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Conflict Aspects of Consumer Contracts in the Electronic Age

Honours Dissertation

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2001 SLSJ

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This paper states the law as of 6th March 2001

Word Count : 10,978

1 Introduction

- 1.1 The advent of ecommerce and its potential to create an exponential rise in cross-border consumer contracting provides practical legitimacy to the discussion of consumer protection from the perspective of international private law. It is trite to say that domestic consumer legislation is premised on the protection of an actor whose weak economic position, combined with a lack of knowledge and experience, allows business to prey on him by introducing contractual terms that are unfair. When elevated to the international plain, consumer vulnerability increases in two ways. Firstly, issues of applicable law and its potential to alter a consumer's rights arise more readily. Secondly, access to judicial redress could be impaired. This paper focuses on the regulation of such conflict problems.

- 1.2 The Internet is commonly perceived as a channel of commerce in which traditional rules are either inapplicable or impossible to enforce. The potential to trade with foreign suppliers through contracts governed by foreign law contributes to this perception, but the basic problems thereby created and the solutions developed to tackle it predate the Internet. This paper attempts an exposition of the law governing the sale of goods ordered online and delivered by traditional means, the reader being notified when the provisions discussed have a wider ambit, with a strict focus on contracts between parties based within the European Community. The discussion will incorporate issues of jurisdiction and applicable

law, taking as its central focus the Brussels¹ and Rome² Conventions respectively, with detailed analysis of each being rendered along with an assessment of their applicability to e-commerce. Indeed the main issue is not whether legal provisions exist, but whether they are framed such that they apply easily to ecommerce. In determining this, recent reforms will be outlined.

- 1.3 The paper proceeds in five parts. Section one will look at the philosophy of international consumer protection and whether e-commerce requires a separate regulatory regime. Having concluded in the negative, analysis of the current provisions on jurisdiction and applicable law will be offered. It will be argued that the jurisdictional protections are both justified in principle and achievable in practice. Section three will offer a more critical analysis of applicable law issues. It will suggest that whilst Art.5 pursues a laudable aim, the provision lacks a single and coherent underlying policy. Further, to the extent that a policy is determinable, it is rarely achieved in practice. Indeed Rome (including the tests shared with Brussels) provides some highly complex interpretational problems whose unraveling pervades this paper. The fourth section illustrates this complexity with a number of fictitious scenarios demonstrating the practical application of the provisions. The conclusion will seek to determine the provision's philosophical underpinnings, their practical application and the effect of e-commerce on them. It will conclude by proposing substantial amendments to Rome that would improve the sections application.

¹ Civil Jurisdiction & Judgements Act 1982/1991.

² Contracts (Applicable Law) Act 1990.

2 Philosophy of International Consumer Protection

2.1 Introduction

The rationale underlying domestic legislation is an economic one based on controlling the supplier's ability to force contractual terms on the consumer.

These considerations are no less relevant when the consumer and supplier are based within different States; indeed distance contracts are arguably more deserving of protection. The Community has been active in establishing the necessary substantive rules, but such matters are of no concern. This paper will instead ask whether mandatory domestic legal obligations may be evaded either by deliberately contracting out of a legal system or, in the absence of choice, by the simple operation of the applicable law process in cross-border contracts. The discussion of Brussels and Rome will demonstrate that, insofar as the supplier has presented himself within the consumer's State and therein solicited a contract, the provisions enact a clear policy of protecting consumers from degradation of both *access* to redress and the *substantive rights* available to them.

2.2 Interaction of Jurisdiction & Applicable Law

Although jurisdiction and applicable law appear as distinct areas, their role in consumer protection is highly intertwined. A theoretical right to protection would be irrelevant unless easily enforced (or vice-versa) whilst both areas are capable of manipulating protections to the detriment of the consumer. Without provisions for each, an e-tailer wishing to evade the consumer's domestic rights could either stipulate a less protective law to govern the contract *or* contract jurisdiction to a

forum whose conflict rules would apply a law less favourable to the consumer. Thus Brussels and Rome are complimentary instruments providing an integrated system of protection to consumers in those situations fulfilling their homogenous qualifying tests.

2.3 Philosophy of Jurisdiction Protection

The jurisdictional protection's primary purpose is to make *access* to judicial redress as easy and effective as possible by ensuring the consumer's right to litigate in the Court of his domicile.³ The low value of most consumer purchases makes the availability of low cost redress with minimum inconvenience in both time and effort essential if the legal rights guarded by Rome are to offer any real protection. Unfortunately there is evidence that Brussels is *ineffective* in reducing both the cost and time associated with cross-border consumer litigation. A report for the EC suggests that litigating a contractual claim for 2,000ECU would generate costs of approximately 2,500ECU if brought in the defendants domicile with litigation in the consumer's domicile saving 11% at most and possibly as little as 3%.⁴ MacRoberts Solicitors have suggested that 5-7,000ECU excluding translation costs is more realistic.⁵ The survey also suggests that litigation typically takes up to two years with an additional six months for enforcement which, although theoretically simple, is a deterrent given its necessity and cost. The main benefit of localising the litigation process to the consumer is therefore

³ Art.14; See para.3.2.1

⁴ COM (96) 13 final, Communication from the Commission – “Action Plan on Consumer Access to Justice & the Settlement of Consumer Disputes in the Internal Market,” p.9.

the availability of the normal localised support facilities such as the family solicitor and consumer associations. Although simple, this is essential if redress is to be within the consumer's reach.

2.4 Philosophy of Applicable Law Protection

The philosophy of Rome is that suppliers who take steps to represent themselves to a consumer within the consumer's State and thereby derive an economic benefit should not be able to evade the *minimum* protection of the consumer's law through the operation of the conflicts process. These principles were adopted by every Brussels State and thus form part of the integrated and consistent regulation of contracts within the specific circumstances. The Convention, in adopting a "destination" rule, requires a foreign supplier to familiarise himself and comply with the (mandatory) rules of every State from which he accepts orders. This rule predates e-commerce but its underlying philosophy is particularly appropriate to it, given that e-consumers will contract, often paying in advance, without the opportunity to evaluate or check the product and relying on the business to deliver. Indeed the ease by which e-tailers promotional material may be disseminated, thereby accruing the economic benefit of new customers within wider markets, forms perhaps the strongest justification yet for adopting the provisions.

2.5 A Separate E-Regulation?

⁵ MacRoberts, *Comment on Electronic Commerce: Jurisdiction and Applicable Law*, in answer to question 11, at <http://www.macroborts.co.uk/dynapub/files/148.Filetype.html?saveTo=/148>

Interestingly e-businesses have criticised the “destination” principle on which both Conventions found. The main argument is that the development of e-commerce will be stifled if compliance with the law of every State to which an e-tailer might trade is necessary. Small and medium-sized enterprises, having most to gain from e-commerce, would be greatly disadvantaged leading to less competition, innovation and choice. Furthermore, an expensive program would be necessary to ensure a website was compliant with the law of those countries clearly targeted and this might not prevent liability in some other State. It is submitted that some perspective is required.

2.6 Rejecting an E-Regulation!

The protections herein discussed are contractual in nature. If an e-tailer wishes to protect himself then he may take steps to alert customers to his target market and reject orders from outwith this area. With the Conventions premised on protecting consumers as weaker parties within society, a principle ascribed by every Community State, there seems no obvious reason to elevate the burden on e-tailers to a superior position. Indeed the principle of medium neutrality requires e-tailers be treated equally unless the characteristics of the Internet would render this inappropriate. Although its global accessibility may permit greater exposure of a website, this is not sufficient to found protection; rather, some form of targeting is required. Thus the main difference between e-commerce and traditional distribution is that the protections apply more readily to the former, a fact hardly justifying their removal. Given that consumer protective rules often

derive from the Community and are therefore homogenous (making compliance easier), combined with the cost disincentive of litigating disputes, equity surely favours granting consumers such basic rights when a dispute does arise. This is the position adopted in practice.

3.1 Jurisdiction & Applicable Law

3.1.1 Introduction

The following discussion will concentrate predominantly on the rationale underlying the Brussels, Lugano⁶ and Rome Conventions. Although limiting consideration to disputes between two parties based within Europe, thereby omitting important incidents of e-trade such as intra-UK⁷ and trans-Atlantic supplies,⁸ it allows a detailed analysis of the circumstances in which protection is thought justified and the content of that protection. The common and underlying rationale,⁹ discussed in preceding sections, is to maintain the consumer's basic domestic protections when a supplier has made representations within the consumer's State and thereby solicited a contract. This is expressed through the *substantive* and *territorial* tests, common to all three Conventions, whose application to e-commerce is of fundamental importance. The homogeneity of the tests allows the discussion to take place predominantly with regard to Art.13(1)(3) of Brussels. The analysis therein is applicable to Rome unless and until any relevant differences are highlighted.

3.1.2 Connecting Factor

⁶ Contains identical consumer protection provisions to Brussels. Effective in EFTA States. See Civil Jurisdiction & Judgements Act 1982 & 1991.

⁷ Civil Jurisdiction & Judgements Act 1982, Sch. 1. Rome applies to intra-UK transactions by virtue of s.2(3) Contracts (Applicable Law) Act 1990.

⁸ The NCC suggests at pp.50-51 that foreign on-line shopping nearly always means with America. National Consumer Council, *E-Commerce and Consumer Protection – A report by the National Consumer Council*, August 2000, PD40/2000. Found at www.ncc.org.uk/pubs/pdf/ecomm_full.pdf

⁹ Schlosser, 1979 O.J. C 59/71, p.118.

One theoretically important difference between Brussels and Rome is the use by the former of a consumer's *domicile* whilst the latter refers to the *habitual residence*. Neither Convention provides an autonomous definition, creating the possibility of inconsistency both between States applying the same Convention and between the protective jurisdiction invoked and the law applied under Rome. In practice inconsistencies are unlikely because "domicile" is very similar to habitual residence on the Continent.¹⁰ Nevertheless the UK has adopted a definition of domicile specifically for Brussels, similar to habitual residence in regard to both individuals¹¹ and companies,¹² in order to avoid the potentially anomalous results that our traditional rules would produce.

3.1.3 Deemed Domicile

One special feature of Brussels requiring consideration is the rule whereby a business trading from outwith a Contracting State through a branch, agency or other establishment *within* such a State acquires a deemed domiciled within that State.¹³ If a foreign website fulfilled the appropriate criteria then consumers would benefit from the protection of Brussels. Given that all Brussels signatories are privy to the Rome Convention, the applicable law protections would also be extended. Unfortunately the criteria espoused by the European Court¹⁴ (ECJ) are

¹⁰ Hartley, T. C., *Consumer Protection Provisions in the EEC Convention*, in North (Ed.), *Contract Conflicts*, 1982, North-Holland Publishing Co., Oxford, f.n.29.

¹¹ s.41 CJJA 1982.

¹² s.42 CJJA 1982.

¹³ Art.5(5) and Art.13(4).

¹⁴ Case 33/78 *Somafer S.A. v Saar-Ferngas A.G.* [1978] E.C.R. 2183 at 2190.

purposefully narrow¹⁵ and concentrate heavily on the concept of a “branch.”¹⁶ The main criteria are as follows:

- 1) A fixed and permanent place of business is necessary, suggesting some form of physical presence;¹⁷
- 2) It must be sufficiently autonomous that the business is not carried out solely within the parent’s area;¹⁸
- 3) It must be subject to a certain direction and control by the parent.¹⁹
- 4) The branch must act on behalf of and bind the parent.²⁰ Thus third parties must know of the tie to the parent but also realise that they can contract all business through the intermediary.

3.1.4 It is submitted that, as mere intangible moveable property, a website *per se* would fail the physical presence test. Furthermore the second and third criteria appear to require a balance whereby the subservient “branch” must have its own management and staffing. *Foss & Bygrave*²¹ argue that the latter requirements are doubtful, suggesting that the permanent place of business test should concentrate on the “degree of *apparent permanency*” through continual use of a particular

¹⁵ North, P.M., & Fawcett, J.J., *Cheshire & North’s Private International Law*, 13th Ed., 1999, Butterworths, London at p.220.

¹⁶ Fawcett, *Methods of Carrying on Business and Article 5(5) of the Brussels Convention*, (1984) E.L.Rev 326 at 329.

¹⁷ Somafer Case, *supra*.

¹⁸ Case C 14/76, *De Bloos v Bouyer* [1976] ECR 1497 at p.1519 (per AG); Fawcett, *supra*, at p.330;

¹⁹ *ibid*, at p.1510.

²⁰ Somafer Case, *supra*, at p.2191.

²¹ Foss, M., & Bygrave, L.A., *International Consumer Purchases through the Internet: Jurisdictional Issues pursuant to European Law*, 2000, 8(2), International Journal of Law and Information Technology 99 at 125-129.

web domain.²² Although concession is given to their argument that the seminal cases were decided in an offline era and therefore *could* be developed to incorporate manifestations of e-commerce,²³ it seems likely that a foreign e-tailer need only worry if it uses a European facility complying with the criteria above to support its website.

3.1.5 Interpretation

One major difference between the Conventions is the interpretative role of the ECJ who have authority over Brussels²⁴ but do not, as yet, have jurisdiction over Rome.²⁵ Thus interpretative guidance on either the *substantive* or *territorial* tests deriving from ECJ decisions are not authoritative under Rome. They are nevertheless highly persuasive, given the statement in the authoritative report by *Guiliano* and *Lagarde*²⁶ (hereinafter “G&L”) demanding Rome be interpreted in “accordance with other international instruments with the same purpose such as the judgements convention.”²⁷ Furthermore, the Brussels Convention is accompanied by similarly authoritative reports by *Schlosser*²⁸ and *Jenard*²⁹ that occasionally refer to the G&L report for guidance. These reports are drawn on heavily below.

²² *ibid*, p.128.

²³ *ibid*, p.129.

²⁴ Luxembourg Protocol, Sch.2 CJJA 1982. The ECJ lacks competence over Lugano, but Courts of the EC and EFTA States may consider each other’s judgements. See O.J. 1988 L 319/37.

²⁵ O.J. 1989 L 48. Protocols await ratification.

²⁶ *Guiliano, M., & Lagarde, P., Council Report on the Convention on the Law Applicable to Contractual Obligations*, O J C 282, 31.10.1980.

²⁷ *ibid*, p.23.

²⁸ *Schlosser Report 1979* O.J. C59/71

3.1.6 Reform

Although the Brussels Convention has been amended and adopted as a Regulation,³⁰ the protections remain substantially identical. The discussion that follows is thus fully applicable to the new provisions, subject to the amended *territorial* test discussed at Para.4.1.1 below.

3.2 Jurisdiction

3.2.1 The Protection

The Jurisdiction Conventions “protect” consumers by ensuring that should litigation arise they are entitled, though not compelled, to have it adjudicated within the Court of their domicile. There are two basic rules.³¹ Firstly, the pursuing consumer may commence proceedings in either the Courts of his domicile or that of the business.³² Conversely, a pursuing business may only commence proceedings within the Courts of the consumers domicile.³³ This attempts to protect the consumer from excesses in cost and inconvenience that would arise if forced to litigate outwith his domicile, thereby improving access to contractual remedies.³⁴

3.2.2 Substantive Test

²⁹ Jenard Report 1990 O.J. C 189/90

³⁰ Regulation 44/2001.

³¹ Art.14

³² Art.14(1)

³³ Art.14(2)

³⁴ See para.2.3

Qualifying for the protection requires fulfillment of two tests. The first is best described as a *substantive* test for it seeks to determine whether the purchaser has the status of a consumer. Consumers are typically perceived as economic weaklings, contracting with more powerful suppliers who act in the course of their business, although interestingly Art.13(1)(3) is conceived by reference to the purchaser only. In accord with the interpretation of the ECJ, it requires:

“...a contract concluded by a person for a purpose which can be regarded as being outside his present or future³⁵ trade or profession.”

3.2.3 The test is interpreted strictly by the ECJ as granting non-assignable rights³⁶ to “private final consumers” only,³⁷ given that the protections derogate from normal Convention rules. The perception of the parties *vis-à-vis* the “consumer” status of the purchaser is essential to the *implicit* requirement of *good faith*. The scenario of a “consumer” intending to use goods for trade or professional purposes³⁸ creates a potential difference between Brussels and Rome for, according to the G&L report, the protections are still available if used “primarily” outwith that profession.³⁹ Yet the strict tenet of the ECJ decisions on Brussels suggest that anything less than “total” consumer status is insufficient.⁴⁰ Interestingly the supplier who in *good faith* believed the customer to be a business would, according to G&L, escape the protective rules if in all the circumstances he could not reasonably have known

³⁵ Case C-269/95 *Benincasa v Dentalkit Srl* [1997] ECR I-3767.

³⁶ Case C-89/91 *Shearson Lehman Hutton Inc. v TVB* [1993] ECR I-139.

³⁷ Case C-150/77, *Societe Bertrand v Paul Ott KG*[1978] ECR 1431 at para.21; Schlosser, *supra*, p.117.

³⁸ e.g. a doctor orders some first aid material in his own name but with the intent of using it in his surgery.

the consumer's status.⁴¹ If a supplier introduced measures to ascertain the customer's status, which the consumer deceitfully eludes, this would likely provide a good defense.⁴² Finally, the *substantive* test's focus on the "consumer" begs the question whether the supplier must be acting within his trade or profession. The G&L Report⁴³ suggests that the protections are "normally" only applicable within a business to consumer contract but, with regard Brussels, the ECJ are unlikely to allow the general rules to be derogated from when neither party acts within their professional capacity.

3.2.4 Territorial Tests

The territorial tests within Art.13(1)(3) of Brussels and Art.5(2) of Rome correspond closely, remembering to interchange the connecting factors as appropriate, with both protecting consumers who contracted subsequent to targeting by foreign suppliers. Although Art.13(1) contains provisions on credit and finance contracts, consideration is given here only to the general provision on contracts for the supply of goods or services. This likely includes electronic supplies.⁴⁴ The protection is available if both tiers of Art.13(1)(3), contained within one paragraph of Rome, are satisfied.⁴⁵ These demand a strong connection between the consumer's domicile and the events leading to contractual conclusion, requiring that:

³⁹ G&L, *supra*, p.23.

⁴⁰ Cf Foss & Bygrave, *supra*, p.106.

⁴¹ *supra*, p.23.

⁴² Dickie, J., *Internet and Electronic Commerce Law in the European Union*, 1999, Hart, Oxford, p.86.

⁴³ *supra*, p.23

⁴⁴ Stone, P., *Internet Consumer Contracts and European Private International Law*, 2000, 9(1), Information and Communications Technology Law, 5 at 8.

- a) in the State of the consumers domicile the conclusion of the contract was preceded by a specific invitation addressed to him *or* by advertising;
- b) the consumer took in that State the steps necessary for the conclusion of the contract.⁴⁶

3.2.5 Guidance on the definition of “specific invitation,” “advertising,” and “steps necessary...” for both Brussels and Rome is found within the G&L Report.⁴⁷

3.2.6 Test 1(a) - Specific Invitation

Although “specific invitation” receives no guidance, it clearly covers approaches made specifically to *that* consumer such as one sent to their email address. It is uncertain whether solicitation by the *consumer* affects this provision,⁴⁸ relevant if the consumer joins a mailing list or visits a web page that is personalised to him.⁴⁹ Nevertheless it is likely, though not certain, that such cases fall within the alternate “advertising” provision.⁵⁰

3.2.7 Test 1(b) - Advertising Test

The “advertising” test has always provided difficult interpretative problems, but e-commerce has amplified the complexity. Despite general agreement that a

⁴⁵ Schlosser, *supra*, p.118.

⁴⁶ Art.13(1)(3).

⁴⁷ Schlosser, *supra*, p.119.

⁴⁸ Stone, *supra*, p.7; Hertz, *Jurisdiction in Contract and Tort under the Brussels Convention*, Copenhagen 1998, p.205. Foss & Bygrave, *supra*, p.116.

⁴⁹ www.amazon.co.uk is an example.

⁵⁰ Cf: Foss & Bygrave, *supra*, p.115.

website constitutes an advert,⁵¹ dispute has arisen as to whether an “advertisement” need be deliberately *targeted* to a particular State or whether mere exposure *within* that State is sufficient. E-commerce has highlighted these difficulties because websites are accessible *within* every country where Internet access is possible. The following paragraph outlines the source of the difficulties.

3.2.8 In the absence of case law, the only available and authoritative guidance is found in the plain wording of the Convention and the G&L Report. The former appears relatively clear, a literal interpretation of Art.13(1)(3) requiring *only* that the advert be exposed *within* a particular State. Given the Internets worldwide accessibility an e-tailer would thus be subject, potentially, to the laws and jurisdiction of every contracting State. E-businesses have understandably focused on the report by G&L who demand more specific *targeting*, talking of advertisements “*aimed specifically at*” the consumer’s domicile.⁵² It provides the demonstrable example of an advert in a publication whose target market is clearly definable along territorial lines. Where a consumer outwith the publication’s normal distributional territory views the advert and thereafter contracts with the supplier, the protections cannot be invoked unless the advert was within a special edition aimed at the consumer’s territory.⁵³ Although apparently more favourable to e-tailers, its application to e-commerce could produce two different

⁵¹ Gringras, *Laws of the Internet*, (1997) pp.49-51; Kronke, in Boele-Woelki and Kessedjian (eds.) *Internet: Which Court Decides? Which law Applies?* (1998) p.65 at pp.82-82; Dickie, *supra*, p.85; Stone, *supra*, pp.7-8; Cf Schu, R., *Consumer Protection and Private International Law in Internet Contracts*, (1997) 5 Int JL & IT 192 at 213 argues that a website is analogous to a vendors shop and therefore cannot be construed as advertising; Foss & Bygrave, *supra*, p.115, suggests signs in a shop window constitute an advert.

⁵² *supra*, pp.23-24.

⁵³ *ibid*, p.24.

interpretations; firstly, it could provide protection only to consumers whose territory has clearly been targeted (thus ignoring the ease within this medium by which other territories are reached); alternatively, it could be interpreted widely by arguing that as the Internet's reach is global, the basic distributional territory is global. The interpretation adopted by commentators tends to polarise between the pro-consumer⁵⁴ and pro-business lobbies.⁵⁵ Interestingly *Stone*⁵⁶ and *Kaye*⁵⁷ have both suggested that there is no need for the advert to be targeted exclusively or specifically at a particular State, the latter arguing the irrelevance of the directness or indirectness by which the advert comes to the consumer's attention.

3.2.9 Although the debate surrounding this requirement is based on fundamental textual ambiguities, we can infer from surrounding circumstances what the Convention may have intended without overzealous reliance on interest group opinions. It is submitted that a degree of "targeting" is necessary, discernible both from G&L and Art.13(1)(3)(b) which permits protection only when a clear link is established between the solicitation of the contract and the consumer's domicile. Determining when online "targeting" has occurred is more difficult, partly because the guidance is tailored to the offline world and, more worryingly, because

⁵⁴ See consumer groups response in European Commission, *Hearing on "Electronic Commerce: Jurisdiction and Applicable Law," Position Papers Submitted to the European Commission*, located at: <http://www.europa.eu.int/comm/scic/conferences/991104/contributions.pdf>; Stone, *supra*, p.8.

⁵⁵ Generally pro-business groups prefer a test based on targeting. See DTI, *Responses to Consultation Paper on European Commission Proposals for Changes to Article 13 of the 1968 Brussels Convention*, April 2000 at www.dti.gov.uk/cacp/consultation/Brussels.htm; Business Groups submissions in European Commission, *Hearing on "Electronic Commerce: Jurisdiction and Applicable Law," Position Papers Submitted to the European Commission, ibid*; MacRoberts Solicitors, *supra*; Croners Electronic Commerce para. 1-73.

⁵⁶ Stone, *supra*, p.7.

⁵⁷ Kaye, P., *The New Private International Law of Contract of the European Community*, 1993, Dartmouth Publishing Co., Aldershot at p.216.

fundamental difficulties exist in applying this test to e-commerce. One particular problem is that while Brussels and Rome are inherently linked to particular “jurisdictional territories,” the international e-tailer will target particular types of consumer whose culture or interests stimulate purchases of the product. Although such consumers *may* reside *primarily* within one State, our increasingly cosmopolitan world ensures consumers with similar cultural attributes or interests will use the site *whatever their location*. It is therefore submitted that a fair, realistic and objective assessment will only be achieved by considering all factors that suggest either deliberate targeting or provide circumstances making it *reasonably foreseeable* that a particular consumer group will be enticed by the website. Relevant factors include the language⁵⁸ or currency used, applicable shipping charges, the territorial denomination (.uk, .com),⁵⁹ terms and conditions, the volume of previous sales and any statement by the supplier or devices purportedly limiting the countries to which he contracts.⁶⁰ Although apparently burdensome, liability only arises when a contract is entered and so a concerned e-tailer can attempt ascertainment of the consumer’s domicile before contracting. Whilst doubts exists as to the effectiveness of statements purporting to limit the trading area, an e-tailer whose attempts to establish the consumer’s domicile are deceitfully eluded would surely have a valid defence.⁶¹

⁵⁸ English is the predominant language of the Internet.

⁵⁹ Foss & Bygrave, *supra*, p.120. It cannot determine whether a site is directed *exclusively* to that State.

⁶⁰ Devices are available to limit who you contract with. See Norwegian Research Centre for Computers and Law, *Technology for Resolving Interlegal Issues*, ECLIP Research Paper, January 2000, at www.jura.uni-muenster.de/eclip; Motion, P., *More Brussels, Anyone?*, 45(12) 2000 JLSS 38 at 39 for discussion of technology designed to hide identity.

⁶¹ Stone, *supra*, p.8; Analogy with Case C-26/91, *Handle v TMCS* [1992] ECR 1-3967.

3.2.10 Test 2 - Connecting Consumer's Domicile to Contract

The second tier of Art.13(1)(3) establishes a close connection between contractual conclusion and the consumers domicile by requiring the consumer to have taken the steps necessary for conclusion within his domicile. This test is carefully framed to avoid the problems that would arise if determination of the *locus contractus* were necessary. It requires consideration only of those *factual steps* that are *indispensable* to contractual conclusion⁶² and would certainly embrace electronic contracting, given G&L's statement that “writing, or any action taken in consequence of an offer or advertisement” is included.⁶³ Two small textual additions within Rome clarify the provisions application, requiring the consumer to take “*all* the steps necessary *on his part*” within the habitual residence.⁶⁴ The word “*all*” might negate the protections where a consumer took *any* steps outwith his habitual residence, but this would be excessively restrictive and ignore the words omission from other language versions.⁶⁵ In contrast, the words “*on his part*” emphasise the concentration on the consumer's action and deters any remote possibility of a Court searching for the *locus contractus*.

3.2.11 Jurisdiction Clauses

The ability to choose (supplier to force) a jurisdiction other than the consumer's is regulated by two provisions. The primary instrument is Brussels whose Art.15 will only hold such clauses valid under one of three conditions; firstly, the

⁶² Apparent from the word “necessary.”

⁶³ *supra*, p.24.

⁶⁴ Art.5(2).

⁶⁵ Kaye, *supra*, p.217.

jurisdiction chosen is the joint domicile/habitual residence of both parties at contractual conclusion, said law permitting such a clause;⁶⁶ secondly, where the clause grants the consumer a wider choice;⁶⁷ or lastly, where the agreement is entered *after* the main contract is formed.⁶⁸ Where none of the above applies, or the formalities are unfulfilled,⁶⁹ jurisdiction is determined by Art.14. A consumer may submit to the chosen jurisdiction by entering an appearance, but doing so only to contend jurisdiction is not submission.⁷⁰ Furthermore, failure to contend jurisdiction will not prejudice his protection.⁷¹

3.2.12 A second provision regulating exclusive jurisdiction clauses is the Directive on Unfair Contract Terms.⁷² The Court of First Instance recently considered an exclusive jurisdiction clause in favour of the supplier's residence⁷³ and held that, without individual negotiation, this clause constituted a significant imbalance in the party's rights to the detriment of the consumer.⁷⁴ Reference was made specifically to terms stipulated as unfair under Art.3(3),⁷⁵ especially those:

“...excluding or hindering the consumer's right to take legal action or exercise any other legal remedy...”⁷⁶

⁶⁶ Art.15(3).

⁶⁷ Art.15(2).

⁶⁸ Art.15(1).

⁶⁹ Art.17. Schlosser, *supra*, p.120. See Art.23(3) Regulation 44/2001, Regulation on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, [2001] OJ L12 16/01/01.

⁷⁰ Art.18. Jenard Report, *supra*, p.29.

⁷¹ See para.3.2.15

⁷² Directive 93/13/EEC.

⁷³ C-240/98 – 244/98 *Oceano Grupo Editorial SA v Quintero & Ors.*

⁷⁴ *ibid*, para.24.

⁷⁵ Art.3(3) Directive 93/13/EEC

⁷⁶ Para.1(q) Directive 93/13/EEC

3.2.13 Given that national implementing legislation must be interpreted in line with the Directive,⁷⁷ such clauses are void under the legislation of every Member State.⁷⁸ Importantly the Directive's application requires only a wider substantive test (not a territorial test) be satisfied and therefore could catch provisions in a contract falling outwith Art.13(1)(3). It seems it could also solve one current ambiguity within Brussels relating to the ability of a supplier to insert a clause referring disputes to *foreign* arbitration proceedings, thereby evading the protections within Brussels.⁷⁹ This ambiguity originates from Art.1(2)(4) of Brussels which excludes arbitration from its ambit.⁸⁰ Although it seems unlikely that the ECJ would allow Brussels to be so avoided,⁸¹ the *Oceano* decision would clearly allow the Directive to strike at such a clause.

3.2.14 Enforcement of Judgements

Although spatial constraints prevent a detailed analysis of recognition and enforcement of judgements, the general rule must be noted. It requires that a Contracting State to whom application for enforcement of another Contracting State's judgement has been made *must* give effect to this *without review* if it falls

⁷⁷ *Oceano*, *supra*, para.32

⁷⁸ Reg.8(1) 1999 Regulations.

⁷⁹ Anton, A., & Beaumont, P., *Civil Jurisdiction in Scotland*, 1995, 2nd Ed., W.Green/Sweet & Maxwell, Edinburgh at p.126; European Consumer Law Group, *Jurisdiction and Applicable law in cross-border consumer complaints – Socio-legal remarks on an on-going dilemma concerning effective legal protection for consumer-citizens in the European Union*, ECLG/157/98 – 29/04/98. Located at www.europa.eu.int/comm/consumers/policy/eclg/rep01_en.html at para.14.

⁸⁰ C-190/89 *Rich (Marc) & Co AG v Societa Italiana Impianti PA*, [1991] ECR I-3855. Interpreted this section strictly.

⁸¹ The ECLG, *supra*, para.14.

within the Convention's competence.⁸² Yet with regard protected consumer contracts, the enforcing Court may re-open the case and reject the judgement if recognising it would conflict with the protections.⁸³ Although the reviewing Court is bound by the trial Court's findings of fact,⁸⁴ the provision prevents a supplier from obtaining a default judgement in his own Courts and then gaining automatic enforcement in the consumer's.⁸⁵

3.2.15 E-Commerce Directive⁸⁶

Although applying the "home state" rule of jurisdiction to certain electronic matters of relevance to consumers, the Directive does not affect the jurisdictional protection of consumer contracts.⁸⁷

3.3 Applicable Law

3.3.1 Introduction

The previous section discussed provisions whose purpose is to improve a consumer's *access* to contractual remedies. In contradistinction to such protection, whose remedy is easily applied once the qualifying criteria are met, determination of the law providing the substantive *remedies* and their scope evokes far greater complexity. The Rome Convention is the primary instrument

⁸² Art. 25.

⁸³ Art.28(1)

⁸⁴ Art.28(2)

⁸⁵ Stone, *supra*, p.7.

⁸⁶ Directive 2000/31/EC O.J.L 178 , 17/07/2000.

⁸⁷ Art.3(3) and Annex I para.6.

by which consumer applicable law issues are determined, but implementing its policy requires application of substantive rules that derive from either National or European law and which may themselves contain divergent conflict rules. This means that three layers of law exist, best understood as a hierarchy whereby Rome is subservient to European rules to the extent their autonomous conflict clauses are inconsistent with it⁸⁸ but superior to National rules whose operation will nevertheless be circumscribed by self-limiting provisions contained therein.⁸⁹ In discussing this complex interaction, the paper will demonstrate that whilst the underlying policy of Art.5 is defensible, it is rarely achieved.

3.3.2 The Convention is designed to ensure that the law found to govern a contract is identical irrespective of the determining forum, applying whenever a dispute arises that necessitates a choice between the laws of different countries.⁹⁰ Although ratified by all Brussels signatories, its rules are not limited to choices between the laws of two contracting States; rather it extends to all conflicts. This paper concerns itself only with intra-Community disputes, questioning Article Five's relevance given that many consumer protective rules derive from the Community and will therefore be included within the legislation of any Member State whose law is contractually chosen. Although initiatives such as the Unfair Contract Terms Act 1977 (hereinafter "UCTA"), the Unfair Terms in Consumer Contract Regulations 1994⁹¹ and 1999⁹² (hereinafter "UTCCR"), and the Distance

⁸⁸ Art. 20, Rome Convention.

⁸⁹ Para.3.3.17.

⁹⁰ Art. 1(1).

⁹¹ SI 1994 No 3159; Directive 93/13 [1993] O.J.L 95/29.

Selling Regulations⁹³ (hereinafter “CPDSR”) all derive from the Community, their national implementation is subject to some discretion. States may implement more stringent requirements than stipulated in the Directive, provide for different effects in breach and include divergently framed conflicts clauses. They will also have their own national provisions on consumer protection. Such differences elevate Rome to its central role in protecting consumers from abuse of the choice of law process.

3.3.3 Qualifying for Article 5

Rome’s consumer protective provisions derogate from its general rules and have consequently been delineated quite carefully. They cover contracts for goods *and* services,⁹⁴ including package tours,⁹⁵ and the provisions of credit therefore. It will not cover contracts for transport⁹⁶ nor services that are to be supplied exclusively outwith the consumer’s habitual residence.⁹⁷ The protections are limited to those persons falling within the *substantive* test, discussed at para.3.2.2, with only an inconsequential textual difference.⁹⁸ Furthermore the *territorial* requirements postulated at para.3.2.4, including all associated interpretational problems, apply equally to Rome. This includes two additional, alternative, tests designed to link

⁹² SI 1999/2083; Directive 93/13, *ibid.*

⁹³ Directive 97/7

⁹⁴ Art.5(1).

⁹⁵ Art.5(5).

⁹⁶ Art.5(4)(a)

⁹⁷ Art.5(4)(b). Morse, *Consumer Contracts, Employment Contracts and the Rome Convention*, 41 (1992)

ICLQ 1 at 6. He questions the relevance of G&L’s statement that such contracts are more closely connected to the foreign State even where the territorial tests are satisfied. Is it not the active targeting of the consumer that is in issue?

⁹⁸ It includes the words “the object of which.”

the contract to the consumer's State. Only one is relevant to e-commerce,⁹⁹ applying where:

“...the supplier or his agent receives the consumer's order in the country of the consumer's habitual residence...”¹⁰⁰

3.3.4 This provision is interesting for two reasons. Firstly it is “alternative” to the normal territorial test, allowing protection without the necessity of “targeting” because the required link to the consumer's territory is already established. This might be construed as evidencing a more general focus within Rome's *territorial* tests on finding the “law of closest connection” rather than the previously postulated “targeting” requirement,¹⁰¹ but inclusion of the “cross-border excursion selling” provisions¹⁰² in a pan-European Convention to deal with the Dane's problem with unscrupulous German businessmen¹⁰³ indicates that overall principle is not to be relied upon in this Convention. Secondly, irrespective of whether the e-tailer targets a particular country the protections will be imposed if he has a permanent branch, agency or agent (e.g. all persons acting on the traders behalf) within the consumer's State.¹⁰⁴ This *might* sustain the protections if an e-tailer has any administrative or technical support within said State. Yet whichever *territorial* test is ultimately satisfied, the consumer will be entitled to certain protections. Their nature must now be outlined.

⁹⁹ Art.5(2)(c) on “cross-border excursion selling.”

¹⁰⁰ Art.5(2)(b).

¹⁰¹ Perhaps supported by Art.5(4). See fn.95, *supra*.

¹⁰² Art.5(2)(c).

3.3.5 The Rule in Art.5

The rationale of Art.5 is to grant the consumer those basic legal *protections* that he would expect if contracting by the law of his habitual residence. The method of applying the consumer's law depends on whether a contract contains a choice of law clause. The rules are as follows:

- 5(2) Where an autonomous choice has been made this shall not deprive the consumer of the protection afforded to him by the *mandatory rules* of his country of *habitual residence*;
- 5(3) In the absence of choice, the *whole contract* shall be governed by the law of the consumers *habitual residence*;

3.3.6 On cursory perusal these provisions appear relatively simple in application and are apparently based on sound principle. Yet both statements are open to doubt. The problematic application derives from two particular characteristics of Art.5(2). These are, firstly, the need to determine when "mandatory rules" exist in this connection and, secondly, the requirement to weigh these against the chosen law to determine which provides greater protection.¹⁰⁵ This latter requirement conflicts with our orthodox tradition and produces complex interpretational problems. Assuming that such difficulties are surmountable, the question of

¹⁰³ Anton, A., & Beaumont, P., *Private International Law*, 1990, 2nd Ed, W.Green, Edinburgh at p.345.

¹⁰⁴ G&L,*supra*, p.24.

divergences in underlying principle must still be addressed. If we look at Art.5(2), it is apparent that autonomous choice is circumscribed to the *minimum* extent necessary, even though a choice in a consumer contract will be on the supplier's terms and often chosen specifically to reduce the supplier's obligations to the consumer. Yet where the supplier has not stipulated a choice, suggesting the lack of an intention to reduce the consumer's rights, we ignore the more justifiable (and potentially more protective) objective proper law under Art.4 in favour of applying the consumer's law *in toto*. In addition to these problems of principle, the interrelation of Art.5 with Art.7 may also be contentious. To justify these criticisms, a detailed exposition of the provisions starting with Art.5(3) will be provided.

3.3.7 Art.5(3) – In the absence of Choice

In the absence of an express or implied choice of law¹⁰⁶ the contract is governed *in toto* by the law of the consumers habitual residence.¹⁰⁷ This provision is absolute in its rejection of Art.4¹⁰⁸ and is said by G&L to be sufficiently clear that no further explanation is necessary.¹⁰⁹ Nevertheless it should be noted that any rule of the habitual residence that is circumscribed by a self-limiting provision will apply subject to this limitation.¹¹⁰ Furthermore in the unlikely event that the forum is not that of the consumer's domicile, any internationally mandatory rules

¹⁰⁵ See para.3.3.9.

¹⁰⁶ Art.3

¹⁰⁷ Art.5(3)

¹⁰⁸ "Notwithstanding the provisions of Art.4..."

¹⁰⁹ *supra*, p.24.

¹¹⁰ Para.3.3.15.

of wider remit than consumer protection are available under Art.7(2).¹¹¹ Despite it being unlikely that an e-tailer trading through an interactive website would omit a choice of law clause, this provision may well be relevant where the site hosts an advert with conclusion of contract being by email or phone.¹¹²

3.3.8 Although effective in providing the consumer with the protection they might expect, the apparent divergence in rationale between Art.5(3) and Art.5(2) is unprincipled. One could argue that where a choice is stipulated the consumer would *expect* the chosen law to apply, subject to protections within his own law, whilst in the absence of choice he would *expect* his whole law to apply. But is it really so obvious that consumers expect their own law to apply to a cross-border contract? Furthermore, Art.5(2) adopts a rationale which appears more obviously aimed at consumer *protection* rather than *expectation*. Surely seeking out a proper law by Art.4 and displacing it under Art.5(3) for the *mandatory rules* of the consumer's habitual resident would be more consonant with the general Convention principles and might increase consumer protection where the Art.4 law is more protective.¹¹³ Yet rejection of this approach increases certainty and, concomitantly, reduces the cost to the consumer of ascertaining and asserting his rights. The discussion of Art.5(2) which follows will demonstrate the scale of complexity that a "displacement by mandatory rule" provision creates and may leave the reader wondering whether maintaining autonomous choice is so

¹¹¹ Para.3.3.12

¹¹² Dickie, *supra*, pp.86-87.

¹¹³ Kaye, *supra*, p.219.

sacrosanct an aim that it could not be sacrificed, in the name of certainty, for an approach similar to Art.5(3) and Art.9(5).¹¹⁴

3.3.9 Art.5(2) – Party Autonomy Restrained

Substantive consumer protective legislation normally allows parties the autonomy to contract as they wish, thereby permitting the use of standard form contracts, but deems certain terms an abuse of economic power by the supplier and controls them. Article 5(2) is based on the premise that the standard of controls within different legal systems vary, making it essential that the supplier does not evade such control through the choice of law process. A chosen law is thus referenced to the standards imposed by the law of the consumer's habitual residence and, where found to provide an *inferior* level of protection, has the “mandatory rules” of the consumer's law imposed on it.

3.3.10 Determining whether one law is inferior to another requires a value judgement based on the test laid down within Art.5(2). This states that:

“...a choice of law shall not have the result of *depriving* the consumer of the *protections* provided by the mandatory rules of his *habitual residence*...”

3.3.11 This test is consonant with the belief in upholding party autonomy, setting the protective minimum by reference to the consumer's law. The threshold test of

¹¹⁴ Formal validity, para.3.3.22.

“deprivation” suggests that mandatory rules of the consumer’s law will supersede rules of the chosen law *only* when a comparative evaluation of both demonstrates the latter to provide *less* protection. Thus where the protections are homogenous, though not necessarily identical, between each legal system the chosen law applies. Similarly, where the chosen law offers greater protection the consumer should be entitled to benefit from this.¹¹⁵

3.3.12 The necessity of evaluating both laws creates considerable complexity in those cases where the protection provided by each is of a similar nature. Indeed it is possible that each law might have a mixture of rules offering greater or less protection than the other. Given that Art.5(2) is a prescriptive rule of law altering the rights of both parties, it should be for the Court to decide rather than the consumer to choose which to apply. *Hartley*¹¹⁶ has sensibly suggested that the assessment made should be with reference to the particular case, though uncertainty remains as to the criteria to be employed. Would the convenience of the consumer’s law, in the consumer’s forum, be relevant? What is surely certain is the fallacy of the cumulative application debate. *Philip*¹¹⁷ argues that nothing in the Convention’s wording prohibits cumulative application and that, indeed, Art.5(2) would have adopted the rule in Art.5(3) had this cumulative approach been prohibited. Nevertheless the whole ethos of Art.5(2) is to uphold parties

¹¹⁵ Morse, *The EEC Convention on the Law Applicable to Contractual Obligations*, 2 (1982) YEL 107 at 136; Dicey & Morris, *supra*, at 3-016.

¹¹⁶ Hartley, *supra*, p.371.

¹¹⁷ Philip, A., *Mandatory Rules, Public Law (Political Rules) and Choice of Law in the EEC Convention on the Law Applicable to Contractual Obligations*, 81 at 99, in North (Ed.), *Contract Conflicts*, 1982, North-Holland Publishing. Allan Phillip was Vice-Chairman of the Working Group that negotiated the Convention.

autonomous choice until a minimum standard referenced to the consumer's law is clearly breached. It would contradict this principle, especially when evaluation requires comparison of the systems *in toto*,¹¹⁸ to allow cumulative application. Indeed the provisions seem premised on protecting the economically weak consumer whose basic "home state" rights should not be violated. There seems no reason or policy justification for providing the international consumer with double protection.¹¹⁹

3.3.13 Scope of Art.5 & the Interrelation with Art.7(2)

Having explained the basic rules within Art.5, it is appropriate to tackle the vexed question of the provision's precise scope and its interrelation with mandatory rules of the forum. It must be ascertained whether the Convention contemplates that the *lex fori*, which is likely (but not definitely) to be the consumer's domicile, will override the law applicable by Art.5. This could be an issue when the chosen law is equally or more protective, whereby Art.5(2) upholds the parties choice. Once determined, a more general discussion of what constitutes a "mandatory rule" will be offered.

3.3.14 There is no definitive guidance on the interaction of these provisions to be found in either the Convention or G&L. To the extent that Art.5 contemplates a carefully defined situation where the Convention will apply *consumer specific* mandatory rules, it is submitted that Art.7(2) should be excluded. Thus tacit

¹¹⁸ Dicey & Morris, *supra*, para. 33-016.

¹¹⁹ Kaye, *supra*, pp.213-214; Morse, *supra*, 137;

support is given to *Stone*,¹²⁰ who argues that Art.5 is the “definitive regulation” of the applicability of *consumer* legislation. The definition of *consumer specific* mandatory rules would clearly incorporate provisions applicable *only* to consumers,¹²¹ but less certainty surrounds the inclusiveness of rules that apply, but are not limited to, consumers.¹²² It is possible that such provisions are only applicable where their purpose is protecting parties in a weaker bargaining position.¹²³ Nevertheless it is further submitted, in contradistinction to *Stone*, that Art.7(2) *does* have a role in applying national provisions of the forum to consumer contracts that neither qualify as *consumer protective* nor contradict those rules that do. Thus Art.5 is seen as paramount with regard the Convention treatment of consumer legislation, but *only* when the *substantive* and *territorial* tests are met. Beyond that, Art.7(2) should apply as normal.

3.3.15 The bold submissions espoused above must nevertheless be accompanied by a health warning. The text of Art.7(2) appears to be quite categorical in its potential to override other Convention provisions, stating that “...*Nothing in this Convention* shall restrict...” the application of internationally mandatory rules of the forum. The author’s alternative submission recognises that interpreting Art.7(2) literally would contradict the (relatively) clear policy expressed in Art.5 and, insofar as the forum is the consumer’s, potentially render Art.5(2) of no

¹²⁰ Stone, P., *The Conflict of Laws*, 1995, Longman, London, p.269.

¹²¹ Morse, *supra*, 2 (1982) YEL 107 at 130; Hartley, *supra*, pp.371-372;

¹²² Kaye, *supra*, p.210. An example is s.12(1) Sale of Goods Act 1979, implying a condition of title on the sellers part irrespective of the purchasers status.

¹²³ Stone, *supra*, p.268. Cf Kaye, *ibid*.

practical effect.¹²⁴ It would nevertheless be undesirable and unjustifiable to adopt *Stone's* view that Art.5 is so omnipotent to consumer protective legislation that Art.7 cannot even be invoked to protect the *substantive* consumer who fails to meet the *territorial* requirements.¹²⁵ If the forum's legislature has deemed a rule sufficiently important to make it internationally mandatory without adherence to requirements as strict as the *territorial* tests in Art.5, there seems no reason to reject it under Art.7. In practice Art.7(2) will be most relevant in applying mandatory rules of the forum whose ambit is wider than the *consumer protective* rules applied through Art.5. Yet given the clear opportunity for a Court to interpret Art.7(2) literally, the possibility of it being used to avoid the problems associated with Art.5(2) cannot be discounted.

3.3.16 Defining Mandatory Rules

Having given detailed consideration to the applicability of and complexity surrounding mandatory rules, attention must turn to the effect that a stipulation (or lack of stipulation) of international applicability within a national mandatory rule has when applying Art.5. Such stipulations impact on both Art.5(3) and Art.5(2) although the difficulties therein created are more pronounced when applying the latter. The Convention defines the mandatory rule as "a rule of law of that country that cannot be derogated from by contract"¹²⁶ but, unlike Art.7(2), Art.5 does not stipulate whether that rule must be internationally mandatory. Commentators agree that where the national provision is silent on its international applicability it

¹²⁴ Hartley, *supra*, p.373.

¹²⁵ Stone, *supra*, p.269.

will be applied unrestrictedly and thereby achieve the policy of Art.5.¹²⁷ Where there is a stipulation, be it self-denying or facilitative to international applicability, it is submitted that this bears fundamentally on whether a rule is mandatory within Art.5.¹²⁸ It is undoubtedly true that where self-denying, or positive but restricted, stipulations exist they may interfere fundamentally with the outcome that Art.5 wishes to achieve.¹²⁹ Indeed *Stone* uses the potential for anomalous results as a basis for arguing that the conflict clauses within UCTA must have been implicitly repealed on ratification of Rome.¹³⁰ Yet there is nothing within Art.5 to suggest that the determination of a rules “mandatory” status should be done without reference to its conflicts clause. Furthermore, Rome is a choice of law rule whose operation, though applying the more favourable law, was not designed to confer substantive protection. This is substantiated by Art.5(3) whose operation simply grants the consumer the protection his own law entitles him to. There seems no logical reason to ignore any clear limitations that a national legislature has decided to include.

3.3.17 Interrelationship of Article 5 and National Mandatory Rules

The complexity surrounding the interaction of Art.5 with both positively and negatively mandatory rules is exemplified by consideration of UCTA 1977. A positive stipulation is found in s.27(2) which applies the controls *notwithstanding* the choice of some other law if either:

¹²⁶ Art.3(3).

¹²⁷ Hartley, *supra*, p.371; Dicey & Morris, para. 33-018; Stone, *supra*, p.268; Morse *supra*, 41 (1992) ICLQ 1 at 8.

¹²⁸ Dicey & Morris, *supra*, para. 33-030. Offers implicit support.

- (a) It was imposed wholly or mainly to allow the party imposing it to evade the protective provisions; *or*
- (b) One party was a consumer who was then habitually resident in the UK and who took (himself or someone on his behalf) the steps necessary for the contract's conclusion in the UK.¹³¹

3.3.18 Thus a consumer is protected by UCTA only if, in addition to the Art.5 tests, one of the sections above are satisfied.¹³² A negative stipulation is exemplified in s.27(1) which prevents UCTA from operating where a UK law would not have applied without being chosen. Imagine a dispute arose over a B2C contract having *no relation* to the UK except for Scottish law being chosen. A simple application of Art.5(2) might suggest that, due to the UCTA controls, Scots law was *more* protective of the consumer and should not, therefore, be superseded. Unfortunately s.27(1) prevents such a consumer from gaining these protections. An intermediate problem might arise where a national provision is stated not to apply to cross-border contracts,¹³³ followed by a definition of international contracts whose threshold for qualification is *higher* than that necessary to invoke the Convention.¹³⁴ In this situation a national provision that *prima facie* has no relevance to cross-border contracts could still find itself being considered under the Rome Convention.

¹²⁹ Hartley, *supra*, pp.381-384.

¹³⁰ Stone, *supra*, pp.268-269.

¹³¹ s.27(2)(b).

¹³² Note also the limiting provision in s.26 applies here.

3.3.19 Interaction of Art.5 & Community Legislation

It was stated previously that consumer protective legislation occurs in a hierarchy, with conflict provisions within individual Community legislation taking precedence over Rome to the extent that they prove inconsistent.¹³⁵ Concomitantly, Rome takes precedence over such legislation where no inconsistency exists. Determining the legal system whose implementing legislation will apply a Directive's protection to a particular contract thus requires an initial appraisal of whether any inconsistencies are present. Given that Directives leave substantial discretion to Member States regarding the detail of such legislation, the possibility to introduce conflict clauses inconsistent with Rome are considerable. This is demonstrated by reference to the recently enacted UTCCR 1999¹³⁶ and CPDSR 2000,¹³⁷ both of which contain the following conflict clause:

“The Regulations shall apply notwithstanding any contract term which applies or purports to apply the law of a *non*-Member State if the contract has a close connection with the territory of the Member States.”¹³⁸

3.3.20 The drafting of this clause is wide and ill defined, being transposed directly from the Directive. This was clearly unnecessary, as consideration of the German

¹³³ See s.26(1) UCTA 1977.

¹³⁴ Art.1(1).

¹³⁵ Art.20, Rome Convention; Dicey & Morris, *supra*, para.33-038; Cf Dickie, *supra*, p.94.

¹³⁶ S.I. 1999 No.2083.

legislation demonstrates, allowing the potential for some rather anomalous results were a Court to interpret it literally. Such problems could occur where the law of another Member State is chosen, given the *implicit* suggestion in the Regulations that such a choice is unobjectionable.¹³⁹ Although the consumer would still receive the Directive's protections, albeit as implemented within the chosen State, it is questionable whether an *implicit* statement within the implementing legislation is sufficient to override *Rome*.¹⁴⁰ If a UK consumer entered a contract governed by the less protective Italian law and invoked his rights under Art.5(2), would a Court insist on granting these specific protections through the Italian law? Despite this apparent laxity of control when another Member State's law is chosen, the polar opposite occurs when a *non-Member* State's law is stipulated. Unlike the German legislation, whose application requires a "close connection" to *Germany* and provides illustrative examples,¹⁴¹ the UK provisions purport to apply so long as there is a close (but not necessarily the closest) connection to *any* Member State.¹⁴²

3.3.21 Assuming the Judiciary may adopt the interpretation promulgated, an event that cannot be guaranteed, the effective distortion of the policy in Art.5 should be considered. This conflict clause applies only where a choice is made and so Art.5(3) will be unaffected. Article 5(2) is affected to the extent that an e-tailer

¹³⁷ S.I. 2000 No.2334.

¹³⁸ Reg.9; Reg.25(5).

¹³⁹ Dicey & Morris, *supra*, Para. 33-040.

¹⁴⁰ Art.20.

¹⁴¹ Knofel, S., *EC Legislation on Conflict of Laws: Interactions & Incompatibilities Between Conflict Rules*, (1998) 47 ICLQ 439 at 442. This includes habitual residence in Germany, German locus contractus etc.

trading to the UK might wish to evade the UK Regulations by choosing another Member State's law. Given the homogeneity of the provisions between States, such effects may seem academic. Yet Directives only set *minimum* standards and provide freedom to introduce more rigorous controls. This provides an incentive to stipulate the applicable law where, for example, the enforcement provisions differ. This may have occurred if the DTI had maintained their initially proposed sanctions under the CPDSR, which included criminal liability and contractual nullity,¹⁴³ rather than the Directive's stipulated minimum penalty of an extended cooling-off period of 30 days.¹⁴⁴ It is hoped that such potential for manipulation will be stifled by the Judiciary adopting a more purposive interpretation.

3.3.22 Formal Validity

In order to determine the formal validity of an e-commerce contract, concluded either online or by email,¹⁴⁵ the Convention contains a specific rule regarding consumer contracts within Art.9(5). The *general rule* on formal validity seeks to uphold contracts by requiring satisfaction of either the applicable law or the law of the habitual residence of either party.¹⁴⁶ This will be relevant to consumer contracts that do not satisfy either the *substantive* or *territorial* tests of Art.5. Yet where these tests are satisfied, Art.9(5) demands satisfaction of the formal requirements of the consumer's habitual residence irrespective of whether Art.5(2) or Art.5(3) apply. This protects consumers by reducing the opportunities

¹⁴² Dicey & Morris, *supra*, para. 33-042.

¹⁴³ Motion, P., *E-Consumers Bite Back*, J.L.S.S. 2000 45(6) 39 at 40.

¹⁴⁴ Reg.26-29.

existing under Art.9(2) to hold a contract valid and places a potentially onerous obligation on those international e-tailers wishing to ensure the validity of their contracts.

¹⁴⁵ G&L,*supra*, p.29. The Convention definition of formal validity would clearly encompass such contracting methods.

4 Convention Reforms

4.1.1 Introduction

The European Community has had competence to legislate as regards both Brussels and Rome since the Amsterdam Treaty introduced Title IV.¹⁴⁷ In November¹⁴⁸ the Council adopted a new Jurisdiction Regulation,¹⁴⁹ based on the revised text of Brussels and Lugano agreed within a specially constituted working group.¹⁵⁰ The UK has submitted to the Regulation,¹⁵¹ which becomes effective on 1st March 2002.

4.1.2 Brussels - New Territorial Test

The Brussels Regulation provides consumers with protection identical to the Convention's, but substantially alters the old Art.13(1)(3) *territorial* test. This revision is designed specifically to counteract the complex interpretational problems, discussed at para.3.2.7, that arose when the already ambiguous "advertising" test was applied to e-commerce. The new unitary provision permits protection where:

"...the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the

¹⁴⁶ Art.9(2)

¹⁴⁷ Art.61-69.

¹⁴⁸ 30th November 2000.

¹⁴⁹ Regulation 44/2001 O.J. L12, 16/01/01; COM (1999) 348 final; COM (2000) 689 final.

¹⁵⁰ EU Document 7700/99 JUSTCIV 60, 30th April 1999.

¹⁵¹ See COM (1999) 348 final, para.2.2.; Basedow, J., *The Communitarization of the Conflict of Laws under the Treaty of Amsterdam*, 2000 (37) CMLR 687 at 696.

consumer's domicile or, *by any means, directs* such activities to *that Member State or to several countries including that Member State*, and the contract falls within the scope of such activities.”¹⁵²

4.1.3 “Directed” Test

The Regulation has replaced the “targeting” test with the *potentially* wider requirement that a supplier has “directed” his business activities to an area that includes the consumer’s State. This counteracts the difficulty previously noted in applying the “targeting” test to e-commerce by recognising that technology renders archaic the assumption of G&L that a trader’s advert can be aimed within strict territorial confines. Although interpreted by Industry groups as increasing consumer’s substantive protection,¹⁵³ acceptance of the submission in para.3.2.9 permits the conclusion that the new test merely clarifies the law and requires the same objective assessment of relevant factors. Yet despite the attractiveness of this conclusion and its consistency with the new text, the initial proposal document contained statements that interfered with this interpretation.¹⁵⁴ This included recital 13 which deemed a web site to be “directed” to a State whenever *accessible* there, thus imposing an extremely strict application of the protections. Although now deleted,¹⁵⁵ the explanatory memorandum to the proposal continues to suggest that a site is “directed” to the consumer’s State if it is both *accessible*

¹⁵² Art.15(1)(c).

¹⁵³ Financial Law Panel Report, *E-Commerce – Review of Legal Implications – Jurisdiction*, January 2001, London, pp.17-18; European Commission, *Hearing on “Electronic Commerce: Jurisdiction and Applicable Law,” Position Papers Submitted to the European Commission, supra.*

¹⁵⁴ COM (1999) 348 final.

¹⁵⁵ COM (2000) 689 final at p.10.

there and “interactive.”¹⁵⁶ It is unclear how much weight this might be given, especially since recital 13 was deleted, but it potentially brings *any* website allowing for information exchange (such as by order form) within the protections automatically. If a site were not interactive, such as one advertising products but requiring that orders be submitted by email, then an objective assessment is required. This “interactive” rule is surely undesirable for it evades any assessment of whether a trader has directed himself to a State. The mere provision of an order form would hardly justify the imposition of protection where the trader has taken clear steps to avoid trading with parties in that State. Rather, a case-by-case assessment should be made.

4.1.4 Connecting Consumer’s Domicile to Contract – A Change

The new Art.15(1)(c) omits the requirement that a consumer take all steps necessary for contractual conclusion within his domicile. This recognises the irrelevance technology has made of the geographical location of the consumer when contracting and concentrates on whether the site was directed to that consumer.¹⁵⁷ This reform was designed to deal with “cross-border excursion selling” as discussed under Rome,¹⁵⁸ but has the beneficial effect of protecting consumers who quite fortuitously are outwith their domicile when they contract. Although resulting in the curious situation whereby a consumer can litigate within his own domicile having contracted whilst in the e-tailer’s, received the product there and then returned to his own State, the protections would only be available

¹⁵⁶ COM (1999) 348 final at p.16.

¹⁵⁷ Explanatory memorandum at p.16.

where an objective assessment shows the site to have directed itself to the consumer's own State.

4.1.5 Miscellaneous Alterations

The new provision maintains the same substantive test as the Convention, although Art.15(1)(c) expressly requires a supplier to be acting in the course of his commercial or professional activities. Unfortunately the opportunity was missed to clarify both the *good faith* requirement and the status of a website as a branch or agency, although the Brussels protections have been extended to package tours.¹⁵⁹

4.1.6 Convention Reforms - Rome

The Community has the competence to adopt the Rome Convention as a Regulation with a Green Paper likely to be tabled within the course of 2001.¹⁶⁰

Clearly any predictions made as to the content of possible reform is mere supposition, but it seems likely that the territorial test in Rome would be amended in line with Brussels to take account of e-commerce developments.¹⁶¹ Although we cannot predict whether more significant amendments will be made, this paper's concluding remarks will advocate a complete overhaul of Art.5.¹⁶² It is

¹⁵⁸ COM (1999) 348 final, p.16.

¹⁵⁹ Art.15(3).

¹⁶⁰ Mario.Tenreiro@cec.eu.int, DG Justice & Home Affairs; DTI, *Consultation Paper on European Commission Proposals for Changes to Article 13 of the 1968 Brussels Convention*, April 2000, para.2.2, at www.dti.gov.uk/cacp/ca/ecommerce.htm

¹⁶¹ Powell, M.D., and Turner-Kerr, P.M., *Putting the E- in Brussels and Rome*, 2000 C.L.S.R. 16(1) 23 at 26; Stone, *supra*, p.11; Cf Financial Law Panel, *supra*, p.26;

¹⁶² Para.6.4

unclear whether the Austrian Presidency's proposal for an "extension" to Art.5 took a similar view,¹⁶³ but a reassessment of the underlying policy and greater consideration of how the provisions should integrate with stand-alone conflict clauses in recent European legislation is required.¹⁶⁴

¹⁶³ Explanatory Report on the Convention on the accession of the Republic of Austria, the Republic of Finland and the Kingdom of Sweden to the Convention on the Law applicable to Contractual Obligations, 1997 O.J. C-191/11.

¹⁶⁴ Basedow, J., *supra*, p.689.

5 Practical Contracting

5.1.1 Introduction

In order to exemplify the difficulties of applying the current provisions on both Jurisdiction and Applicable law, the effect of the Brussels reform and the potential discrepancies where it interacts with Rome, this chapter proceeds with a number of fictitious scenarios that constitute plausible and potentially common situations. In each scenario key facts will be altered to demonstrate different legal problems, with the facts and outcome of Scenario 1 forming the basis that later scenarios will build upon. This will not be a comprehensive exposition and so the reader is referred back to previous discussion on all points.

5.1.2 Scenario 1

The Netherlands resident company “E-Models,” trading at www.e-models.nl, supply model making kits to businesses *and* consumers. Their interactive site does not stipulate its target market but its contractual terms include an applicable law clause (Netherlands) and an exclusive jurisdiction clause (Netherlands). Prices are quoted in Guilders and Euros. It supports the Dutch and English language.¹⁶⁵ The order form requests a name, delivery address and VAT number where applicable.¹⁶⁶ The purchaser is asked to choose between Netherlands and International European postage options.

¹⁶⁵ Chosen due to the common usage of English in Holland.

¹⁶⁶ Most businesses have a VAT number, offering an indication of a customer’s status.

5.1.3 The proprietor of “Aeromodel Scotland,” Bob, knows of this site but has never contracted with them. He buys his nephew, an avid fan of model windmills, two kits from “E-models” through his home computer. Whilst perusing he happens upon products with marketing potential in Scotland. He wonders whether to:

- 1) Order the windmill separately with dispatch to his home;
- 2) Place both orders simultaneously stipulating his own name and address;
- 3) Place both orders separately with delivery of both to the shop.

Bob is a domiciliary and habitual resident of Scotland. Given the purportedly poor quality of model windmills, he wishes to safeguard his Scottish consumer rights.

Quid iuris?

5.1.4 It is essential that both the *substantive* and *territorial* tests are satisfied as, without satisfaction, Bob would have to litigate in Holland with Scottish mandatory rules inapplicable under either Art.5(2) and Art.7(2). In respect the *substantive* test, Option 1 would qualify as he is purchasing purely for purposes outwith his trade. Option 2 is more complex, requiring an assessment (in applying Art.5(2) Rome) of whether Bob is acting “primarily” outwith his trade. It seems unlikely he is and, with regard Jurisdiction, anything short of “total” consumer status is insufficient. Adopting Option 3 would see him forego the protections, for E-Models would justifiably believe in *good faith* that the customer was a business.

The delivery address, combined with the provision of a VAT number, would compound this belief.

5.1.5 In regard to the *territorial* test, there was no “specific invitation” but the advertising requirement may be satisfied. Although it is clear that exposure to the advert (website) must have solicited the sale, and that some form of targeting is necessary, the discussion at para.3.2.7 showed the uncertainty as to whether intentional and active targeting is required or whether a more objective test is applied based on the foreseeability of consumers within a particular State being enticed by the site. Whichever is ultimately utilised, the same factors are relevant in determining whether “targeting” has occurred. Although these facts do not evidence an *exclusive* targeting of British consumers, the availability of an Inter-European postage option suggests that Scottish orders are welcome. Secondly, the possibility of payment in ECU *might* suggest that pan-European trade is contemplated although this factor may be weak during the currency’s infancy. The use of English is an important factor, but the wide usage of this both within the Netherlands and on the Internet generally must be considered. If too much emphasis were put on language then consumers of the English-speaking world would gain a disproportionate level of protection (especially if the foreseeability test were used). Fourthly, failure to stipulate the trading area or reject the order would be relevant, especially if E-Models were shown to regularly contract with consumers within the UK. Finally the Netherlands domain name might suggest a Dutch target market, negating liability. Yet this factor is of weak persuasive

value, equating closely with a mere postal address, although denominations that suggest internationality (.com; .int) might be more persuasive. On balance it seems that on the objective approach advocated above this test would clearly be satisfied. Indeed, there is little to suggest the e-tailer does not contemplate transacting with British consumers. Yet if a Court adopted a narrower approach and required a clear intention to attract British consumers then the provisions applicability becomes more doubtful. Although using English in a Dutch web site and a Netherlands domain name do not automatically suggest targeting of UK consumers, the addition of international shipping options and unspecified target market would likely be sufficient to convince a Court that targeting had occurred. Furthermore, since Bob took all the steps necessary for contractual conclusion within Scotland, the second requirement is satisfied.

- 5.1.6 If Option 1 is adopted, Bob may litigate in Scotland and receive the protection offered by Art.5(2). The choice of Dutch law remains effective but the mandatory consumer protective rules of Scots law may be superimposed on it. This occurs only where a comparison between Dutch law and Scottish mandatory consumer protective rules shows that, in Bob's situation, the Scottish rules provide a *higher* degree of protection. In determining this, full consideration is given to stipulations of territorial scope contained within the rules of either system. Scottish rules of wider ambit than consumer protection may also be imposed if internationally mandatory under Art.7(2). It is less certain whether Bob would be protected by the British version of the "UTCCR" and "CPDSR." If a literal interpretation of

their conflict clauses are employed, Art.5(2) will be incapable of applying the British version, requiring the protections to be applied through the Dutch legislation. If a literal approach were rejected, determination of which version applied would be in accordance with the general assessment under Art.5(2). Clearly factors such as one system applying stricter controls than stipulated within the Directive would be relevant in determining whether Scottish mandatory rules offered greater protection.

5.1.7 Scenario 2

Assume the situation to be identical to Scenario 1 save for the omission of the choice of law and jurisdiction clauses. Bob can choose to litigate in Scotland or Holland¹⁶⁷ and the dispute is governed *in toto* by Scots law under Art.5(3). Thus Bob is entitled to the protective rules of Scotland so long as their own conflict clauses do not prevent this. These rules include the UK version of UTCCR and CPDSR. If Bob decided to litigate in Holland then Scots law still applies but he is entitled to the internationally mandatory rules of Holland under Art.7(2). The ambit of the Dutch rules must be wider than consumer protection and their application cannot interfere with the Scottish consumer protective rules.

5.1.8 Scenario 3

The facts are identical to Scenario 1 except that Bob places the order through his laptop whilst in Venice, meaning that all steps necessary for the conclusion of contract occurred outwith Scotland. In vitiating the requirements of both

Art.13(1)(3) and Art.5(2) the choice of law clause is upheld and Bob's Art.14 right to sue within Scotland is lost (although the Jurisdiction clause is invalid).¹⁶⁸

If the events occurred after the Brussels Regulation enters into force, Bob could litigate within Scotland¹⁶⁹ but would not benefit from Scottish consumer protective mandatory rules under Art.5(2). However, it was submitted that where such rules are internationally mandatory they can still be applied under Art.7(2) where the requirements of Art.5 are unfulfilled.¹⁷⁰

5.1.9 Scenario 4

Although taking the facts of Scenario 1, two additional assumptions are made; firstly, the Court adopted a fairly strict test of "targeting" under Rome and held the test was not met; secondly, the events took place subsequent to the entering into force of the Brussels Regulation. The discussion in Scenario 1 highlighted the *potential* problem for e-consumers if a strict "targeting" test were imposed and this is emphasised when applied in parallel with the more permissive "directed" test within the Regulation. If the explanatory memorandum were followed regarding "interactive" websites then EModels would automatically be subject to Scottish jurisdiction on contracting with Bob. If ignored, the factors elucidated in Scenario 1 along with the wider, more objective "directed" test would establish Scots jurisdiction. This demonstrates not only that a "directed" test is *potentially* wider than a "targeting" test, depending on how a Court would interpret the latter,

¹⁶⁷ Art.14 Brussels Convention.

¹⁶⁸ Oceano Case, *supra*.

¹⁶⁹ Art.16(1) Brussels Regulation.

¹⁷⁰ See para.3.3.13.

but also that inconsistencies may arise if Rome is not amended to incorporate a “directed” test. It would allow Bob a Scottish forum, yet he would have to accept Dutch law. The only caveat is the potential to apply Scottish internationally mandatory rules under Art.7(2).¹⁷¹ Nevertheless it would be desirable, despite this short-term remedy, to amend Rome in accordance with Brussels.

¹⁷¹ See para.3.3.13; Cf Stone, *supra*, p.269.

6 Conclusion

6.1 Introduction

The perception of the consumer as an economic weakling has long justified our domestic legislation's interference with the autonomy principle, requiring mandatory legislation to uphold those obligations that a consumer should expect when contracting. The quintessence of such rules is the inability of parties to contract out of them, yet the elevation of consumer contracts to a conflict scenario could jeopardise their mandatory nature. Domestic provisions often seek to prevent this by incorporating statements of extra-territorial application or otherwise, but fears remained that were disputes adjudicated in a Court other than the consumer's then both the access to justice and availability of such protections might be prejudiced. Thus the Conventions on jurisdiction and applicable law have sought to tackle this problem directly.

6.2 Justifying Protection

The Convention protection's underlying philosophy is undoubtedly homogeneous, for the *substantive* and *territorial* tests determining their applicability are practically identical. Given their clear interrelation a common philosophical basis was desirable, but the interpretational morass surrounding the provisions makes determination of the exact philosophy difficult. The guidance offered by G&L emphasised the necessity of a supplier targeting a consumer's State which, though not without difficulty, appeared relatively straightforward. The advent of e-

commerce complicated this formulation because websites may be viewed *within* every country worldwide, questioning whether mere exposure in a State is sufficient or whether more is required. When amendments to Brussels introduced the “directed at” test, business groups criticised it for extending the supplier’s liability rather than clarifying the provisions for e-commerce. Yet in reality it sought merely to better define those situations, hidden by the apparent simplicity of a targeting test, when the imposition of protection was thought justified. The ambiguities arose because the original guidance, tailored to the offline world, assumed that to target one particular State a supplier would have to use channels specific to that State. If he used such channels then an attempt to derive an economic benefit was clear along with the justification for imposing liability under that State’s protections; if custom was incidentally derived without using such channels then imposing protection was unjustified. The guidance thus ignored the philosophical question as to where we draw the line between allowing protection and rejecting it. The interpretation submitted at para.3.2.9 attempts to address this by asking when, on an objective appraisal, the consumer should be protected. The rationale is that a supplier should not be forced to account under a particular legal system if the likelihood of him benefiting from trade there was sufficiently low that imposing a burden of compliance on him would be unjustified. It was shown earlier that this interpretation is sustainable and, it is submitted, should be taken as the underlying philosophical basis of the protections. It is thus concluded that the amendments to Brussels seek the correct balance of interests between parties insofar as the solution regarding interactive

websites, noted at para.4.1.3, proves unfounded. It is desirable that Rome be similarly amended.

6.3 Protection Content - Brussels

Although the protection's underlying basis is commendable, the content of that protection received a mixed review in earlier chapters. The Brussels rule is relatively simple, it being at the behest of a qualifying consumer to pursue or defend within his home State. This derives from the rationale that a supplier taking the advantage of trade should also accept liability within that State. Although both cost and time create a major disincentive to litigation, thereby supporting the development of ADR, the possibility of using local practitioners and Courts is a prerequisite for litigious redress. This was enshrined in the Brussels Regulation when the derision of e-tailers appeared hollow given the paucity of litigation. Indeed the consumer's access to his home forum, when read in conjunction with Rome, is the quintessential protection. It was seen in Scenario 4 that such access, combined with the availability of Art.7(2), is capable of protecting consumers to a similar degree as Art.5. In this situation, and recalling the innate complexity surrounding Art.5, conclusions are necessary as to what its underlying basis should be and how its operation could be improved.

6.4 Protection Content - Rome

Protecting the domestic legal rights of a consumer who enters a cross-border transaction is undoubtedly justified on the philosophical basis previously

discussed. Although the difficulties of e-commerce are likely to instigate adoption by Art.5 of the “directed at” test, the problems of content and complexity discussed below have not arisen due to e-shopping; rather they penetrate Article Five’s underlying rationale. Earlier discussion identified a distinction between seeking the most *protective* law and seeking the protection that a consumer might *expect*.¹⁷² The former is reflected in Art.5(2) whereby the consumer gains at *minimum* the protection of his own law or, if more protective, the benefit of the chosen law. Unfortunately it is difficult to administer, requiring both a highly complex weighting of each law’s protective effects plus an investigation as to whether “mandatory” rules are mandatory in this international context. In truth this provision reflects the minimum concession necessary to pay lip service to consumer protection whilst maintaining an overzealous adherence to party “autonomy.” This is reflected by Art.5(3) which lacks hesitation in deviating from the Convention scheme to impose the consumer’s law *in toto*, ensuring he receives the protection he *expects*. Surely if Art.5 was seeking to apply the most *protective* law it would require the consumer’s mandatory rules be superimposed (where more protective) over the law of the characteristic performer.¹⁷³ This is not a criticism of Art.5(3) for its provisions are more consonant with the philosophy that the targeting of consumers for economic advantage justifies overriding choice by the supplier. Indeed, it is submitted that Art.5(3) should replace Art.5(2).

¹⁷² Para.3.3.8

¹⁷³ Art.4.

6.5 Rome – Essential Reforms

Given the likelihood that Rome will be adopted as a Community Regulation, the following proposals should be tabled. In addition to adopting the new “directed at” test, Art.5(2) should be amended to override a suppliers choice with the consumer’s law *in toto*. This system would be more principled and easier to administer without creating any great distortion in compliance costs. At present an e-tailer wishing to ensure his website’s compliance with the consumer’s law must conduct an audit to determine whether his contractual terms are of the requisite standard, carry out a complex weighting exercise and alter them if deficient. Given the additional necessity of formal validity by the consumer’s law, it appears more principled to reject autonomy within this very specific area and ensure additional certainty for all parties involved.

- 6.6. The second proposed alteration is a redefinition of “mandatory rules” for the purposes of Art.5. The current provision takes account of the conflict clauses within national legislation when determining the protection available under both Art.5(2) and (3).¹⁷⁴ If these provisions are to become the definitive regulator of consumer protection in conflict law then, irrespective of whether proposal one is adopted but especially if Art.5(2) is retained, a definition of “mandatory rules” that disregards such clauses is essential. The following exemplifies how this redefinition could be achieved, based on Art.5(2), but it is stressed that any move to an Art.5(3) approach should similarly provide the consumer with protective rules irrespective of national conflict clauses. A redraft might read:

“...protection afforded him by those rules *that would be mandatory with regard to purely domestic contracts* by the law of the country in which he has his habitual residence...”

6.7 Given that Regulations are both directly applicable and directly effective insofar as they are clear, precise and unconditional, the new provision could override such national clauses.¹⁷⁵ It would also avoid the problematic interaction with Community derived legislation whose conflict clauses would no longer be superior. A clear provision of Community law would certainly rebut the rule implicit within UTCCR and CPDSR.¹⁷⁶

6.8 Final Thoughts

The reader will probably conclude that e-tailer's wishing to embrace new markets have a complex web of regulation to negotiate in ascertaining their liabilities and rights. Yet despite elevating the provisions to greater practical relevance the medium itself has not so much created problems of application as highlighted those already existing. This has stimulated reform of the relatively simple Brussels Convention; it remains to be seen whether reform of Rome will go beyond the qualifying criteria. This author hopes an opportunity is not missed.

¹⁷⁴ Cf Stone, *supra*, p.269-270.

¹⁷⁵ Art.249 EC; Steiner, J., & Woods, L., *EC Law*, 6th Edn, 1998, Blackstone Press, p49-50.

¹⁷⁶ para.3.3.18.

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