of a MS.

The choice of the body of law of a third State by the parties as governing law for the contract is invalid if the aforementioned body of law is in conflict with the public provisions. With regard to the question at hand, the law applicable governing the contract shall be the body of law of the aforementioned MS in place of the law chosen by the parties.


The fundamental rules of the Directive on unfair commercial practices were inserted into Act No. XLVII of 2008 Prohibiting Unfair Commercial Practices in Respect of Consumers and into the Competition Act. Just as the Directive, the latter act lacks explicit PIL provisions. Furthermore, the most relevant part of the Act on Unfair Commercial Practices deals with the Administrative Law background of unfair commercial practices.

IV. CONCLUSIONS

As asserted earlier, there are enormous differences in the methods applied to the implementation of PIL provisions between the different EU MSs. If we examine the position of the Hungarian rules, we may state that Hungarian lawmakers have employed a range of solutions for implementing EU PIL rules on applicable law:

- Firstly, the Hungarian PIL Code was amended and certain parts removed (see the modification to the Rome I and II Regulations as reviewed earlier)
- Secondly, some rules were implemented in provisions of substantive law, as in case of posting of workers. These acts contain both choice-of-law rules and substantive provisions
• Thirdly, certain provisions were incorporated in Hungary’s Introductory Act to Civil Code, legislation dealing with the enforcement of the Civil Code.

• Fourthly, other rules were implemented in specific laws (decrees and acts) of certain areas. Typically, this was the most common solution, resulting in substantive law and PIL being mixed in the acts and decrees, just as they are in the EU directives themselves.

In the authors’ opinion, there are signs of perplexity by the national legislator: the methods used are not consistent with each other. However, we are certain that this heterogeneity derives from the nature of EU law. Moreover, we are fairly convinced that only a small part of the legislation is misleading because of the application of less fortunate methods. It is evident that the fragmentation of EU law cannot be cleared up by the MSs. In the relationship between the EU and MSs, the latter are “followers.” Consequently, fragmentation easily seeps into the legislation of the MSs. In order to shield their own PIL codes, the MSs have had to construct special rules which bypass the formerly well built systems.

In summary, we would suggest the following measures:

• Civil law MSs should try to keep their PIL codes for PIL rules, even if the EU rules on substantive provisions do also contain PIL provisions. Failing this, they will reproduce the fragmentation of EU law itself.

• The EU should try to unify its rules on PIL. Firstly, general rules are necessary. Secondly, at a minimum, less fragmentation is required: most PIL provisions should be built into Rome I. Moreover, there also should be a rethinking of the general rules of consumer contracts in the Rome I Regulation since—as mentioned earlier—the practice cannot and does not follow these rules. Furthermore, the “center of gravity” in such cases also should be more clearly determined.

In the authors’ view, there are signs in the EU of an intention to reintegrate rules: this can also be seen regarding substantive consumer law—notwithstanding the fact that the scope of the new consumer law directive has been limited. This approach preferably should appear in the field of PIL as well. Let’s hope for the best, and—until better-structured legislation arrives—keep our gunpowder dry.

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1 If we review the roots and historical background of this evolution, there is good reason to call it a new European choice of law revolution, as certain authors do: see Ralf Michaels, The New European Choice-of-Law Revolution, 82 TUL. L. REV. 1607–1644 (2008).


Magnus & Christian Armbrüster & Werner F. Ebke & Rainer Hausmann, ARTIKEL 11–29 ROM I-VO; ARTIKEL 46 B, C EGBGB, (2011);


10 Restatement of the Law (Second), Conflict of Laws 2d Volume I 1971 Ch 8 § 186 et seq.


14 We could call these substantive provisions mandatory or imperative rules, but their internationally mandatory character is subject of debate, see Dieter Martiny (Hrsg.) INTERNATIONALES VERTRAGSRECHT, 1287–1288 (2011).


17 INTERNATIONALES VERTRAGSRECHT, supra note 1, at 1286; Michaels & Kammann, Europäisches Verbraucherschutzrecht… supra note 1, at 605–607.

18 To contracts concluded earlier the Convention must still be applied.

19 For a comprehensive general analysis see STAUDINGER KOMMENTAR—EINLEITUNG ZU…, supra note 1 at Rn 32–40; STAUDINGER KOMMENTAR, ARTIKEL 11–29 ROM I-VO… supra note 1 at ARTIKEL 23—Verhältnis zu anderen Gemeinschaftsrechtsakten Rn 1–31.


22 See the material scope of Rome I Regulation and the national rules governing contracts which fall outside the scope of Rome I Regulation.

23 The origin of this problem has roots in the connection between EU law and international law. For a collection of related theories, it is worth reading Ralf Michaels, *Global Legal Pluralism, 5 AN. REV. O. LAW & S. SCIENCE. 249 et seq.* (2009)


25 The paper is due to be published by Andrea Bonomi, Gian Paolo Romano and the Swiss Institute of Comparative Law (Eds.), *YEARBOOK OF PRIVATE INTERNATIONAL LAW* (2011).


29 See Art. 17 and 18 of the Directive.


31 Case C-465/04, Honyvem Informazioni Commerciali Srl v Mariella De Zotti. ECR 2006, I-02879.


33 See the Annex of the Directive.

34 See Art. 9 ibid.

35 Stefan Leible & Matthias Lehmann, *Die Verordnung…supra* note 1 at 531.

36 The procedural system in such cases is similar to child abduction cases: in general, the main purpose is to reestablish the earlier legal status and no contrary measures may be approved, regardless of the new owners of the object.


For the background of EU labor law, see Jeff Kenner, EU EMPLOYMENT LAW: FROM ROME TO AMSTERDAM AND BEYOND (2003); Philippa Watson, EU SOCIAL AND EMPLOYMENT LAW: POLICY AND PRACTICE IN AN ENLARGED EUROPE (2009); For texts of EU and MS’s legislation see Anders Etgen Reitz (Ed.) LABOR AND EMPLOYMENT LAW IN THE NEW EU MEMBER AND CANDIDATE STATES (2007).

See Article 3(7) of the Directive.
See Article 3(1)(a) through (f) of the Directive.
Art. 5(2) Rome I Regulation. Initially, this solution may be problematic in cases when passengers pass a border to travel.
See the Annex of Regulation 392/2009/EC.
For the European consumer law background, there can be found numerous comprehensive and extensive publications, see e.g. Paolisa Nebbia & Tony Askham Richmond (Eds.), EU CONSUMER LAW (2004); Stephen Weatherill, EU CONSUMER LAW AND POLICY (2005); Hans-W. Micklitz & Norbert Reich & Peter Rott (Eds.), UNDERSTANDING EU CONSUMER LAW (2009); Hans Schulte-Nölke & Christian Twigg-Flesner & Martin Ebers (Eds.), EC CONSUMER LAW COMPENDIUM: THE CONSUMER ACQUIS AND ITS TRANSPOSITION IN THE MEMBER STATES. (2008); Reiner Schulze & Hans Schulte-Nölke & Jackie M. Jones (Eds.), A CASEBOOK ON EUROPEAN CONSUMER LAW (2008).

Cross-Border Consumer Contracts, supra note 1 at 327–328.
See Art. 7 of the Regulation.
Albert Venn Dicey & John Humphrey Carlile Morris & Lawrence Collins, THE CONFLICT OF LAW, FOURTH CUMULATIVE SUPPLEMENT TO THE FOURTEENTH EDITION, 393–394 (2011); Leible & Lehmann, Die Verordnung..., supra note 1 at 537.
Pfeiffer, Neues Internationales..., supra note 1 at 627; Ragno: The Law Applicable to Consumer..., supra note 1 at 147.
However, it is important to mention that in legal practice, in most cases the law of the professional’s residence is applied, even if the professional has an activity in the homeland of the foreign customer. For example, if a Hungarian temporary resident in Germany visits a German (multinational) phone company and contracts for a mobile phone, in most of the cases German law will be applied because of the parties stipulation forced by the company. Such choice-of-law is sometimes expressis verbis uttered in the contract, or (without reference that it would be a choice-of-law) the parties simply use German (substantive law) conditions in their contract. In the viewpoint of PIL, latter can be considered an incorporation of foreign law. However, in theory, according to Rome I, neither of these two solutions is allowed to harm the consumer’s rights that he...
would have based on the law of his/her permanent residency: in our example, Hungarian law. Since the substantive provisions of the MSs are different, that is why we believe there may exist millions of contracts in which the customer's rights are harmed, and the parties use an “improper choice of law” for their contract.

Moreover, the situation is similar in regard to third states (non-MSs). If a company from a third state maintains a website and contracts can be concluded through the website, the habitual residence of the consumer will likely have relevance. If someone concludes a consumer contract with a New York based company and buys goods from New York via the Internet, the contract may be a consumer contract according to Art. 6 of Rome I, and the general rules of Art. 4 of the Regulation [esp. Art. 4(1)a] cannot be applied. Of course, in order to reach this conclusion, the term “directed activity” has to be interpreted (targeted activity test) considering all circumstances of the case. However, in our opinion the text and background of the Rome I Regulation would lead to the determination of this fact since the territorial conditions are present in the country of the consumer. According to Art. 6(2) of the Regulation, if the parties decide to choose New York law, they may not lower the level of consumer protection as it is set in the laws of the country of the consumer’s habitual residence. In this case, the New York company could hardly imagine that European rules may have relevance, and (in our opinion) the consumer also wouldn’t likely be aware of this fact. On the other hand, please note that if the consumer were to rent an apartment in New York, the contract would not be treated as a consumer contract, since service contracts where the services are to be supplied in a country other than the consumer’s habitual residence do not fall under the material scope of Art. 6 of Rome I [Art. 6(4)ia]]. For a deep analysis cf. Gralf-Peter Callies, Consumer Contracts, in Callies (Ed.), ROME REGULATIONS… supra note 1 at 124–155, esp. 143–145. For a comparison to US rules, see Healy, Consumer Protection… supra note 1 at 536–546; Giesela Rühl… supra note 1 at 155–171 (2007).


62 Fallon & Francq, Towards Internationally Mandatory… note 1 at 158.


64 Plender & Wilderspin, THE EUROPEAN… supra note 1 at 164; Norbert Reich & Hans-W., Micklitz, EU. VERBRAUCHERR. 474, 480, 482 (2003).


66 See note 1.

67 See Art. 5 Rome II Regulation.

68 von Hoffmann, Richtlinien der EG… supra note 1 at 50; Lando, The EEC Convention… supra note 1 at 181.


70 For the length of withdrawal periods see Schulte-Nölke & Twigg-Flesner & Ebers, EC CONSUMER LAW COMPRENDIUM… supra note at 98 (2008). For a comparative analysis of lengths of periods for other Directives see id. at 79–451.


73 Cf. Art 6(1) of the Directive: “Member States shall ensure that, in the interests of consumers and of competitors, adequate and effective means exist to prevent the continued use of unfair terms in contracts concluded with consumers by sellers or
suppliers." However, in our opinion, this provision lacks the attributes required for having a direct effect.

74 See Art. 9 Rome I Regulation.


77 Staudenmayer, The Directive... supra note 1 at 547.

78 Magnus, Consumer... supra note 1 at 247.

79 Staudenmayer, The Directive... supra note 1 at 560.

80 Staudenmayer, The Directive... supra note 1 at 561.


85 Basedow, Europäisches... supra note 1 at 1927–1928.

86 Mankowski, Das Herkunftslandprinzip... supra note 1 at 179–181.; Michaels, The New European... supra note 1 at 1628 et seq.

87 Hellner, E-Commerce Directive... supra note 1 at 113.

88 Mankowski, Das Herkunftslandprinzip... supra note 1 at 179.


90 Jan-Jaap Kuipers & Sara Migliorini, Qu’est-ce yue sont les ‘lois de police’? EUR. REV. O. PR. LAW 193 (2011).


See the judgement BGH, 19.03.1997. For citations and background see Stéphanie Francq, The Scope of Secondary Community Law in the Light of the Methods of Private International Law—Or the Other Way Around?, in Andrea Bonomi, Petar Sarcevic, Paul Volken (Eds.), YEARBOOK OF PRIVATE INTERNATIONAL LAW 339 et seq., esp. footnote 22 (2006).

Our short summary about the Gran Canaria cases was based on Recital (61) of the Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization. COM(2002)0634 final.


See id. at 16.


And if that EU system follows the model of maximum harmonization, it is, as the Commission correctly contends, more ‘coherent’ - but the damage wrought at national level cuts still deeper.” Stephen Weatherhill, Consumer Policy, in Paul Craig and Gráinne de Búrca, THE EVOLUTION OF EU LAW, 865 (2011).

102 See id. at 867.

103 As a general rule, consumers will have 14 days if they wish to return goods bought at distance (over the Internet, by post or telephone).

104 For the US, even lessons taken from a federal state such as Switzerland may be of use, since the basics (federal level and local level) are very similar. For an early comparison of US and Swiss rules see e.g. Magdalene Schoch, Conflict of Laws in a Federal State: The Experience of Switzerland, 55 HARVARD LAW REVIEW, 738–779 (1942).


107 Law-Decree No. 13 of 1979 on Private International

108 See e.g. the Austrian PIL Code [(IPRG—SR 291 Bundesgesetz vom 15. Juni 1978 über das internationale Privatrecht), the German PIL Code, which is the introductory act of the the German Civil Code [EGBGB Einführungsgesetz zum Bürgerlichen Gesetzbuche in der Fassung der Bekanntmachung vom 21. September 1994 (BGBl. I S. 2494; 1997 I S. 1061), das zuletzt durch Artikel 2 des Gesetzes vom 27. Juli 2011 (BGBl. I S. 1600) geändert worden ist], the Italian Civil Code (Legge 31 maggio 1995, n. 218, Riforma del sistema italiano di diritto internazionale privato, in Suppl. ordinario n. 68, alla Gazz. Uff. n. 128, del 3 giugno 1995, in regard of latter law, see Andrea Giardina, Italy: Law Reforming the Italian System of Private International Law. 35 INTERNATIONAL LEGAL MATERIALS 760–782 (1996). For another approach, see the French solution, where PIL has not been codified in one single Code, but can be found in different acts and also in several court decisions.

For a deeper review of the codes' history, see Peter Hay, Patrick J. Borchers, Symeon C. Symeонides, CONFLICT OF LAWS 129–141 (2010). For the first version of the Hungarian Code see Ferenc Mádl, Law-decree No. 13 of 1979 on private international law. Ministry of Justice of the Hungarian People’s Republic, Budapest, 1982. However, please note that over the last thirty years, numerous amendments have been made to the Code.


110 The most important provisions of contracts and on special contracts can be found in Part IV. On obligations of the Civil Code, see Art. 198–606 thereof.

111 Act No. III of 1952 on the Code of Civil Procedure. The act contains the most important provisions concerning civil procedures, especially the provisions on civil litigation in Hungary.


114 Hungary has examined and in part used methods of the German and Austrian PIL Codes for achieving
coherency with the Rome I and Rome II regulations. We have especially reviewed Art. 35, and the provisions on obligations of the Austrian PIL Code (IPRG) and Art. 3 and the articles on obligations of the German PIL Code (EGGBG). Cf. STAUDINGER KOMMENTAR—EINLEITUNG ZU..., supra note 1 at Rn 32–40; Rn 30—Anleitung der deutschen IPR an die Rom I-VO.

115 For a background see Raffai & Szabó: Selected Issues... supra note 1 at 137 et seq.

116 However, contrary to EU law, the choice of applicable law to obligations arising out of torts in the scope of the Code is still not available.


119 Please note that we will use the same chronology as in case of EU legislation: consequently, in order to have a better and easier overview, the order of review will be based on the adoption of the directives and not that of Hungarian laws.


123 In certain instances, further rules can be found in other sources such as collective agreements. As regards employers engaged in construction, workers employed shall be subject to collective agreements covering the entire industry or an entire sector in lieu of the Labor Code, provided that the given collective agreement creates more favorable conditions for the employees (Art. 106/B).


128 Art. 339 of the Civil Code states that “a person who causes damage to another person in violation of the law shall be liable for such damage.”

129 See Art. 4 of the Decree.

130 Or, more precisely, of his/her rights for cancellation of the contract and of his/her rights concerning his/ her offer. However, provisions governing the legal consequences of withdrawal are not to be found in the Decree.

131 Decree 2 of 1978 on the Implementation of the Civil Code (its—complicated—proper name is Decree 2

132 These directives were implemented by Act No. III of 2006 on the Amendment of Act No. IV of 1959 on the Civil Code and Other Laws for the Purpose of Harmonization in the Scope of Consumer Protection.


134 The Decree was formally implemented into the Hungarian legal system by Government Decree 2 of 2006 on the amendment of laws for the purpose of harmonizing in the scope of consumer protection (see Article 1.c).


137 Please note that Hungarian legislation was somewhat behind with the adoption of these rules.


141 Vékás: Antizipierte... supra note at 791–792.


143 However, it must be mentioned that the exclusion of certain areas from the Rome I Regulation and the Rome Convention was partly made because of the special position of Denmark in the EU Justice and Home Affairs (JHA) system and the earlier conflict of laws regime. This means that Denmark has neither joined the Rome Convention, nor applies the rules (inclusive PIL rules) that are adopted in the field of JHA. For its present positions see The Protocol on Denmark attached to the Treaty on the Functioning of the European Union: Protocol (No 22) On The Position Of Denmark. OJ C 83,

144 See footnote 1 in present article. For an absolutely contrary opinion, stating that the European solutions can be lessons for the United States, see James J. Healy, *Consumer Protection...* *supra* note 1 at 557.


146 Cf. „The European Council also highlights the importance of starting work on consolidation of the instruments adopted so far in the area of judicial cooperation in civil matters. First and foremost the consistency of Union legislation should be enhanced by streamlining the existing instruments. The aim should be to ensure the coherence and user-friendliness of the instruments, thus ensuring a more efficient and uniform application thereof.” Art. 3.1.2. The Stockholm Programme—An Open and Secure Europe Serving and Protecting Citizens. OJ C 115, 4.5.2010, 1.
The State Bar of California International Law Section

Honoring

Albert S. Golbert

as the Warren G. Christopher International Lawyer of the Year

The State Bar of California International Law Section will honor the winner of the 2012 Warren G. Christopher International Lawyer of the Year Award at a reception during the State Bar’s Annual Meeting October 11-14, 2012 in Monterey, California.

This award is presented annually to a California lawyer for Achievement in International Law. This is the second year that the International Law Section has presented such an award. The first recipient was the late Warren G. Christopher and the award was subsequently named in his honor. This year’s award will be presented to Albert S. Golbert at a reception in his honor while celebrating his accomplishments as a lawyer. Mr. Golbert, a former senior partner at Bryan Cave, has been a Certified Specialist in Taxation Law for several decades and now practices international tax law in Los Angeles. He has wide international experience having practiced in Europe, the Middle East, Africa, Australia, and the Far East. Mr. Golbert was a founding member of the Executive Committee of the International Law Section and is now an Advisor Emeritus. In 2000 he received the Dana Latham Award bestowed by the Taxation Section of the Los Angeles County Bar Association, and he has been honored as one of the Best Lawyers in America 2006-2012 and as a Southern California Super Lawyer.

The reception will be held at the Portola Hotel, Monterey, California on Saturday, October 13, 2012 at 5:30 pm.

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Global Mobility: Managing International Assignments in the Middle East

by Sara Khoja*

With businesses operating globally, it is increasingly common for employees to work in business units spread across jurisdictions or to spend time on secondment to an associated company or corporate branch.

International assignments can address employee developmental gaps, permit a good candidate to obtain exposure to a new market, and enhance integration of local operations with international management. However, from a management perspective, operating a globally-integrated workforce poses specific concerns, including a need to obtain advice on the employment law and practice in each jurisdiction where employees work. Tax advice may also be necessary from both the employer's and employees' perspectives.

This article examines the issues involved in seconding employees to the Middle East, and the main employment considerations that every employer should know.

I. APPLICATION OF LOCAL LAW

From a cultural perspective, there are key considerations in the Middle East. Temporary international assignments or 'secondment' is not a recognized concept within the Gulf Cooperation Council (GCC). Rather, each employee must have a local entity to sponsor his or her work permit and residency visa, independent of any employment status outside the region. Such sponsorship is employer specific. As far as government authorities are concerned, the sponsor of an employee is also his employer.

In the United Arab Emirates, an integral part of the sponsorship application is the employment contract. The sponsoring entity and employee must execute the employment contract in a prescribed form, which is registered with the Ministry of Labour or other relevant free zone authority, depending on the sponsor’s location. This contract is treated as the operative employment agreement by the UAE authorities, and no later contract can diminish or extinguish the rights or benefits conferred within it.

In all GCC countries, local labour laws have mandatory application to individual workers. Each GCC country has a labour code providing for minimum employee entitlements, including paid annual leave, sick leave and pay, provisions governing termination for cause, disciplinary procedures and sanctions, and health and safety obligations.

With regard to termination of employment other than for cause, the key employee entitlements are to a minimum period of notice and an end of service gratuity (Gratuity).

II. GRATUITY

The statutory formula varies across GCC member states broadly as follows (there are particular factors which might apply to reduce or extinguish the right to claim Gratuity and which are not set out below): Gratuity is not payable if an employee is terminated for gross misconduct, or in certain other specific circumstances relating to the employee’s breach of the employment contract.

Whilst there is no personal income tax in the GCC states, the form of salary payment is regulated increasingly. Both Kuwait and the UAE require salaries to be paid electronically, using locally regulated banks and accounts. This requirement can be troublesome for international assignees who wish to continue receiving payment in their home country.

III. EMPLOYER POLICIES

Operating an international assignment HR structure requires integrated company policies that can manage expectations for managers and assignees. A key consideration for such policies is whether to give them contractual effect, enabling employees to rely on them and seek enforcement of their terms.

The following considerations are relevant to Employer Policies in this regard:

- Assignment Policy: this should provide a reference point for employees and managers with regards to the terms of an assignment, such as a potential variation of benefits (i.e., relocation and repatriation costs), and flexibility, so that employees are treated consistently. Such a
United Arab Emirates
Conditional on 12 months’ service;
21 days’ basic salary (plus commission if applicable) for each complete year
30 days’ basic salary (plus commission if applicable) for each complete year over 5 years
Cap of 2 years’ basic salary (plus commission if applicable)
Bonus may also be included if it is guaranteed or given as a custom and practice
Pro-rata entitlement for part years
Reduced if employee resigns in first 5 years

Kingdom of Saudi Arabia
½ month’s remuneration for each year
1 month’s remuneration for each year over 5 years
Pro rata entitlement for part years worked
Reduced if the employee resigns in the first 10 years

Emirate of Qatar
Conditional on 12 months’ service
3 weeks’ for each complete year of service

Emirate of Kuwait
15 days’ remuneration for each complete year of service
1 month’s remuneration for each complete year over 5 years’ service
Cap of 1.5 years
Reduced if the employee resigns in the first 10 years

Kingdom of Bahrain
15 days’ remuneration for first 3 years of service
1 month’s remuneration for each year over 3 years
Reduced if the employee resigns in the first 5 years

Sultanate of Oman
Conditional on 12 months’ service
15 days’ remuneration for each year
1 month’s remuneration for each service year over 3 years

policy should also distinguish between different groups, grades or categories of employees, and have different terms for short-term and long-term assignments;

• Local HR policies or collective agreements: in any jurisdiction certain policies will be mandatory such as health and safety, disciplinary and grievance policies. The application of collective agreements covering pay, HR policies and potentially termination may also be mandatory, and this also is a specific concern issue in many European jurisdictions;

• Employee job descriptions and titles: these can affect the legal provisions applicable to an assignment in the local jurisdiction, with certain categories of employees often excluded from the application of key employment protections. Immigration provisions are also important, and the basis for work permits and residency can depend on the employee's role and title;

• Tax equalization: if the employer imposes tax equalization, then clarity of its meaning and effect on the employee on assignment is of paramount importance.

IV. KEY ROLE: GENERAL MANAGER

Any business seeking to operate in the GCC needs to be licensed in each GCC country where it seeks to do business. As part of such establishment, a General Manager must be appointed. The General Manager’s name appears on the business’ trade license and a number of statutory duties and liabilities are attached to the role. A General Manager is typically required to be a resident of the country of establishment; and in some instances dual residency in more than one GCC country is possible. However, employment liability accrues in each GCC country for such an individual, as the basis for the residency is the individual’s employment and sponsorship.

Another consideration when appointing a General Manager is obtaining the Ministry of Labour’s recognition of the individual’s educational and professional qualifications and certificates. As part of the application for a work permit and residency visa, the individual must submit attested certificates
to the Ministry of Labour, which then issues the work permit and residency visa stating a job title commensurate with the certificates. Where an individual does not have a university degree in a subject relating to the business activities of the employer, it is highly unlikely that the individual would be issued a work permit and residency visa stating ‘General Manager’ as the designated job title. The absence of such a designation can make it difficult for the individual to obtain business visas to travel to other GCC countries or other countries within the wider Middle East.

V. TERMINATION

The contractual basis for an international assignment usually is the original employment contract, the secondment agreement, and depending on the jurisdiction, the local contract with the host company. All three documents need to be consistent; and if the assignment is terminated prior to completion, the agreements should either provide for the underlying employment also to terminate, or for the assignee to be repatriated back to the underlying employing entity.

When removing an employee from a secondment, the employer also should consider whether to repatriate and reassign the employee, rather than terminate employment. The reason for termination should be clear, and an assessment made on the potential exposure arising out of the termination, both in the local jurisdiction of assignment and in the home country. The employee may have statutory claims which could be brought in both jurisdictions, and contractual claims potentially may be brought in the home country. Therefore, the risk of dual claims cannot be discounted. Where an exit is negotiated, the terms should be documented by drafting settlement or compromise agreements that comply with statutory provisions for waiver or settlement of employee entitlements in the jurisdictions where the employee was employed or assigned.

Endnotes

* Sara Khoja is a Senior Associate at the law firm of Clyde & Co. Her work focuses on employment law issues, and advising clients in various sectors including construction, technology, hospitality, retail and insurance.
Attorneys Without Borders, Arbitration in California: A Proposal

By Nicholas P. Connon & Robert A. de By

California law prohibits foreign attorneys from representing clients in international arbitrations held within the State. An attorney participating in arbitration in California is practicing law, and “[n]o person shall practice law in California unless the person is an active member of the State Bar.” (Bus. & Prof. Code, § 6125).

Due to the restriction in California, foreign parties and their legal advisors may choose other venues for their arbitration that allow foreign attorneys to arbitrate—venues such as New York, London, or Paris. As a result, California’s failure to accommodate foreign attorneys seeking to arbitrate international matters within the State deters international arbitrations from taking place in California.

A provision allowing foreign attorneys to represent their clients in California would make the state an attractive center for international arbitration. This would give rise to increased international arbitration activity in California, and concomitant legal work and business activity for its legal community. Both would benefit greatly from the increased presence of international arbitration in the State. Such arbitrations bring a demand for arbitrators, local counsel, court reporters, interpreters, conference space, hotel rooms, and other facilities. In short, allowing foreign attorneys to represent their clients in California international arbitrations will create jobs and be economically beneficial to the legal industry as well as the public.

Other states and nations actively work to attract international arbitrations. For example, New York, England, France, and Singapore all allow foreign attorneys to represent their clients in international arbitrations—making these locations preferred choices as seats for international arbitral matters. California should do the same.

By providing a neutral forum, international arbitration works to cure entanglements created by parties from different legal cultures being in a cross-border legal dispute. A crucial part of doing so is accommodating the expectations of persons from often very different backgrounds. Needless to say, allowing such parties access to trusted counsel, familiar with their business, legal culture, and the parties’ expectations is crucial to the confidence international arbitration requires to be an effective dispute resolution mechanism. Excluding such experienced counsel from California arbitrations serves no legitimate purpose and undermines California’s position when it comes to attracting international arbitration. Doing so is inconsistent with principles of diversity and tolerance of other cultures, qualities that California is famous for the world over. California is the gateway to Asia, as well as to much of Latin America. A parochial approach to international arbitrations robs the State and its legal professionals of significant revenue and reputational potential.

Finally, there is the issue of reciprocity. California should allow foreign attorneys to participate in international arbitrations where California attorneys are permitted to practice in the country where the foreign attorney comes from. This open door policy would provide a boost to California attorneys both in California and abroad. Any boost to the California legal industry should be welcome.

It is for these reasons that the California legislature should amend Section 1282.4 to permit foreign attorneys to act as counsel and arbitrators in international arbitrations in California.

Endnotes

1 Nicholas P. Connon is the co-managing partner of Connon Wood Scheidemantle LLP and chair of the firm’s Middle East Practice Group. He is based in the Los Angeles office, and has extensive experience in international litigations. Robert A. de By, based in Connon Wood’s London office, is chair of the International Arbitration Practice Group and has represented numerous domestic and international clients in international arbitrations, litigations, and mediations concerning complex cross-border contractual, business, investment and other major multi-jurisdictional disputes. They also are the authors of the website www.GlobalArbitrationLawyers.com.

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