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Committee on Legal Affairs

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PE 382.371v01-00

## AMENDMENTS 32-85

### Draft report

(PE 374.427v01-00)

**Maria Berger**

Proposal for a regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)

Proposal for a regulation (COM(2005)0650 – C6-0441/2005 – 2005/0261(COD))

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Text proposed by the Commission

Amendments by Parliament

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Amendment by Maria Berger

Amendment 32

Recital 7

(7) Freedom for the parties to choose the applicable law must be one of the *cornerstone* of the system of conflict-of-laws rules in matters of contractual obligations.

(7) Freedom for the parties to choose the applicable law must be one of the *cornerstones* of the system of conflict-of-laws rules in matters of contractual obligations. ***Such freedom comprises the right to choose as the applicable law principles and rules of substantive law of contract recognised internationally. However, such principles and rules must comply with certain minimum standards in order to be eligible, and be subject to the limitations on freedom of choice imposed by Articles 5-7 of this Regulation. They should be created by an independent, impartial and neutral body; their content***

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*should be balanced and protected against evasion and abuse by certain mandatory rules; and they should regulate rights and duties in a reasonably comprehensive way. These conditions are met, for instance, by the UNIDROIT Principles of International Commercial Contracts.*

Or. de

*Justification*

*The additional wording is to be read in conjunction with the amended first subparagraph of Article 3(2).*

Amendment by Klaus-Heiner Lehne

Amendment 33  
Recital 7

(7) Freedom for the parties to choose the applicable law must be one of the *cornerstone* of the system of conflict-of-laws rules in matters of contractual obligations.

(7) Freedom for the parties to choose the applicable law must be one of the *cornerstones* of the system of conflict-of-laws rules in matters of contractual obligations. ***Such freedom comprises the right to choose as the applicable law principles and rules of substantive law of contract recognised internationally, as well as principles and rules of substantive law of contract established by the Community legislator.***

Or. de

*Justification*

*The additional wording is to be read in conjunction with the amended first subparagraph of Article 3(2).*

Amendment by Klaus-Heiner Lehne

Amendment 34  
Recital 10

(10) With more specific reference to

(10) With more specific reference to

consumer contracts, the *conflict rule must make it possible to cut the cost of settling disputes on what are commonly relatively small claims and to take account of the development of distance-selling techniques. Harmony with Regulation (EC) No 44/2001 requires both that there be a reference to the concept of “targeted activity” as a condition for applying the consumer-protection rule and that the concept be interpreted harmoniously in the two instruments, bearing in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation No 44/2001 states that “for Article 15(1)(c) to be applicable it is not sufficient for an undertaking to target its activities at the Member State of the consumer’s residence, or at a number of Member States including that Member State; a contract must also be concluded within the framework of its activities”. The declaration also states that “the mere fact that an Internet site is accessible is not sufficient for Article 15 to be applicable, although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.”*

consumer contracts, the *mandatory rules of the Member State in which the consumer habitually resides should always apply. However, the principle of freedom to choose the applicable law extends also to consumer contracts. In order to take account of the development of distance-selling techniques, steps must be taken to ensure that, when a contract is concluded at a distance, application of the mandatory consumer protection rules of the Member State in which the consumer habitually resides does not depend on the mere fact that an Internet site is accessible. A more important requirement is a positive attitude on the part of the seller to concluding a contract at a distance.*

Or. de

#### *Justification*

*The principle of freedom to choose the applicable law should also apply to consumer contracts. But account must be taken of the fact that the consumer is the weaker party. Therefore the mandatory consumer protection rules which exist at European and Member State level must be taken into account in consumer contracts.*

*Clarification is needed to take account of developments in distance selling. To make full use of the potential of distance selling, steps must be taken to ensure that a contract concluded on the Internet by a consumer in a Member State to which the online offer was not directed does not lead to application of the mandatory consumer protection rules of the Member State in which the consumer habitually resides. Because of higher costs, particularly for SMEs, there would otherwise be a danger that e-business would envisage solutions for only one Member State.*

Amendment by Jean-Paul Gauzès

Amendment 35

Recital 11

(11) Regarding individual employment contracts, **the conflict rule** should make it possible to identify the centre of gravity of the employment relationship, looking beyond appearances. This rule does not prejudice the application of the mandatory rules of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services.

(11) Regarding individual employment contracts, **this regulation** should make it possible to identify the centre of gravity of the employment relationship, looking beyond appearances. **Recognition of this fact must also apply in determining the true nature of the contractual relationship.** This rule does not prejudice the application of the mandatory rules of the country to which a worker is posted in accordance with Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services. **Member States must ensure that this directive is properly implemented.**

Or. fr

*Justification*

*In order to thwart stratagems designed to obtain a competitive advantage through non-compliance with labour law, it is necessary to recognise the facts of the matter, so as to see behind appearances and appreciate the true nature of the contractual relationship between a service provider or self-employed person on the one hand and a recipient or customer on the other.*

*Regarding form, the drafting of recital 11 should be improved by replacing the words 'conflict rule' with 'regulation'.*

*Efforts should be continued to increase the effectiveness of directive 96/71 concerning the posting of workers in the framework of the provision of services (improvements regarding information for companies, administrative cooperation, effectiveness of monitoring procedures and legal proceedings).*

Amendment by Jean-Paul Gauzès

Amendment 36

Article 1, paragraph 1, sub-paragraph 2

It shall not extend, in particular, to revenue,

It shall not extend, in particular, to revenue, customs or administrative matters, **or to the**

customs or administrative matters.

*responsibility incurred by a State for acts and omissions in the exercise of its public functions ('acta iure imperii').*

Or. fr

*Justification*

*It is proposed that administrative law be specifically excluded from the scope of the regulation which must only relate to situations governed by private law. In order to ensure consistency, the wording is drawn directly from the common position on Rome II.*

Amendment by Jean-Paul Gauzès

Amendment 37

Article, 1 paragraph 2, point (b)

(b) contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has **similar** effects, including maintenance obligations;

(b) contractual obligations relating to a family relationship or a relationship which, in accordance with the law applicable to it, has **comparable** effects, including maintenance obligations;

Or. fr

Amendment by Jean-Paul Gauzès

Amendment 38

Article, 1 paragraph 2, point (c)

(c) obligations arising out of a matrimonial relationship or a property ownership scheme which, under the law applicable to it, has **similar** effects to a marriage, **wills** and successions;

(c) obligations arising out of a matrimonial relationship or a property ownership scheme which, under the law applicable to it, has **comparable** effects to a marriage and successions;

Or. fr

Amendment by Jean-Paul Gauzès

Amendment 39

Article, 1 paragraph 2, point (d)

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) obligations arising under bills of exchange, cheques and promissory notes and **all** other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character, ***including those arising from contracts concerning financial instruments admitted to trading on a regulated market under Directive 2004/39/EC of the European Parliament and of the Council of 21 April 2004 on markets and financial instruments<sup>1</sup>, together with the related property rights;***

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<sup>1</sup> OJ L 145, 30.4.2004, p. 1.

Or. fr

*Justification*

*It is necessary clearly to exclude operations covered by stock exchange law from the scope of Rome I: they are already covered by extensive and specific Community legislation.*

Amendment by Jean-Paul Gauzès

Amendment 40

Article 3, paragraph 1, sub-paragraph 2

The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract, ***behaviour of the parties or*** the circumstances of the case. ***If the parties have agreed to confer jurisdiction on one or more courts or tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.***

The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract, the circumstances of the case ***or any other objective element by which the wishes of the parties may be judged.***

*Justification*

*More detailed specification within the future regulation of the notion of 'tacit choice' based on objective elements alone, order of importance, without any reference to 'behaviour of the parties'.*

*Rejection of the assumption that agreement by the parties to confer jurisdiction on a Member State court means that they have also chosen the law of that Member State. In specific terms such an assumption would call into question the very principles of international private law which apply here.*

Amendment by Jean-Paul Gauzès

Amendment 41  
Article 3, paragraph 2

***2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community.*** *deleted*

***However, questions relating to matters governed by such principles or rules which are not expressly settled by them shall be governed by the general principles underlying them or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.***

Or. xm

*Justification*

*The principles and rules of the substantive law of contract recognized internationally or in the European Community would not solve all the issues likely to be raised in connection with the interpretation or the execution of the contract. Moreover the possibility of referring to “general principles” would introduce legal uncertainty. All contracts must be subject to a recognised and reliable national legal order, including a complete set of codified rules.*

Amendment by Maria Berger

Amendment 42  
Article 3, paragraph 2, subparagraph 1

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or *in* the Community.

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally, or ***adopted by the Community pursuant to Article 251 of the EC Treaty.***

Or. de

*Justification*

*A reference to the common frame of reference should always make clear that this is not only recognised, but has been adopted by the proper legislative procedure.*

Amendment by Klaus-Heiner Lehne

Amendment 43

Article 3, paragraph 2, subparagraph 1

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally ***or in*** the Community.

2. The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally. ***Freedom to choose the applicable law is also subject to the established principles of the substantive law of contract enshrined in Community legislation.***

Or. de

*Justification*

*This provision should be clarified by the amended Recital 7. The principal of freedom to choose the applicable law must extend also to the common frame of reference. It does not matter that this legal framework has not yet been developed, since the reference to Community legislation makes clear that relevant legislation must be endorsed by the democratically legitimate institutions at European level.*

Amendment by Jean-Paul Gauzès

Amendment 44

Article 3, paragraph 2, sub-paragraph 2

However, questions relating to matters governed by such principles or rules which

However, questions relating to matters governed by such principles or rules which

are not expressly settled by them shall be governed by ***the general principles underlying them or, failing such principles, in accordance with*** the law applicable in the absence of a choice under this Regulation.

are not expressly settled by them shall be governed by the law applicable in the absence of a choice under this Regulation.

Or. fr

Amendment by Jean-Paul Gauzès

Amendment 45

Article 3, paragraph 2 a (new)

***2a. Without prejudice to the application of the mandatory provisions of Community law or lex fori, the parties may choose to apply the rules or principles of contract law formally adopted by the European Parliament and Council in a Community act published in the L series of the Official Journal of the European Union, where, at the moment of choosing the rules or principles applicable, they are resident in two different States.***

***Questions concerning matters covered by these rules or principles which are not expressly resolved by them shall be governed by the law chosen by the parties or, in the absence of such a law, the law indicated by this regulation.***

***Member States may decide that such contracts may be automatically resiliated on the request of one of the parties if they are not cross-border in nature or if they have been concluded in violation of a mandatory provision of Community law.***

Or. fr

Amendment by Klaus-Heiner Lehne

Amendment 46

Article 3, paragraph 4

***4. The fact that the parties have chosen a foreign law in accordance with*** ***deleted***

*paragraphs 1 or 2, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called “mandatory rules”.*

Or. en

#### *Justification*

*The limitation of freedom gives rise to uncertainty and increases the cost of legal due diligence and litigation. This applies especially to contractual relationships in the financial markets where well-tested standard documentation is broadly used in order to harmonise products and foster their tradability and liquidity. Examples of standardised products are financial instruments such as bonds and loans, as well as derivatives, repos and securities loans. The current wording of Article 3 also conflicts with Article 6 of Council Regulation (EC) No 1346/2000 of 29 May 2000 on Insolvency Proceedings (the 'Insolvency Regulation') and similar provisions in Articles 23 and 25 of Directive 2001/24/EC of 4 April 2001 on the reorganisation and winding up of credit institutions (the 'Bank Winding Up Directive'), which provide that in an insolvency of a party the enforceability of set-off or netting is governed by the law that the parties have chosen as the governing law of the related agreement. Considering the recitals of the Insolvency Regulation, it was the intention of the legislator to protect the parties' reliance on the chosen governing law, which otherwise would be frustrated if the mandatory insolvency laws of the forum concursus were to prevail.*

Amendment by Jean-Paul Gauzès

#### Amendment 47 Article 4

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law *determined as follows*:

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law *of the country with which it is most closely connected*:

*1a. The contract shall be presumed to be most closely connected with the country of habitual residence of the party providing the characteristic service at the time when the contract is concluded.*

*1b. In particular, a contract shall be presumed to be most closely connected as follows:*

(a) a contract of sale shall be ***governed by the law of*** the country in which the seller has his habitual residence;

(b) a contract for the provision of services shall be ***governed by the law of*** the country in which the service provider has his habitual residence;

(c) a contract of carriage shall be ***governed by the law of*** the country in which the carrier has his habitual residence;

(d) a contract relating to a right in rem or right of user in immovable property shall be ***governed by the law of*** the country in which the property is situated;

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be ***governed by the law of*** the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country;

***(f) a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence;;***

(g) a franchise contract shall be ***governed by*** the law of the country in which the franchised person has his habitual residence;

(h) a distribution contract shall be ***governed by*** the law of the country in which the distributor has his habitual residence.

***2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.***

(a) a contract of sale shall be ***presumed to be most closely connected with*** the country in which the seller has his habitual residence;

(b) a contract for the provision of services shall be ***presumed to be most closely connected with*** the country in which the service provider has his habitual residence;

(c) a contract of carriage shall be ***presumed to be most closely connected with*** the country in which the carrier has his habitual residence;

(d) a contract relating to a right in rem or right of user in immovable property shall be ***presumed to be most closely connected with*** the country in which the property is situated;

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be ***presumed to be most closely connected with*** the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country;

(g) a franchise contract shall be ***presumed to be most closely connected with*** the law of the country in which the franchised person has his habitual residence;

(h) a distribution contract shall be ***presumed to be most closely connected with*** the law of the country in which the distributor has his habitual residence.

***2. By way of exception, the presumptions indicated in paragraphs 1a and 1b may be disregarded if it is clear from all the circumstances indicate that the contract is most closely connected with another country and where the designated legislation is manifestly unsuitable.***

*Justification*

*To the extent that the law applicable to the contract has not been chosen by the parties, a flexible solution based on the principle of close connection could be chosen, accompanied on the one hand by a set of seven presumptions (deleting those relating to intellectual or industrial property and modifying the one relating to contracts of carriage) relating to specific contracts and, on the other hand, by a strictly defined but generalised exemption clause.*

Amendment by Maria Berger

Amendment 48

Article 4, paragraph 1, point (h a) (new)

***(ha) an insurance contract shall be governed by the law of the country where the insured risk is situated; to determine in which country the insured risk is situated, the court shall apply its national law.***

Or. de

Amendment by Maria Berger

Amendment 49

Article 4, paragraph 1, point (h b) (new)

***(hb) all contracts not covered by subparagraphs (a) to (ha) shall be governed by the law of the country in which the party who performs or is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract.***

Or. de

Amendment by Jean-Paul Gauzès

Amendment 50

Article 4, paragraph 1, point (e)

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be **governed by** the law of the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country;

(e) notwithstanding point (d), a lease for the temporary personal use of immovable property for a period of no more than six consecutive months shall be **presumed to be most closely connected with** the law of the country in which the owner has his habitual residence, provided the tenant is a natural person and has his habitual residence in the same country **and that this law is in line with the law applicable where the property is situated**;

Or. fr

Amendment by Maria Berger

Amendment 51

Article 4, paragraph 2

**2. Contracts not specified in paragraph 1 shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract. Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.**

**2. If it is clear from the circumstances as a whole that the contract clearly is more closely connected with a country other than the country specified in paragraph 1, the law of that country shall apply.**

Or. de

Amendment by Jean-Paul Gauzès

Amendment 52

Article 4, paragraph 2

**2. Contracts not specified in paragraph 1 shall be governed by the law of the country**

**2. Contracts concerning which the previous paragraph contains no presumption**

in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract.

***Where that service cannot be identified, the contract shall be governed by the law of the country with which it is most closely connected.***

***regarding the law applicable*** shall be governed by the law of the country in which the party who is required to perform the service characterising the contract has his habitual residence at the time of the conclusion of the contract, ***unless the circumstances relating to the contract clearly indicate closer connections with the law of another country.***

Or. fr

### *Justification*

*The implementation of a restricted exemption clause regarding the rules establishing the law applicable is necessary to guarantee greater legal security for service providers.*

Amendment by Janelly Fourtou

Amendment 53

Article 5

***1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.***

***2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, who has his habitual residence in a Member State for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.***

***It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence 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, unless the***

***1. This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer') for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.***

***2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:***

***- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or***

*professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.*

*- if the other party or his agent received the consumer's order in that country, or*

*- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.*

*3. Paragraph 1 shall not apply to:*

*3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.*

*(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;*

*(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;*

*(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.*

Or. en

#### *Justification*

*This amendment seeks to replace the new version of Article 5 proposed by the Commission with the text of Article 5 of the Rome Convention. It is considered, first, that the text of the Rome Convention is not known to have given rise to any problems in practice. Secondly, it is argued that the new text could have the effect of discouraging traders, particularly SMEs, from opening Internet trading sites and engaging in transactions with consumers from other countries in that this could involve them in having to deal with all the legal systems of the*

*Member States of the EU. This is hardly consistent with the aims of the single market. Moreover, the Commission's text is discriminatory as it would apply only to consumers in Member States of the EU. Lastly, the Commission introduced the new provision without conducting an impact assessment, which is essential in view of its potential adverse impact on businesses and on the internal market.*

Amendment by Maria Berger

Amendment 54  
Article 5

1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the **Member** State in which the consumer has his habitual residence.

2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, **who has his habitual residence in a Member State** for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the **Member** State in which the consumer has his habitual residence 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, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.

3. **Paragraph 1 shall not apply to:**

(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**

1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the State in which the consumer has his habitual residence.

2. Paragraph 1 shall apply to contracts concluded by a natural person, the consumer, for a purpose which can be regarded as being outside his trade or profession with another person, the professional, acting in the exercise of his trade or profession.

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the State in which the consumer has his habitual residence or, by any means, directs such activities to that State or to several States including that State, and the contract falls within the scope of such activities, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.

3. **For all contracts between undertakings and consumers covered by paragraph 2(1) the choice of the law of a non-EU State is invalid, if the consumer would thereby lose the protection provided by an EC directive, as long as**

(a) **the contract is connected with EU Member States exclusively, or**

*residence;*

*(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;*

*(b) the consumer has his habitual residence in a Member State and the conditions under paragraph 2(2) are fulfilled.*

*The law to be applied instead emerges from the general rules for paragraph 1 and from Article 5(1) for paragraph 2.*

*(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.*

Or. de

Amendment by Jean-Paul Gauzès

Amendment 55

Article 5, paragraph 1

*1. Consumer contracts within the meaning and in the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.*

*1. A contract concluded by a natural person (the consumer) for a purpose which can be regarded as being outside his trade or profession with another person (the professional) acting in the exercise of his trade of profession, shall be governed by the law of the country in which the consumer has his habitual residence, provided that:*

*(a) the professional exercises his trade or profession in the country in which the consumer has his habitual residence; or  
(b) the professional, by every means possible, directs his activity towards the country in question or a number of countries including the country in question, and the contract falls within the scope of this activity.*

*Failing this, the law applicable to a consumer contract shall be governed by the law applicable under Article 4, subject to the mandatory provisions of the law of the country in which the consumer has his habitual residence.*

Amendment by Klaus-Heiner Lehne

Amendment 56  
Article 5, paragraph 1

1. Consumer *contracts* within the meaning and in the conditions provided for by paragraph 2 shall **be governed by the law** of the **Member State in which the** consumer has his habitual residence.

1. ***Notwithstanding the provisions of Article 3, a choice of law made by the parties in a consumer contract*** within the meaning and in the conditions provided for by paragraph 2 shall **not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he** has his habitual residence.

Or. en

*Justification*

*The principle of freedom to choose the applicable law should be preserved also for consumer contracts. The original proposal limits the freedom of choice for consumer without justification. However, notwithstanding a choice of law clause in consumer contracts, the mandatory provisions of the *acquis communautaire* and/or the mandatory provisions of the home State of the consumer should apply in consumer contracts.*

Amendment by Klaus-Heiner Lehne

Amendment 57  
Article 5, paragraph 1 a (new)

***1a. Notwithstanding the provisions of Article 4, in the absence of choice in accordance with Article 3 consumer contracts within the meaning of and under the conditions provided for by paragraph 2 shall be governed by the law of the Member State in which the consumer has his habitual residence.***

Or. en

*Justification*

*The principle of freedom to choose the applicable law should be preserved also for consumer contracts. However, in the absence of choice of law the consumer has to be protected. This can be best achieved by applying the law of the Member State in which the consumer has his habitual residence.*

Amendment by Diana Wallis

Amendment 58  
Article 5, paragraph 1 a (new)

***1a. Any statements and dealings pertaining to the pre-contractual phase of a contract shall be regarded as forming part of the contract.***

Or. en

*Justification*

*The same law as that applied to the contract should apply to the pre-contractual phase of it, as many actions made during this phase are conclusive in inducing consumers into signing a contract. This solution would be in line with the provision of the Council common position on Rome II.*

Amendment by Diana Wallis

Amendment 59  
Article 5, paragraph 2, subparagraph 2

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence 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, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.***

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several States. ***It shall also apply in cases where the professional deliberately invites the consumer to enter into a contract while the latter is outside his/her country of residence, or when the professional invites the consumer to travel to another country and the contract is concluded there.***

*Justification*

*Article 5 in its current wording does not seem to apply to cases where the consumer is invited by the business to travel to another country to conclude a contract or where the consumer while on holiday is approached by a company proposing the conclusion of a contract (i.e. timeshare...).*

Amendment by Jean-Paul Gauzès

## Amendment 60

Article 5, paragraph 2, subparagraph 2

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence 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, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.***

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by any means, directs such activities to that Member State or to several ***Member States. It shall also apply in cases where the professional deliberately invites the consumer to enter into a contract while the latter is outside his/her country of residence, or when the professional invites the consumer to travel to another country and the contract is concluded there.***

Or. en

*Justification*

*I consider that the non-application of the conflict rule in Article 5 to these scenarios would create loopholes in the legislation that will be exploited by businesses to the detriment of consumers.*

*In addition, the newly introduced restriction that states 'unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence' should be deleted as is not necessary and could create confusion. The realignment of the future regulation with what is set out in the Brussels I regulation (Article 15(1)(c)) is important to ensure coherence in the legislation.*

Amendment by Klaus-Heiner Lehne

Amendment 61

Article 5, paragraph 2, subparagraph 2

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence 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**, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.

It shall apply on condition that the contract has been concluded with a person who pursues a trade or profession in the Member State in which the consumer has his habitual residence or, by means **of positive conduct**, directs such activities to that Member State or to several States including that Member State, and the contract **results from** such **conduct**, unless the professional did not know where the consumer had his habitual residence and this ignorance was not attributable to his negligence.

Or. en

*Justification*

*In the absence of the proposed amendment the Regulation could be taken to mean that any trader who traded via the internet would be obliged to offer redress to consumers in accordance with the law in that consumer's Member State, even if the trader had not deliberately targeted that Member State. There are occasions when the trader does not know the consumer's Member State when undertaking the transaction. This occurs in particular when an SME uses a website to advertise its products.*

*Under this amendment, the trader would be obliged to act in accordance with law of the consumer's Member State only if he had positively targeted it - rather than inadvertently. In the absence of this amendment traders might be reluctant to set up e-business or would specifically target it to their own Member State only. This would reduce consumer choice and undermine the internal market.*

Amendment by Jean-Paul Gauzès

Amendment 62

Article 5, paragraph 3

**3. Paragraph 1 shall not apply to:** *deleted*

**(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;**

***(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;***

***(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.***

Or. en

*Justification*

*I see no valid reason for the exclusion of certain consumer contracts from the rule of Article 5. All consumer contracts for the supply of goods or services should follow the same rule. In addition, the Brussels I regulation on jurisdiction and enforcement (Regulation (EC) No 44/2001) does not include those exclusions except as regards transport contracts. Coherence with the Brussels I regulation has to be ensured. However, I think that transport contracts concluded over the internet should also follow the rule of Article 5.*

Amendment by Diana Wallis

Amendment 63

Article 5, paragraph 3, point (a)

***(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;*** *deleted*

Or. en

*Justification*

*All consumer contracts for the supply of goods and services should follow the same rule, i.e. application of the law of the consumer's country of residence. In addition the Brussels I regulation on jurisdiction and enforcement (Regulation (EC) No 44/2001) does not include those exclusions except as regards transport contracts.*

Amendment by Diana Wallis

Amendment 64

Article 5, paragraph 3, point (b)

(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990;

(b) contracts of carriage other than contracts relating to package travel within the meaning of Directive 90/314/EEC of 13 June 1990 **or contracts relating to car rental;**

Or. en

Amendment by Diana Wallis

Amendment 65

Article 5, paragraph 3, point (c)

**(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.**

**deleted**

Or. en

*Justification*

*Further consideration should be given to this exclusion, which should be viewed against the background of the growing number of EU citizens purchasing real property in Member States other than their State of residence, often as a result of direct advertising or other activities in their Member State of residence.*

Amendment by Jean-Paul Gauzès

Amendment 66

Article 5, paragraph 3, point (c)

(c) contracts relating to a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.

(c) contracts relating to **the exercise of** a right in rem or right of user in immovable property other than contracts relating to a right of user on a timeshare basis within the meaning of Directive 94/47/EC of 26 October 1994.

Or. fr

Amendment by Klaus-Heiner Lehne

Amendment 67

Article 5, paragraph 3 a (new)

***3a. Contracts covering an initially agreed service and subsequent follow-up services, or a series of subsequent services of the same type, which are linked in time, shall be governed by the law applicable to the first agreement under paragraph 1.***

Or. de

*Justification*

*Account should be taken in the regulation of the fact that in some circumstances business relationships are concluded for the long term, and a number of individual contracts can follow on from a framework contract (e.g. transfer contracts under a giro account contract). To prevent a change in the applicable law for the individual contracts if the consumer changes his habitual residence during the term of the framework contract, the applicable law should depend only on the framework contract as the 'first agreement', by analogy with the first sentence of Article 1(2) of Directive 2002/65/EC of the European Parliament and of the Council of 23 September 2002 concerning the distance marketing of consumer financial services and amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC. This would take account of the fact that EU citizens often change their habitual place of residence within the EU, for example for work reasons.*

Amendment by Maria Berger

Amendment 68

Article 5 a (new)

***Article 5a***

***1. An insurance contract shall be governed by the law of the country where the policyholder has his habitual residence, unless otherwise provided for in paragraphs 2 to 4.***

***2. If taking out an insurance policy is compulsory, the insurance contract shall be governed by the law of the country which imposes the obligation to take out insurance.***

***3. Notwithstanding paragraph 1, the parties may choose, in accordance with Article 3,***

*that their contract is to be governed by the law of the country where the risk is situated. However, Article 5(1) shall apply to a contract between a consumer and a professional as defined therein.*

*4. Paragraphs 1 to 3 shall not apply to contracts of re-insurance or contracts covering large risks as defined in Council Directives 88/357/EEC<sup>1</sup> and 90/618/EEC<sup>2</sup>, as amended.*

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<sup>1</sup> *Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services (OJ L 172, 4.7.1988, p. 1). Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).*

<sup>2</sup> *Council Directive 90/618/EEC of 8 November 1990 amending, particularly as regards motor vehicle liability insurance, Directive 73/239/EEC and Directive 88/357/EEC which concern the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance (OJ L 330, 29.11.1990, p. 44).*

Or. en

Amendment by Jean-Paul Gauzès

Amendment 69

Article 6, paragraph 2, point (a)

(a) by the law of the country in or from which the employee habitually carries out his work in performance of the contract. The place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. ***The conclusion of a new contract of employment with the original employer or***

(a) by the law of the country in or from which the employee habitually carries out his work in performance of the contract. The place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his ***specific*** tasks abroad. ***The intentions of the parties concerning a future return and a continued employment***

*an employer belonging to the same group of companies as the original employer does not preclude the employee from being regarded as carrying out his work in another country temporarily;*

*relationship are among the factors to be taken into account in assessing the temporary nature of the posting.*

Or. fr

Amendment by Maria Berger

Amendment 70

Article 6, paragraph 2, point (a b) (new)

*(ab) For the purposes of points (a) and (aa) the place of performance shall not be deemed to have changed if he is temporarily employed in another country. Work carried out in another country shall be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad.*

Or. de

*Justification*

*This text appears in point (a) of the Commission proposal and its substance reflects the Rome Convention. The term 'tasks' is intended to make it clear that the temporary activity in another country should be interpreted narrowly.*

Amendment by Jean-Paul Gauzès

Amendment 71

Article 6, paragraph 2, point (b)

(b) (b) if the employee does not habitually carry out his work in or from any one country, or he habitually carries out his work in or from a territory subject to no national sovereignty, by the law of the country in which the place of business through which he was **engaged** is situated.

(b) (b) if the employee does not habitually carry out his work in or from any one country, or he habitually carries out his work in or from a territory subject to no national sovereignty, by the law of the country in which the place of business through which he was **employed** is situated.

Or. fr

Amendment by Jean-Paul Gauzès

Amendment 72  
Article 6, paragraph 3

3. The law designated by paragraph 2 may be excluded *where it appears from the circumstances as a whole* that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

3. The law designated by paragraph 2 may *exceptionally* be excluded where it appears *manifestly unsuitable and where* the contract is *clearly* more closely connected with another country, in which case the contract shall be governed by the law of that country.

Or. fr

Amendment by Maria Berger

Amendment 73  
Article 6 a (new)

*Article 6a*

*Notwithstanding Article 3, in leases concerning immovable property a choice of law made by the parties shall not have the result of depriving the tenant of the protection afforded him by the mandatory rules of the law of the country where the immovable property is located.*

Or. de

Amendment by Jean-Paul Gauzès

Amendment 74  
Article 8

1. Mandatory rules are rules the respect for which is regarded as *crucial* by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within

1. Mandatory rules are rules the respect for which is regarded as *necessary* by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling

their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.

**3. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection. In considering whether to give effect to these mandatory rules, courts shall have regard to their nature and purpose in accordance with the definition in paragraph 1 and to the consequences of their application or non application for the objective pursued by the relevant mandatory rules and for the parties.**

within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

2. Nothing in this Regulation shall restrict the application of the rules of the law of the forum in a situation where they are mandatory.

Or. en

#### *Justification*

*The adjective 'crucial' should be replaced by 'necessary' to qualify properly mandatory laws.*

*Article 8(3) allows courts to apply the mandatory provisions of another State. This possibility would increase the number of incidences in which the application of the European conflict-of-law rules would be superseded. To avoid such a situation, Article 8(3) has to be deleted.*

Amendment by Maria Berger

Amendment 75  
Article 8, paragraph 1

1. Mandatory rules are rules the respect for which is regarded as **crucial** by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

1. **For the purposes of this Article**, mandatory rules are rules the respect for which is regarded as **necessary** by a country for safeguarding its political, social or economic organisation to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

Or. de

Amendment by Jean-Paul Gauzès

Amendment 76  
Article 10, paragraph 1

Amendment applies to French text alone.

Or. fr

*Justification*

*In the French version of Article 10(1), the meaning of the word 'l'agent' is unclear. The term 'agent' in English in fact corresponds to the French word 'représentant'; this is in fact the term used in the German version of Article 10(1): 'Vertreter'. The wording of the French text should therefore be amended accordingly.*

Amendment by Maria Berger

Amendment 77  
Article 10, paragraph 4

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law *those* requirements **are mandatory provisions within the meaning of Article 8.**

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law *such* requirements **apply irrespective of the country in which the contract is concluded or of the law governing that contract.**

Or. de

*Justification*

*In the case of contracts concerning immovable property, the reference should not be to mandatory provisions, but to mandatory requirements in the country where the property is situated.*

Amendment by Giuseppe Gargani

Amendment 78  
Article 10, paragraph 4

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract *the subject matter of which is a right in immovable property or a right to use immovable property* shall be subject to the *mandatory requirements* of form of the law of the *country where the property is situated if by that law those requirements are mandatory provisions within the meaning of Article 8.*

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract which is *intended to be entered or transcribed in public registers* shall be subject to the *rules* of form of the law of the *State under the authority of which the public register is kept.*

Or. it

*Justification*

*Community law recognises the role and importance of public registers in ensuring the secure circulation of assets entered therein (see Articles 12 and 14 of Regulation (EC) No 1346/2000).*

*The safeguarding of public trust, the specific technical rules of each system and the consequences of entering contracts in public registers (above all, enforceability vis-à-vis third parties of the right of the holder of such assets and certainty regarding purchase by successive successors in title) mean that only documents drawn up in the form required by the law of the State under the authority of which a register is kept may be entered in such registers.*

Amendment by Jean-Paul Gauzès

Amendment 79

Article 10, paragraph 4

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated *if by that law those requirements are mandatory provisions within the meaning of Article 8.*

4. Notwithstanding paragraphs 1 to 3 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated.

Or. fr

*Justification*

*Concerning contracts relating to the right to immovable property or the right to use immovable property, Article 10(4) only allows the application of the requirements of form of the country where the property is situated if those requirements are mandatory provisions*

*within the meaning of the regulation. The connection between these two types of rule which constitutes a departure from the Rome Convention, is not legally speaking correct. The objective of mandatory provisions is to safeguard the political, social or economic organisation of a country while requirements of form seek to ensure a high level of legal security, thereby protecting the parties to a contract and third parties. The reference to mandatory provisions should therefore be deleted.*

Amendment by Klaus-Heiner Lehne

Amendment 80

Article 13, paragraph 3 a (new)

***3a. The transition of ancillary rights (including, but not limited to, a security interest, mortgage, suretyship or guarantee) or the assignee's right to claim transfer of such ancillary rights shall be governed by the law that applies to the contract and, if the ancillary right is owed by a third party, by the law that applies to the obligation of the third party.***

Or. en

*Justification*

*There is strong demand to clarify and harmonise the conflict-of-law rules applicable to ancillary rights. This applies especially to contractual relationships that form part of true sale securitisation transactions where the special purpose vehicle (SPV) acquires title to the assigned loans or receivables. The question whether and to what extent the SPV also acquires any security interests or mortgage attached to such rights is of great importance for investors and rating agencies. The presence of a clear conflict-of-law rule would achieve legal certainty and reduce costs for legal due diligence and litigation.*

Amendment by Jean-Paul Gauzès

Amendment 81

Article 22

The regulation shall not prejudice the application ***or adoption of acts of the institutions of the European Communities which :***

***(a) in relation to particular matters, lay down choice-of-law rules relating to contractual obligations; a list of such acts currently in force is provided in Annex 1;***

The regulation shall not prejudice the application ***of the provisions of Community law which in individual cases resolve conflicting laws governing contractual obligations.***

or

**(b) govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or**

**(c) lay down rules to promote the smooth operation of the internal market, where such rules cannot apply at the same time as the law designated by the rules of private international law.**

*Justification*

*For the sake of consistency, the provisions of Rome I must be brought into line with the Rome II common position.*

Amendment by Maria Berger

Amendment 82  
Article 22, point (b)

**(b) govern contractual obligations and which, by virtue of the will of the parties, apply in conflict-of-law situations; or** **deleted**

Or. de

Amendment by Maria Berger

Amendment 83  
Article 22, point (c)

**(c) lay down** rules to **promote** the smooth operation of the internal market, where **such rules** cannot apply **at the same time as** the law **designated by** the rules of **private** international law.

**(c) include** rules **designed** to **contribute to** the smooth operation of the internal market, where **they** cannot apply **in conjunction with** the law **arising from** the rules of international **private** law.

Or. de

Amendment by Jean-Paul Gauzès

Amendment 84  
Article 22 a (new)

**Article 22a**

***Not later than ...\*, the Commission, after extensive consultation with the insurance industry and other interested parties, shall submit to the European Parliament and the Council a report examining whether the Regulation should include a provision on insurance contracts taking into consideration the basic principles foreseen by Directive 88/357/EEC and by Directive 2002/83/EC<sup>1</sup>.***

***The report shall be accompanied by an impact assessment. If appropriate, the report shall propose amendments to this Regulation.***

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<sup>1</sup> ***Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance (OJ L 345, 19.12.2002, p. 1). Directive as last amended by Directive 2005/68/EC (OJ L 323, 9.12.2005, p. 1).***

Or. en

*Justification*

*The current regime of the law applicable to insurance contracts is laid down in the Second Council Directive 88/357 EEC of 22 June 1988 and Directive 2002/83/EC of the European Parliament and of the Council. Due to the national transposition of the provisions laid down in these Directives, consumers and businesses have varying possibilities of a choice of law. With a Regulation it would be possible to harmonise current national disparities and to raise legal certainty. With the increasing mobility of the EU's citizens and the integration of the Insurance Single Market, flexibility for both parties to an insurance contract - providers and policy-holders - has to be ensured.*

Amendment by Giuseppe Gargani

Amendment 85  
Article 23 a (new)

**Article 23a**

***Not later than ...\*\*, the Commission, after extensive consultation with the insurance industry and other interested parties, shall submit to the European Parliament and the Council a report examining whether the Regulation should include a provision on insurance contracts taking into consideration the basic principles laid down by the sectoral directives. The report shall be accompanied by an assessment of the impact of the provisions to be introduced.***

***If appropriate, the report shall propose amendments to this Regulation.***

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***\*\* Two years with effect from the date on which this Regulation enters into force.***

Or. it

*Justification*

*The current regime of the law applicable to insurance contracts is laid down in the Second Council Directive 88/3577 EEC of 22 June 1988 and Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002. Owing to the transposition into national law of the provisions laid down in these directives, consumers and businesses have various options with regard to choosing the law applicable. With a regulation it would be possible to harmonise current national disparities and thus achieve legal certainty. However, given the increasing mobility of the Community population and the integration of the single market in insurance, it would be necessary to ensure a degree of flexibility for both parties – providers and policy-holders – in the choice of the law applicable to insurance contracts, depending on their characteristics.*