

## CONSUMER PROTECTION IN TRANSNATIONAL RELATIONS: THE CONTRIBUTION OF THE EU

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### ABSTRACT

*Up to now, it has not yet been possible to build a universal normative body under contract law, each state having its own. The plurality of existing regulations often creates legal uncertainty, undermining the legitimate expectations of the parties. To minimize these problems the Rome I Regulation on the law applicable to contractual obligations provides that the law applicable to headquarters of international contracts. It enshrines the principle of the autonomy of the will of the parties, seeking that the solution be the same in all EU Member States. That legal text also indicates, by contract categories, which law is applicable in the event of lack of choice. The EU was aware of certain categories of contracts, in particular the consumer contract, for which it chose a special scheme. Our approach will be directed to the rules applicable to consumer contracts. We will highlight the need to protect the weaker party, taking into account the principle of more favorable treatment. The EU has continued to devote also to those contracts the possibility of the parties to choose the applicable law, but respecting some limits. We will review the European literature on the subject and try to interpret the law by highlighting its shortcomings, with reference to some jurisprudence of the CJEU. The Rome I Regulation on consumer contract seat establishes a minimum status, the application of the law of the consumer's habitual residence, imposing certain conditions. However, the legal system does not cover all consumers. We will try to show which consumers can invoke this law. Regulation protects only passive consumers, those for whom the trader directed its activity, does not apply to active consumers, moving to another state and then acquire products or services to a professional.*

**Keywords:** *consumer; contract; european; law; professional*

### 1. INTRODUCTION

With the development of commercial relations and the phenomenon of globalization, we find that, more and more, legal relations develop in international contexts, connecting with more than a legal system. However, it has not yet been possible to build a universal contract law. In this context, we can not fail to mention the activity carried out by certain international organizations, especially the International Institute for the Unification of Private Law (UNIDROIT) and the United Nations Commission on International Trade Law (UNCITRAL). Both have sought to harmonize the discipline of international commercial contractual relations, contributing to greater predictability and security in this type of relationship. In addition to these non-binding contributions, we find that each State has its own disciplinary regime under contracts. The possibility of different legal regimes being applicable creates a great deal of uncertainty, undermining the legitimate expectations of the parties. Consider the case of a Portuguese company selling its products to an Azerbaijan company. Thus, we will be before two legal systems that demand the regulation of the contractual relationship.

If we also imagine the possibility of the parties granting, under the same contract, to establish relations with legal persons from other States, we easily find that the number of potentially applicable ordinances will increase. In order to avoid this multiplicity of regimes, various possibilities are drawn: through conflict rules, namely 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); by means of international conventions which have as their object a common contractual discipline, ratified by the respective acceding States, for example the 1980 Vienna Convention on the law applicable to the international sale and purchase of goods; and by means of Soft Law texts intended to harmonize the discipline of international commercial contracts. As a paradigm of the latter, we highlight UNIDROIT principles and their very important contribution to international trade. However, we can not fail to emphasize the operative character of both international conventions, given that the parties may refrain from applying them, or from the non-binding nature of Soft Law, in addition, it forms part of texts lacking the compulsory character, but revealing great technicality and adequacy to transnational relations. Moreover, they impose themselves on clarity, flexibility and persuasiveness. We can not fail to mention that these regulatory bodies are not intended for consumers who purchase goods outside their professional activity. It is our intention to approach the technique of the conflict rule, especially in the Rome I Regulation and, as far as our study is concerned, the law applicable to the contract concluded between a consumer and a professional. Let us not forget that the option of the regulation technique has been implemented in the sense of linking all Member States and harmonizing the subjects they portray.

## **2. GENERAL CONSIDERATIONS**

This Regulation establishes the conflictive normative framework for determining the law applicable to contractual obligations within the European Union, designing for certain normative categories special provisions, protecting the weaker party. We are talking about the transport contract, the consumer contract, the insurance contract and the employment contract. The present law underpins the principle of the freedom of the parties in the choice of law (principle of private autonomy), provided that, where such a choice does not operate a supplementary regime through clear and specific rules for the most varied contracts, in civil and commercial (Pinheiro, 2016). With this harmonization of conflict rules, the courts of the Member States will be able to determine, in the same way, the law applicable to an international contract, when the parties have not exercised the faculty conferred on them by this Regulation. It should be emphasized that with the entry into force of the Lisbon Treaty the communitarisation of Private International Law of the Member States was deepened, now moving towards a unified Private International Law system through Regulations, leaving only national legislators, in the context of transnational relations, a merely residual role (Masiá, 2016). The European Union therefore seeks to preserve its aims, including security, justice and the gradual attainment of an area of freedom. The Member States are therefore empowered to take action in the framework of judicial cooperation in civil matters with cross-border implications, always with a view to contributing to the proper functioning of the internal market, with all those measures favoring harmony and the compatibility of the rules applicable in the Member States with regard to conflicts of laws and jurisdictions. The purpose of the Rome I Regulation is to unify the conflict rules on civil and commercial disputes at European level, as was the case with its predecessor Rome Convention. Both diplomas provide similar legal solutions, and we find that the current regulation did not introduce any substantial changes, and in our view it is limited to updating some of the matters already covered by the Convention. It should be noted that the Regulation has a universal character, as its predecessor also established it, and the law designated under both instruments is applicable even in the case of a law of a non-contracting State.

With regard to the interpretation of both the 1968 Brussels Convention on Jurisdictional Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters and Council Regulation (EC) No 44/2001 of 22 December 2000 on recognition and enforcement of judgments in civil and commercial matters, which has replaced it, as well as the current Regulation (EU) n. No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, which replaced the previous regulation, the Court of Justice of the European Union has defended the need for an autonomous interpretation of the legal categories evidenced by the regulations (Paredes, 2006). For this purpose, the national authorities have contributed a great deal to the question referred for a preliminary ruling by the national court.

### **3. CONSUMER CONTRACTS: THE LAW APPLICABLE**

Article 6 of the Rome I Regulation establishes a special regime for the designation of the law applicable to the consumer contract. This precept takes into account the fragilities of the weaker party intending to protect the consumer. The application of the general scheme of Article 4 of the Regulation is removed from the outset. The Court of Justice of the European Union clarified the concept of consumer, stating that the protection applies to 'private final consumers' (Case 150/77, Bertrand). It subsequently concluded that the protection granted to consumers extends to contracts concluded exclusively by private individuals in order to meet consumer needs and can not cover undertakings or legal persons (Case C-269/95 Benincasa). This protection can be invoked only by the consumer himself and not by an applicant acting in the exercise of his professional activity to whom the consumer has transferred his rights (Case C-89/91, Shearson Lehmann Hutton). Finally, the Court held that the definition of a consumer must be interpreted autonomously and uniformly throughout the Union (C-508/12, Vapenik). The Court concluded that: 'Thus, the Court has already held that the rules of special jurisdiction over consumer contracts can not be applied to contracts between two persons engaged in commercial or professional activities (see, to that effect, Case C-89/91 Shearson Lehmann Hutton [1993] ECR I-139, paragraphs 11 and 24). 33 It must be stated that there is also no imbalance between the parties in a contractual relationship such as that at issue in the main proceedings, namely that between two persons not engaged in commercial or professional activities. Therefore, that relationship may not be subject to the system of special protection applicable to consumers contracting with persons engaged in commercial or professional activities' (paragraphs 32 and 33 of the case). When it is a legal relationship between a consumer and a professional (the one who carries out commercial activities) the law of the consumer's country applies. However, it is important to state that the application of the law of the consumer country presupposes, in order to be applied, that the commercial or professional activity of the person contracting with the consumer, the professional, develops in or to the consumer's country and that the contract is within the scope of its activities. The regime set out in Article 6 of the Regulation, formerly Article 5 of the Rome Convention, also presupposes that consumer goods are supplied as part of a professional activity. Some understand that only in this way can we face an inequality between the parties and, as such, the need to protect the weaker party (Pinheiro, 2015). However, this rule should apply even if the professional acts outside the scope of his activity and the consumer is unaware of this situation acting in good faith (Giuliano & Lagarde, 1980). It should be noted that the European legislature in this area has not failed to enshrine the possibility for the parties to elect the law regulating their contract. However, that choice can not deprive the consumer of the protection afforded him by the provisions which can not be derogated by agreement of the law, which, in the absence of choice, would apply to him under Article 6 (1) of the Rome I Regulation. The same is true of the law of habitual residence of the consumer, which provides the minimum standard of protection and presents itself as the law most closely connected with the weaker party (Pinheiro, 2006) (Ramos, 2016).

Thus, the autonomy of the will of the contracting parties will only be relevant to the extent that the law chosen manifests itself to the consumer (Ramos, 2016). It is therefore necessary to examine Article 6 (1) and (2) of the Rome I Regulation, starting with the letter of the law:

«1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional: (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such 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 on the basis of paragraph 1.»

This conflict rule, foreseen for consumer contracts, establishes two assumptions to be applied. On the one hand, it determines the material scope of the standard requiring that the protagonists of these contracts should be: a professional and a consumer. On the other, it delimits the territorial scope of application, prescribing only passive or sedentary consumers as receivers of the standard (Giuliano & Lagarde, 1980). As regards the material scope, Article 6 applies to any contract concluded between a natural person for a purpose which may be considered as being outside his trade or profession, the consumer, with another person acting in the course of his business activities or professionals, the professional. The legislator enshrined the theory of the impression of the recipient privileging only the behavior of the consumer that can be known by the professional. Hence the expression used by the legislature "for an end that may be considered as foreign to his commercial or professional activity". In short, the interpretative result of a particular statement must be in accordance with the recipient's theory of impression, that is, in the sense that a normal declarant placed in the position of the actual declarant could deduct from the declarant's behavior, in the light of the good faith and the circumstances in which the case may be considered. If, on the assumption that we are dealing with a dual-purpose contract, both personal and professional, we must take account of the position taken by the CJEU in Case C-464/01 (Johann Gruber v Bay Wa AG). Although the case concerns the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, the problem raised and the solution envisaged remain the same in the instruments that followed and have already been referred to by us. Consequently, "a person who has concluded a contract in respect of goods intended to be used in a manner which is partly occupational and which is partly outside his trade or profession may not rely on the special rules of competence laid down in Articles 13 to 15 of that Convention, unless the occupational use is marginal, to the point of having only a negligible role in the overall context of the operation in question, and in that respect it is irrelevant that the extra-professional aspect is dominant; - it is for the court seised of the action to decide whether the contract in question was concluded in order to satisfy the requirements arising from the professional activity of the person concerned or whether, on the contrary, professional use only plays an insignificant role; - for that purpose, that court must take into account all relevant facts which are objectively apparent from the file; on the other hand, the circumstances or elements which the contracting party might have known at the time of conclusion of the contract shall not be taken into account,

unless the person claiming to be a consumer behaved in such a way that he could legitimately cause to the other party to the contract the impression that he was acting for professional purposes. " Whenever the part of the contract, related to the acquirer's business activity, is of minimal significance, it will affect the entire contract and for this reason the acquirer can not invoke Article 6 of the Rome I Regulation. Regarding territorial scope, in the context of international or transnational trade relations, consumer protection must take into account the dichotomy between active consumer and passive consumer (Garcimartín, 2016). The passive consumer is anyone who purchases consumer goods in the market of his habitual residence. This implies that the professional acts within the market of the first, including there, to acts of publicity. (Garcimartin, 2016). In these circumstances the law of the habitual residence of the consumer should be applied. (Pinheiro, 2006). The emphasis of the internationality of the contract is placed on the professional's performance, he is the "responsible" for this situation. The active consumer is everyone who moves to the professional market. Imagine a Portuguese consumer who purchases a consumer good in another state from a professional. In this case, the legislature intended that the consumer can not invoke the application of the law of his habitual residence. The principle of the personality of the law is thus refuted. In short, the Rome I Regulation being the normative body capable of indicating the substantive law best placed to regulate a given international contract that falls within its material scope and having as procedural support Regulation (EU) no. No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, account should be taken of Article 17 (1) (c) of the latter legal instrument that determines the following: "1. In matters relating to a contract concluded by a person, the consumer, for a purpose which can be regarded as being outside his trade or profession, jurisdiction shall be determined by this Section, without prejudice to Article 6 and point 5 of Article 7, if: c) in all other cases, the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer's domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities." In the light of the foregoing, two situations are outlined: the first, which is set out in Article 6 (1) (a) of the Rome I Regulation and which establishes the professional situation of the trader or trader in the country where the consumer resides habitual. The expression activities includes both the situation where the professional has a business establishment in the consumer's country, and the other one where the professional is temporarily in the consumer's country, by hypothesis, at a trade show booth (Garcimartín, 2016). The second situation is provided for in Article 6 (1) (b) of the Rome I Regulation and concerns the possibility for the trader, by any means, to direct his activities to the country of the habitual residence of the consumer or to several countries , including that country, ie the habitual residence of the consumer, and the contract falls within the scope of those activities. We find that the legislator pointed out the means that can be used to reach that consumer and disregarded the place where the contract is celebrated. We can see the adaptation of the regulation to the dynamics of commercial relations established via the internet. We can not fail to underline the importance of the term "targeted activities". It should be noted that consumer protection provided for in the Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, known as the Brussels I Regulation (currently Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012) and the Rome I Regulation shall apply if the trader has "directed his activities" to the Member State of the consumer within the meaning of Article 17 (1) (c) of that Regulation and Article 6 (1) of the Rome I Regulation. In this regard, recital 24 of the Rome I Regulation refers to the consistency in the interpretation of the material scope between the rules of these two instruments with regard to the concept of "directing activities".

The Court has been providing guidance on how to interpret the concept of "directing activities" for a particular Member State. In *Pammer v Alpenhof* (Joined Cases C-585/08 and C-144/09) the Court had to decide whether access to a website was sufficient to consider whether a trader directed his activity to the Member State of domicile within the meaning of Article 15 (1) (c) of the Brussels I Regulation in the version applicable at the time. It has decided that mere accessibility to a website in a particular Member State is not sufficient to show that the trader has directed his activity to that Member State. On the contrary, in order to demonstrate this, it is necessary to establish whether, before the conclusion of the contract with the consumer, it is apparent from those websites and from the overall activity of the trader that he intended to establish business relations with consumers domiciled in one or more Member States, consumer's domicile. In *Mühlleitner* (C-190/11), the Court held that it is not necessary for the contract to be concluded from a distance, but that this element can be taken into account when analyzing all relevant factors necessary to determine whether the professional directs activities for a particular Member State. In *Emrek* (C-218/12), the Court held that Article 15 (1) (c) of the Brussels I Regulation, Article 17 (1) (c) , version at the time, does not require a causal link between a website and the conclusion of the contract. However, that causal link is an indication of the connection of the contract to a commercial or professional activity directed at the Member State of the consumer's domicile. In short, in view of all the Court's guidelines, a list of criteria has been drawn up by the Court itself: "the international nature of the activity, the mention of routes from other Member States to the place where the use of a language or currency other than those normally used in the Member State of the trader, with the possibility of reserving and confirming the reservation / order in that language, the mention of telephone numbers with an international of expenditure on an Internet referral service to provide consumers in other Member States with access to a trader's site or a site of their intermediary, the use of a first-level domain name different from the Member State where the trader is established, and the mention of an international clientele constituted by customers domiciled in different Member States. However, the following elements do not constitute sufficient proof of that intention: the mere accessibility of the professional or intermediary's website in the Member State of the consumer's home, an e-mail address and other contact details, or the use of a language or currency which is commonly used in the Member State of the trader "(Practical Guide - Competence and Law applicable to international consumer contracts, 2018). In short, it is necessary that the web site invite the conclusion of distance contracts and that a distance contract has actually been concluded by any means (Pinheiro, 2015). Those interpretative criteria apply either under Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, Article 17 and in the Rome I Regulation, Article 6 (1) (b). It should be noted that the legislator in Article 6 of the Rome I Regulation did not include transport and insurance contracts where one of the interveners is a consumer. This is enshrined in other provisions, namely Articles 5 and 7 of that Regulation.

#### **4. CONTRACTS EXCLUDED**

The legislator in Article 6 (4) excludes from the scope of paragraphs 1 and 2 of the same legal precept a list of situations that relate to several situations:

- a) A contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence. It will be easy to understand the reason for the departure from the regime established by virtue of this type of contracts to show a very strong link with the country where the service is provided.
- b) A contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314 / EEC of 13 June 1990 on package travel, package holidays and package tours. This exclusion finds its reason for being in the fact that the regulation had

laid down special rules for this for this typology of contracts, article 5. It should be noted that travel organized under Directive 2015/2302 of the European Parliament and of the Council of 25 November 2015 on package travel and related travel Regulation (EC) No 2006/2004 and Directive 2011/83 / EU of the European Parliament and of the Council and repealing Council Directive 90/314 / EEC.

- c) A contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47 / EC. This exclusion covers mortgages or any other guarantee on real estate. This is due to the greater connection of the object of these contracts with the parents' law of the situation of the property even though one of the parties is a consumer. It is concerned with the principle of effectiveness in its two strands, principle of greater proximity and principle of the feasibility of decisions. Also known as the principle of closer connection.
- d) Rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service.

Financial contracts, contracts entered into by private investors in connection with a public offer for the sale of securities or a public offer for the acquisition of securities are excluded. Participation in collective investment undertakings is also excluded. These may take the form of Investment Funds or Investment Companies, aiming at the collective investment of capital obtained from the public, whose operation is subject to the principle of risk sharing and the pursuit of the exclusive interest of the participants. All investment vehicles are appropriate for raising the savings of an indefinite number of small investors (also called retail investors) and channeling them to the economy with a minimum of risk and with assured liquidity. Thus, all the transactions referred to in Article 6 (4) (d) naturally require a uniform legal regime for the determination of the applicable law, preventing the application of different schemes by virtue of the habitual residence of the investor (recital 28 of the Regulation). In this way, we intend to instill predictability and security in this type of relationship. Finally, the legislature has withdrawn the contracts (e) (...) concluded within the scope of Article 4 (1) (h). According to recital 28, the application of a plurality of laws to which Article 6 (1) and (2) may lead is not in line with financial instruments as standardized products (Fernandes 2010). It is intended that the law of the country of habitual residence of the consumer does not call into question the "regulatory unit" (Fernandes, 2010). To retain:

- Regulation (EU) No 1215/20121 and Regulation (EC) No 593/20082 include special provisions to determine: the Member State or States whose courts have jurisdiction to hear disputes relating to consumer contracts and the applicable law to these contracts.
- Such special provisions may derogate from the general principles of jurisdiction and applicable law, with the aim of protecting the consumer as a weaker party to the contractual relationship.
- Generally allow the protected party may only be sued in the courts of your residence, but give it the competence choice option when this part is on the claimant quality.

## 5. CONCLUSIONS

1. The Rome I Regulation enshrines the principle of autonomy of will in private international law, ie the possibility for the parties to designate the law applicable to their international contract;

2. However, this law may not deprive the consumer of the protection afforded him by the law of his habitual residence, observing the requirements of article 6, numbers 1 and 2;
3. Article 19 of that regulation does not indicate what we are to understand by the habitual residence of natural persons; consequently, we must delimit that concept independently from the circumstances in casu;
4. Article 6 protects only passive consumers, those who purchase consumer goods in the market of their habitual residence.
5. If the consumer moves to the country of the professional he must be treated as a consumer of that country.
6. The application of the law of the habitual residence of the consumer will depend on the verification of one of the subparagraphs contained in article 6 n° 1 of the Rome I Regulation: situation in which the professional has a commercial establishment in the country of the consumer, like the other one in which the professional is temporarily in the consumer's country; the possibility of the professional, through any means, to direct his activities to the country of habitual residence of the consumer or to several countries, including that country, that is the habitual residence of the consumer, and the contract falls within the scope of those activities.
7. With regard to the concept of targeted activity, it is important to bear in mind the positions of the Court of Justice of the European Union and the criteria provided by it.

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