

Conflict of Laws on Insurance Contracts in Europe

The Rome I proposal – Towards Uniform Conflict Rules for Insurance Contracts?

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[85]5.1 Introduction

Private international law recognizes insurance contracts as a distinct category to which special rules apply.¹ Regulation no 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I Regulation) provides more or less clear cut rules for jurisdiction relating to insurance contracts that favour the weaker party.² The conflict of law rules for insurance contracts in Europe, on the contrary, are notorious for being rather complicated. Firstly, this is caused by a diversity of sources. The conflict of law rules are scattered, on the one hand, over several insurance directives – amongst others the second and third Non Life Insurance Directive and the consolidated Life Assurance Directive – and the Rome Convention on the law applicable to contractual obligations of 1980 on the other hand. Whether the directives or the Rome Convention applies depends on the location of the risk. There are even situations where neither the insurance directives nor the Rome Convention apply and in these cases national conflict rules apply. Secondly, the conflict rules laid down in the insurance directives are excessively complex. Thirdly, these directives leave room for varying implementation. Consequently, the conflict rules are not uniform in the Member States.

The Rome Convention is due to be replaced by a regulation based on Article 61(c) in conjunction with Article 65 EC Treaty. On 15 December 2005 the Commission adopted a Proposal on the law applicable to contractual obligations, called the Rome I Regulation.³ Though most respondents to the consultation launched by the preceding Green Paper⁴ replied to the question on insurance contracts that the current system of conflict rules was not satisfactory, the Commission decided to, in essence, maintain the current situation. The Commission proposal, however, has encountered serious criticism on several points, amongst others on the fact that a provision on insurance con[86]tracts is missing. Therefore, during the Council negotiations on the Commission proposal, several proposals were made for a provision on insurance contracts.⁵ The most recent publicly available Council working text, from 25 June 2007, contains a special provision on insurance contracts in Article 5a, applicable to risks

¹ The most comprehensive book on private international law rules concerning insurance is F. Seatzu, *Insurance in Private International Law. A European Perspective*, Oxford-Portland Oregon: Hart Publishing 2003.

² See Articles 8-14 Brussels I Regulation. When the insurer pursues a claim, in principle the court of the policyholder, insured or beneficiary has jurisdiction; when the weaker party is the plaintiff, he may go to either his own court or the court of the insurer. For large risks, these rules may be departed from by a choice of court agreement. Violation of these jurisdiction rules constitutes a ground of refusal for recognition and enforcement (see Article 35). See Seatzu 2003 (fn. 1), p. 45-85; P. Stone, *EU Private International Law. Harmonization of Laws*, Cheltenham/Northampton: Edward Elgar 2006, p. 114-121; X.E. Kramer, *Internationale bevoegdheid en forumkeuze in verzekeringszaken. Nieuwe ontwikkelingen*, *Verzekeringsarchief (VA)* 2006, p. 110-117.

³ Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM(2005) 650 final, 2005/0261 (COD), 15 December 2005.

⁴ Green paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM(2002) 654 final, 14 January 2003.

⁵ See the Council's website for the relevant documents: <www.consilium.europa.eu>.

situated both inside and outside the EU.⁶ A draft report with compromise amendments presented in the European Parliament's JURI Commission in September of this year, contains an almost identical provision on insurance contracts.⁷ However, at the moment of completing this contribution⁸, no agreement on this provision, had yet been reached and the position of insurance contracts is therefore uncertain. The expectation is that a political agreement in the Council can be reached by the end of this year and that the Parliament's vote at first reading will take place at the beginning of 2008.⁹

This contribution will deal with the conflict rules applicable to insurance contracts in the EU and will focus on the Rome I proposal. Firstly, the current system of the conflict of laws on insurance is presented to illustrate its complexity as well as the basis for the proposed conflict rules. Secondly, the desirability and necessity of uniform conflict rules for insurance contracts is elaborated. Thirdly, attention is paid to the Commission proposal for the Rome I Regulation, the consequent developments, and in particular the proposed conflict rule on insurance contracts, as included in the most recent publicly available Council text.

5.2 European Conflict of Law Rules on Insurance Contracts

5.2.1 *Introduction; Location of the Insured Risk*

According to Article 1(3) and (4) Rome Convention, this Convention does not apply to insurance contracts, other than reinsurance, covering risks situated within the European Community. For these risks conflict rules are laid down in several insurance directives. Where the risk is located outside the EU, the general rules of the Rome Convention apply.

The location of the risk, as far as non life insurance is concerned, is regulated by Directive 88/357/EEC, referred to as the second Non Life Insurance Directive.¹⁰ Article 2(d) provides that in general the 'place of the risk' means the Member State where the policyholder has his habitual residence or, in case of a legal person, his establishment. If the insurance policy relates to buildings, it is the Member State where the building is situated. For insurance of motor vehicles, the risk is located in the Member State of registration of the motor vehicle. In case the insurance policy covers travel or holiday risks of a duration of maximum four months, the risk is located in the Member State where the policyholder took out the policy. From Article 1(1g) of Directive 2002/83/EC [87] on Life Assurance it follows that for determining the place of the risk of a life insurance the habitual residence or establishment of the policyholder is decisive.¹¹

5.2.2 *Risks Located on the Territory of the European Community: Insurance Directives*

Where the risk is located within the EU, the directives provide conflict of law rules that apply so long as the insurer is established in the EU.¹² These rules leave room for differing

⁶ Council of the European Union, 25 June 2007, Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), no 11150/07, JUSTCIV 175, CODEC 716.

⁷ European Parliament 2004-2009, Committee on Legal Affairs, Compromise amendments 2-44, Draft report (PE 374.427v01-00) by Cristian Dumitrescu, PE 393.856v01-00, 28 September 2007.

⁸ On 12 October 2007.

⁹ See also the Legislative Observatory: <<http://www.europarl.europa.eu/oeil/file.jsp?id=5301232>>.

¹⁰ 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 and amending Directive 73/239/EEC, OJ 1988, L 172/1.

¹¹ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ 2002, L 345/1.

¹² In case he is not, national conflict of law rules of the Member States apply.

implementation and consequently the conflict rules are not the same in the EU Member States.¹³ In the Netherlands, the directives relating to non life insurance have been implemented and elaborated in the Conflict of Laws Act on Non Life Insurance (*Wet Conflictenrecht Schadeverzekering*) and those relating to life insurance in the Conflict of Laws Act on Life Insurance (*Wet Conflictenrecht Levensverzekering*).¹⁴

5.2.2.1 Non Life Insurance

For the conflict rules relating to non life insurance especially the above mentioned second Non Life Insurance Directive as amended by Directive 92/49/EEC (third Non Life Insurance Directive) is relevant.¹⁵

An important distinction is that between large risks and other risks (medium or small risks, also called mass risks). The term 'large risks' is defined by Article 5(d) and the annex of Directive 73/239/EEC (first Non Life Insurance Directive) as amended by Article 5 of the second Non Life Insurance Directive. These are, amongst others, transport risks, risks relating to credit or suretyship as far as they relate to a business activity of the policyholder, and risks related to a large or medium-sized business that fulfils certain criteria as to the balance sheet, turnover and employees.¹⁶

Article 7 of the second Non Life Insurance Directive is the most important provision.¹⁷ For large risks, pursuant to Article 7(1)(f) (as amended by the third Non Life Insurance Directive) parties can choose any applicable law. An exception to the freedom of choice is laid down in Article 7(1)(g). Where all the other elements relevant to the situation [88] are connected with one Member State only, the choice of law cannot set aside the application of mandatory rules of that Member State.¹⁸ According to Article 7(1)(h) a choice of law by the parties must be expressed and demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. Pursuant to Article 7(1)(h), if no (valid) choice has been made, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country, may by way of exception be governed by the law of that other country. The contract shall be rebuttably presumed to be most closely connected with the Member State in which the risk is situated.¹⁹

¹³ See for an overview of the implementation in Belgium, France, Germany, Italy, the Netherlands, Spain and the United Kingdom M. Frigessi Di Rattalma, *The Implementation Provisions of the EC - A Commentary, Choice of Law Rules for Insurance Contracts*, The Hague/London/New York, Kluwer Law International 2003.

¹⁴ See for a commentary on the Dutch laws M.E. Koppenol-Laforce, *Toepasselijk recht op verzekeringsovereenkomsten*, in: *Tekst & Commentaar, Verzekeringsrecht*, Deventer: Kluwer 2005, p. 115-149 and *The Dutch Report on the Implementation of the EC Choice of Law Rules for Insurance*, in: Frigessi Di Rattalma 2003 (fn. 13), p. 49-57. See specifically on motor vehicle insurance X.E. Kramer, Part 1225 - *Toepasselijk recht op verzekeringsrechtelijke aspecten*, in: J.J. van der Wansem (eds.), *Handboek Schaderegeling Motorrijtuigen*, Samson Bedrijfsinformatie: Alphen aan den Rijn (loose-leaf).

¹⁵ Council Directive 92/49/EEC of 18 June 1992 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and amending Directives 73/239/EEC and 88/357/EEC, OJ 1992, L 228/1. See for a short overview Stone 2006 (fn. 2), p. 324-328; for a thorough analysis see Seatzu 2003 (fn. 1), p. 131-164.

¹⁶ It should fulfil at least two of these three criteria:
- balance-sheet total: 6,2 million ECU,
- net turnover: 12,8 million ECU,
- average number of employees during the financial year: 250.

¹⁷ In the Netherlands this provision is incorporated in Article 5 Conflict of Laws Act on Non Life Insurance (*Wet Conflictenrecht Schadeverzekering*).

¹⁸ Cf. Article 3(3) Rome Convention.

¹⁹ See for the application of this provision in the Netherlands, Court of Appeal The Hague, 19 November 1996, *Nederlands Internationaal Privaatrecht (NIPR)* 1997, no 212 and District Court Arnhem 8 June 2000, *NIPR* 2000, no 287; for England see *Crédit Lyonnais v. New Hampshire Insurance Co* [1997] 2 Lloyd's Rep 1 (CA).

For other than large risks, Article 7(1)(a-e) provides rules. Article 7(1)(a) states that where a policyholder has his habitual residence or central administration within the territory of the Member State in which the risk is situated, the applicable law is the law of that Member State. However, where the law of that Member State so allows, the parties may choose the law of another Member State.²⁰ Article 7(1)(b) provides that where a policyholder does not have his habitual residence or central administration in the Member State in which the risk is situated, the parties may choose the law either of the Member State in which the risk is situated or of the country in which the policyholder has his habitual residence or central administration. Pursuant to Article 7(1)(d), where Member States grant greater freedom of choice of the law applicable to the contract, the parties may take advantage of this freedom. Most Member States have liberal rules in this regard. Article 5 of the Dutch Conflict of Laws Act refers to the Rome Convention, which means that the liberal rule of Article 3 Rome Convention on the choice of law applies, except for consumer contracts under Article 5.²¹ Article 7(1)(h), as discussed above for large risks, is applicable when no choice of law has been made. Thus, the law of the country, from amongst those considered in the preceding subparagraphs, with which the contract is most closely connected applies, and this is presumed to be the Member State in which the risk is situated.

Article 7(2) of the second Non Life Insurance Directive contains a provision on the application of mandatory rules, or so-called priority rules, similar to Article 7 Rome Convention. It provides that nothing in this article shall restrict the application of mandatory rules of the forum, irrespective of the law otherwise applicable to the contract. Furthermore, if the law of a Member State so stipulates, the mandatory rules of the law of the Member State in which the risk is situated or of the Member State imposing the obligation to take out insurance may be applied if and in so far as, under the law of those States, those rules must be applied whatever the law applicable to the contract. This last exception is implemented differently in the Member States. For example in the Netherlands, a mandatory law of a third country may be applied, whereas the United Kingdom – in conformity with its position under Article 7(1) Rome Convention – does not allow this.²² In addition, Article 8 dealing with compulsory insurance, for [89] example motor vehicle insurance, is relevant in this regard. Article 8(4)(c) provides that a Member State may, by way of derogation from Article 7, lay down that the law applicable to a compulsory insurance contract is the law of the State which imposed the obligation to take out insurance. The implementation laws of the Member States differ in this respect. Article 5(d) of the Dutch Conflict of Laws Act provides that in conformity with Article 8(4)(c) of the second Non Life Insurance Directive, to compulsory insurance the law of the country that imposes the obligation is applicable. The United Kingdom, on the contrary, has not made use of this provision.²³

5.2.2.2 Life Insurance

The rules regarding life insurance contracts are simpler. Some years ago, the existing life insurance directives were consolidated in Directive 2002/83/EC, otherwise referred to as the consolidated Life Assurance Directive.²⁴ The conflict rules laid down in the second and third

²⁰ See for the application in the Netherlands District Court The Hague 15 October 1997, NIPR 1999, no 69.

²¹ For the United Kingdom see Seatzu 2003 (fn. 1), p. 195-196; I. MacNeil, UK Report on the Implementation of the EC Choice of Law Rules for Insurance, in: Frigessi Di Rattalma 2003 (fn. 13), p. 131-150.

²² See for the Netherlands, Article 4(4) Conflict of Laws Act on Life Insurance (*Wet Conflictenrecht Levensverzekering*). See for the United Kingdom, Stone 2006 (fn. 2), p. 327.

²³ See Stone 2006 (fn. 2), p. 327.

²⁴ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, OJ 2002, L 345/1.

Life Assurance Directives²⁵ are now included in Article 32 of the consolidated Life Assurance Directive.²⁶

Article 32(1) of the Life Assurance Directive provides that the law applicable shall be the law of the Member State of the commitment (*i.e.* the habitual residence or establishment of the policyholder). However, where the law of that State so allows, the parties may choose the law of another country. Most Member States, including the Netherlands and the United Kingdom, allow a choice of law.²⁷ The choice of law, however, may be restricted by Article 5 Rome Convention on consumer contracts.²⁸ Furthermore, pursuant to Article 32(2), where the policyholder is a natural person and has his/her habitual residence in a Member State other than that of which he/she is a national, the parties may choose the law of the Member State of which he/she is a national.

In line with Article 7(2) of the second Non Life Insurance Directive and Article 7 Rome Convention, Article 32(4) contains a rule on mandatory rules (priority rules) of the law of the forum and the law of the commitment (but not of other third countries).

5.2.3 Risks Located Outside the Territory of the European Community: Rome Convention

As follows from Article 1(3) and (4), the Rome Convention is applicable where the insured risk is located outside the EU, as well as to contracts of reinsurance. For the determination of the location of the risk the rules of the insurance directives are not directly applicable, but since they are incorporated in the domestic law of the Member [90] States, they will apply as *lex fori*.²⁹ The Rome Convention does not contain a special provision on insurance, thus the general provisions apply.

5.2.3.1 Choice of Law

The main rule of the Rome Convention is that parties can make a choice of law for any law. According to Article 3(1) Rome Convention the choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. Parties can select the law applicable to the whole or to a part only of the contract (so-called *dépeçage*). Parties may choose the applicable law in the insurance contract itself, but may also choose the law later on, or change the applicable law, pursuant to Article 3(2). Any variation by the parties made after the conclusion of the contract shall not adversely affect the rights of third parties.³⁰

Several substantive insurance rules are, under national law, regarded as mandatory, which means parties cannot derogate from these. The Rome Convention contains several relevant provisions in relation to mandatory rules. Article 3(3) provides that where parties have chosen a foreign law, whether or not accompanied by a choice of court or tribunal, where all the other elements relevant to the situation at the time of the choice are connected with one country only, this shall not prejudice the application of the mandatory rules of that country. This rule is also included in Article 7(1)(g) of the second Non Life Insurance Directive.³¹ Furthermore, Article 7

²⁵ Directive 90/619/EEC and Directive 92/96/EEC.

²⁶ See on the (identical) rules of the second and third Life Assurance Directives Seatzu 2003 (fn. 1), p. 165-191.

²⁷ For the Netherlands, see Article 4 Conflict of Laws Act on Life Insurance (*Wet Conflictenrecht Levensverzekering*). For the United Kingdom, see Stone 2006 (fn. 2), p. 328; Seatzu 2003 (fn. 1), p. 195.

²⁸ See also section 2.3.3 below. Article 5 Rome Convention applies through the national implementation laws or through Article 32(5) of the Life Assurance Directive, which stipulates that the Member States, subject to paragraphs 1 to 4, shall apply their general rules of private international law concerning contractual obligations.

²⁹ See e.g. Article 3 of the Dutch Conflict of Laws Act on Non Life Insurance (*Wet Conflictenrecht Schadeverzekering*). See on this issue also Seatzu 2003 (fn. 1), p. 92-93.

³⁰ Seatzu 2003 (fn. 1), p. 96 concludes that the interests of the third party beneficiary of a life insurance contract cannot limit the retroactive effect of a subsequent choice of law, since Article 3(2) only refers to "rights" of third parties, and not to interests of a third party.

³¹ See section 2.2.1 above.

Rome Convention lays down a provision on mandatory rules (priority rules).³² Article 7(2) concerns overriding interests of the forum country. It provides that nothing in this Convention shall restrict the application of mandatory rules, applicable irrespective of the law otherwise applicable to the contract, of the forum country. Article 7(1) makes way for overriding interests of third countries. Effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. Regard shall be had to their nature and purpose and to the consequences of their application or non-application. The application of rules of 'ordre public' of third countries is somewhat controversial, and therefore Article 22(1)(a) allows countries to make a reservation not to apply Article 7(1). Germany, Ireland, Luxembourg, Portugal and the United Kingdom have made use of this reservation. Lastly, the chosen law, in exceptional cases, may be set aside when the rules manifestly are incompatible with the law of the forum, pursuant to Article 16.

5.2.3.2 The Applicable Law in Absence of a Choice of Law – Characteristic Performance

Article 4 Rome applies in a situation where the parties did not make a choice of law. Article 4(1) provides that the law of the country with which it is most closely connected shall govern the contract. Pursuant to Article 4(2), the contract is presumed to be [91] most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence or central administration. It is usually assumed that this is the habitual residence of the insurer.³³ This rule differs from the insurance directives, where the place of the insured risk or the habitual residence of the policyholder is mostly decisive. Article 4(5) provides that paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. This rule, for example, can be applied to co-insurance contracts.³⁴

5.2.3.3 Consumer Contracts

In a situation where the insurance contract is between a company and a natural person, for a purpose outside his trade or profession, and is concluded under one of the circumstances of Article 5(2) Rome Convention, the conflicts rule of Article 5 applies. According to Article 5(2) the insurance contract is only governed by the special rules of this provision in two situations. First, if the conclusion of the contract in the consumer's country was preceded by a specific invitation addressed to him or by advertising, and he had taken all the necessary steps on his part for the conclusion of the contract in that country. Second, if the insurer or his agent received the consumer's order in the country of the habitual residence of the consumer.

According to Article 5(2) a choice of law in an insurance contract governed by this article, has a limited effect, since it will not deprive the consumer (policyholder, insured) of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence. In absence of a choice of law, the law of the consumer's habitual residence, pursuant to Article 5(3), governs the contract.

³² See on this provision Stone 2006 (fn. 2), p. 308-311.

³³ See also Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde, OJ 1980, C 282/1, comment 3 on Article 4 (see also <<http://www.rome-convention.org>>). See also for the Netherlands District Court Rotterdam, 19 November 2003, NIPR 2004, no 248. This rule is sometimes questioned, see Seatzu 2003 (fn. 1), p. 103-104.

³⁴ As discussed in relation to Article 3, the law applicable pursuant to Article 4, also can be set aside by mandatory (priority) rules of the forum state or (unless the forum state made a reservation) a third country (Article 7), or when it manifestly contradicts public policy (Article 16).

5.3 Desirability and Necessity of a New Conflict of Laws System for Insurance Contracts

As the overview provided above shows, the system of conflict of laws in regard of insurance contracts is complicated. The division between risks located within the EU and risks located outside the EU, which results either in the application of the directives or the Rome Convention, can be explained from an historical point of view, but is not justifiable.³⁵ Besides the application of the EU directives or the Rome Convention based upon the location of the risk, a third situation may occur, *i.e.* where the risk is located [92] within the EU, but the insurer is established outside the EU. In this situation, national conflict of law rules apply.³⁶

The application of different regimes of conflict rules in the first place results in a lack of transparency, as has also often been remarked in the replies to the 2003 Green Paper on Rome I.³⁷ The conflict rules of the directives on the one hand, and the Rome Convention on the other hand, are not consistent. Insurance contracts are categorized differently. The directives make a distinction between life and non life insurance, and within non life insurance between large risks and mass risks. In the Rome Convention a distinction is made between consumer contracts and other (commercial) contracts. These different distinctions have important consequences for the applicable law and especially for the question whether or not a choice of law is possible. Apart from these different distinctions, also the connecting factors used in the insurance directives and Rome Convention diverge, with different outcomes for the applicable law as a result. Furthermore, because of this multiplicity of regimes some rules, for example those relating to the conditions for a choice of law or priority rules, are unnecessarily duplicated.³⁸

Apart from this diversity of sources, the conflict rules laid down in the various insurance directives are complex and unsystematic, especially those concerning non life insurance. These rules at the least need consolidation. Further, the directives at several points give the Member States freedom with regard to the implementation of the rules, and this has resulted in differences in the conflict of law rules. This is not in the interests of the internal market. It is not justifiable that there are harmonized rules for contracts in general as well as for special contracts, such as consumer and employment contracts, but not for insurance contracts. Furthermore, this is not consistent with the situation of the Brussels I Regulation, which does include special jurisdiction rules for insurance contracts.

In my opinion, this calls for the inclusion of insurance contracts in the Rome I Regulation. The next section will discuss the Rome I proposal as well as the developments that have taken place since the Commission proposal was put forward.

5.4 The Rome I Proposal on the Law Applicable to Contractual Obligations

5.4.1 From Convention to Regulation

The Rome Convention was drafted in the 1970's and 80's and has been in force since 1991. The modernization of the Rome Convention became an issue after the coming into force of the Treaty of Amsterdam in 1999. This Treaty moved "judicial cooperation in civil matters" from the third to the first pillar. Article 61(c) EC Treaty states that in order to establish progressively

³⁵ Cf. Max Planck Institute for Foreign Private and Private International law, Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and its Modernization, p. 26-27.

³⁶ See also section 2.2 above. See also the Green Paper (fn. 4), p. 21.

³⁷ These replies are published on the website of the European Commission, see <http://ec.europa.eu/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm> - Replies to the Commission's ROME I Green Paper (COM(2002)654 final).

³⁸ See also C.A. Joustra, Het voorstel voor een Rome-I-Verordening: een nieuwe kans voor het ipr voor verzekeringsovereenkomsten...?, *Nederlands Tijdschrift voor Handelsrecht* 2006, p. 135.

an area of freedom, security and justice, the Council has to adopt measures in the field of judicial cooperation in civil matters, as provided for in Article 65. This includes a list of measures concerning aspects of private international and procedural law. Article 65(b) provides for measures concerning the conflict [93] of laws. Following the conversion of the Brussels Convention into the Brussels Regulation in 2002, the conversion of the Rome Convention into a regulation was put on the agenda.

5.4.2 *The Green Paper on Rome I: a New Conflicts System for Insurance Contracts?*

In January 2003 the Commission put forward the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.³⁹ The purpose was to launch a wide-ranging consultation on a number of issues regarding the conversion and the modernisation of the rules. The Green Paper generated over eighty responses, which are published on the website of the European Commission.⁴⁰

For insurance contracts, the Commission distinguished the three situations, as set out above: a) the risk is located outside the territory of the EU (Rome Convention applies); b) the risk is located in the EU and is covered by an insurer established in the Community (the insurance directives apply); c) the risk is located in the EU and is covered by an insurer not established in the Community (national conflict of law rules apply). The Commission remarked that the current situation has been criticised by private international law specialists, in particular because “it is not strictly compatible with the concern for transparency in Community law”.⁴¹ The question is raised whether situation a), in which the insurer’s law applies by virtue of the Rome Convention, is in line with the general aim, also described in the Brussels I Regulation, of ensuring a high level of protection where the policyholder is a private individual.

The Commission presented three possible solutions for insurance contracts. These are i) to incorporate a special rule on insurance in Rome I, applicable for risks located outside the EU, ii) to improve the transparency of Community legislation by incorporating the special insurance rules of the directives in Rome I, iii) to improve the transparency by giving a regular update in the annex of Rome I on the sectoral instruments.⁴² The most far-reaching – and in my opinion most preferred – solution is the one presented under ii). However, the Commission pointed out that this is not necessarily the appropriate legislative technique for rules concerning insurance, since when drafting the insurance directives, the Community legislature wished to leave the Member States some room for manoeuvre regarding the connecting factors, and this is not compatible with a regulation.⁴³

Question 7 of the consultation concerned insurance contracts and reads as follows: “How do you evaluate the current rules on insurance? Do you think that the current treatment of hypotheses (a) and (c) is satisfactory? How would you recommend resolving the difficulties that have been met (if any)?” The majority of the responses from the governments (eight in total) indicate that the current situation is not satisfactory, since it is not transparent.⁴⁴ Several Member States pleaded for the inclusion of insurance [94] rules in Rome I.⁴⁵ Also the European Economic and Social Committee clearly indicated to be in favour of including a special rule on insurance

³⁹ See fn. 4.

⁴⁰ See fn. 37.

⁴¹ Green Paper (fn. 4), p. 21.

⁴² Green Paper (fn. 4), p. 22.

⁴³ Furthermore, the Commission pointed out that most Member States, responding to the Commission’s work on insurance and electronic commerce, expressed their wish not to incorporate conflict rules in the Rome Convention or its successor. See Green Paper (fn. 4), p. 22.

⁴⁴ See the responses on the Commission’s website, fn. 37. Especially Germany, the Netherlands, Norway and Finland stress that the current system is not satisfactory.

⁴⁵ In particular Germany and the Netherlands are in favour of this solution.

in the Regulation, covering all insurance policies, regardless of the location of the risk.⁴⁶ Most responses by business representatives, consumer organizations, as well as legal practitioners and academics that specifically deal with the question relating to insurance contracts, also stressed the need for clear and more uniform rules.⁴⁷

5.4.3 The Commission Proposal for a Rome I Regulation

The Commission adopted its proposal for a Regulation on the law applicable to contractual obligations (Rome I) on 15 December 2005.⁴⁸ The improvement of the situation regarding contracts proposed by the Commission, in my view, is disappointing. It has received a lot of criticism on the part of insurance contracts, as has the proposal on a whole.⁴⁹ The United Kingdom already at the outset of the negotiations informed that it does not want to opt in to the future regulation.⁵⁰ It would be a big loss if the United Kingdom does not join Rome I, especially in relation to insurance contracts, since the United Kingdom is an important player on the European insurance market.

5.4.3.1 Outline of the Commission Proposal in Relation to Insurance Contracts

This section will only briefly outline the Commission proposal, since during the Council negotiations substantial amendments have been suggested (to be discussed in sections 4.4 and 4.5).⁵¹

Under the Commission proposal, the position of insurance contracts remains the same. The exclusion of insurance contracts relating to risks located within the EU as laid down in Article 1(3) Rome Convention, is abandoned in Article 1 of the Rome I proposal. However, Article 22(a) states that this Regulation shall not prejudice the application or adoption of acts of the institutions of the European Communities which in relation to particular matters, lay down choice of law rules relating to contractual obli[95]gations; a list of such acts currently in force is provided in Annex 1. This annex includes the relevant insurance directives, as discussed in section 2.2 above.⁵²

← Met opmaak:
opsommingstekens en
nummering

⁴⁶ Opinion of the European Economic and Social Committee on the 'Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation', OJ 2004, C 108/1, p. 20.

⁴⁷ See for example the replies by the International Chamber of Commerce, The European Consumers' Organisation, the Bar Council of England and Wales and The Max Planck Institute for Foreign and Private International Law.

⁴⁸ Rome I proposal, see fn. 3.

⁴⁹ See on insurance contracts Max Planck Institute for Comparative and International Private Law, Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), *RebelsZ* 2007, p. 277-281, also published on the website of the MPI (including all commentaries on Rome I), see <<http://www.mpipriv.de>>; A. Staudinger, Internationales Versicherungsvertragsrecht – (k)ein Thema für Rom I?, in: F. Ferrari & S. Leible (eds.), *Ein neues Internationales Vertragsrecht für Europa*, Jena: Jenaer Wissenschaftliche Verlagsgesellschaft 2007; Joustra 2006 (fn. 38), p. 130-137; P. Mankowski, Der Vorschlag für die Rome I-Verordnung, *IPRax* 2006, p. 101.

⁵⁰ Pursuant to its special position in regard of Title IV of the EC Treaty; also Ireland and Denmark have the option not to adhere the PIL regulations. The UK did opt in to all other PIL Regulations. See on the UK position O. Lando & P.A. Nielsen, The Rome I Proposal, *Journal of Private International Law* 2006, p. 46; S. James, Rome I – The uncertainty remains - Why the continuing negotiations on Rome I matters to English lawyers, *Journal of International Banking and Financial Law* 2007, p. 256-257.

⁵¹ See on this proposal *i.a.*: Lando & Nielsen 2007 (fn. 50), p. 29-51; Max Planck Institute 2007 (fn. 49), p. 225-344; Mankowski 2006 (fn. 49), p. 101-113; S.F.G. Rammeloo, *Via Romana*. Van EVO naar Rome I–Nieuw Europees IPR inzake het recht dat van toepassing is op verbintenissen uit overeenkomst, *NIPR* 2006, p. 239-253.

⁵² By mistake refers to the old (second and third) directives on life insurance, instead of on the consolidated Life Assurance Directive of 2002.

Also relevant for insurance contracts are the proposed amendments to Article 3, 4 and 5.⁵³ The Commission proposal adds a phrase to Article 3(1), stating that a choice of court is a presumption that parties also made a choice of law. The proposed Article 3(2) implies that parties may choose internationally recognized principles, such as the UNIDROIT principles as the applicable law, but not the *lex mercatoria*.⁵⁴ These changes however, are abandoned in the Council text. In Article 4 the general principle of the closest connection and the presumptions are abolished and replaced by a catalogue of fixed connecting factors for eight specified contracts. The background of this amendment is to make the conflict rules as precise and foreseeable as possible.⁵⁵ The insurance contract would be governed by Article 4(1)(b) for the contract for the provision of services, and is consequently governed by the law of the country in which the insurer has his habitual residence. Unlike under the Rome Convention, this is a fixed rule and not a presumption. This rigid rule has however received a lot of criticism as well. In the Council text, this rule is relaxed; it states that where another law is manifestly more closely connected with the law of another country, the law of that country shall apply. Lastly, the scope of Article 5 for consumer contracts is broadened and its application is simplified by completely excluding the possibility of a choice of law. This provision is however still subject to amendments by the Council and Parliament.

5.4.3.2 Criticism on the Lack of a Provision on Insurance Contracts and Further Initiatives

As mentioned before, the Commission proposal received severe criticism and is being intensively negotiated in the Council and the Parliament. In regard of insurance contracts, especially the criticism of the European Economic and Social Committee (EESC) and the efforts of the Max Planck Institute on Foreign Private and Private International Law (Hamburg) in this regard are worth mentioning.⁵⁶ The EESC remarked in relation to insurance contracts that “a golden opportunity to simplify and harmonise conflict-of-law rules and to solve problems in the relevant area is being squandered”.⁵⁷ The Committee rightfully points out that insurance contracts covering risks located within the EU are (or actually: should be) within the scope of the regulation and that there is no objective reason to treat insurance contracts different from other contracts. For the sake of legal consistency, a comprehensive approach superseding special rules would be desirable and the different treatment of risks inside and outside the EU should therefore be abolished, according to the EESC.

The Max Planck Institute published its extensive comments on the Rome I proposal in 2006, after intensive discussions of its established working group on Rome I held in [96] the first half of 2006, and was therefore one of the front runners.⁵⁸ The Institute has proposed Article 5a on insurance contracts, which provides as follows:⁵⁹

1. The law applicable to the insurance contract shall be the law of the country in which the policyholder has his habitual residence or central administration at the time of the conclusion of the contract.
2. The parties to the contract of insurance may choose

⁵³ See also section 2.3 above

⁵⁴ Commission Proposal (fn. 3), Explanatory Memorandum, p. 5.

⁵⁵ Commission Proposal (fn. 3), Explanatory Memorandum, p. 5.

⁵⁶ See also fn. 49 for other critical discussions regarding the position of insurance contracts. Many Member States have also been active in this regard, however, the statements of the individual Member States are not (yet) publicly available in the Council's register.

⁵⁷ Opinion of the European Economic and Social Committee on the Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), OJ 2006, C 318/56, p. 61.

⁵⁸ See fn. 49.

⁵⁹ See fn. 49, p. 47-50 of the electronic version.

- (a) the law of the country in which the risk or part of it is situated in accordance with the internal law of the forum;
 - (b) in case of an insurance contract limited to events occurring in a given State, the law of that State;
 - (c) in life insurance contracts, the law of a country of which the policyholder is a national;
 - (d) in travel or holiday insurance of a duration of six months or less, the law of the country where the policyholder took out the policy.
3. The law applicable to a compulsory insurance contract is the law of the country which imposes the obligation to take out insurance.
4. The rules set out in paragraphs 1 and 2 of this Article do not apply to re-insurance and to the insurance of large risks as defined in Council Directive 73/239/EEC as amended by Council Directives 88/357/EEC and 90/618/EEC, as they may be amended.

This interesting proposal essentially consolidates the existing rules, while abolishing some of the complex rules of the directives. I will limit myself to three short comments on this proposal. First, paragraphs 1 and 2 apply to all non-large risks (medium and small risks, or mass risks). For these the Institute proposes an approach similar to that of Article 7 of the second Non Life Insurance Directive as well as consumer contracts under Article 5 Rome Convention, *i.e.* application of the habitual residence or central administration of the policyholder. The question is, however, whether for professional parties this rule is most appropriate. Secondly, more in general the question is whether the subject-related connecting factor of the place of the risk is not more appropriate than the habitual residence of the policyholder, though it must be submitted that in most cases these places will coincide. Thirdly, paragraph 4 excludes large risks, within the meaning of the first and second Non Life Insurance Directives. To these risks, one may assume, the general rules of Article 3 and 4 Rome Convention will apply. This implies an unlimited possibility to choose the law, and application of the law of the insurer in absence of a choice of law. In my opinion, it would be more comprehensible to include explicit rules on large risks and reinsurance contracts in this special provision so that it covers all insurance contracts.

5.4.4 *The Amended Text of the Commission Proposal: a New Provision on Insurance Contracts*

The criticism on the Commission proposal has led to intensive negotiations in the Council and the Parliament on virtually all provisions of the proposed Rome I Regulation. As for insurance, in October 2006 a provisional version of a new article, Article 5a, was included in a footnote.⁶⁰ To a certain extent, this resembles the proposal by the Max Planck Institute, discussed in the previous section. In several following Council texts, Article 5a got a permanent position, but its content has been amended several times, and different options have been presented.⁶¹ Delegates are very active in regard of insurance contracts, as the number of documents in the council register concerning comments of the Member States on Article 5a show.⁶² The United Kingdom, in spite of its announcement to opt out on Rome I, even launched a consultation for stakeholders on insurance in Rome I in March 2007.⁶³

⁶⁰ Council of the European Union, Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I), 12 October 2006, no 13853/06 JUSTCIV 224 CODEC 1085.

⁶¹ See e.g. Council, 12 December 2006, no 16353/06, JUSTCIV 276, CODEC 1485 and 4 May 2007, no 8935/07, JUSTCIV 110, CODEC 421. Many documents exclusively concern insurance contracts.

⁶² These are, however, not publicly available, see also previous footnote.

⁶³ HM Treasury and Department for Constitutional Affairs, Insurance in Rome I. A consultation, March 2007, available at <<http://www.hm-treasury.gov.uk/>> (consultation & legislation). The responses are not (yet) published.

In April 2007, the German presidency presented a compromise package, amongst others on Article 3 and 4, but this does not include Article 5a on insurance contracts.⁶⁴ The most recent publicly accessible document from the Council dates from 25 June 2007; in this text Article 5a on insurance is still in brackets.⁶⁵ Insurance contracts were most recently discussed on a meeting of 10 October 2007, but no agreement has yet been reached on this provision.⁶⁶

Article 5a of this Council text reads as follows:

1. An insurance contract covering a large risk within the meaning of paragraph 1a and a reinsurance contract shall be governed by the law of the country in which the insurer or re-insurer has his habitual residence, unless the applicable law has been chosen in accordance with Article 3.

1a. Large risks within the meaning of paragraph 1 are those risks enumerated in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance (other than life assurance). This shall also apply when such risks are situated in a third country.

2. An insurance contract covering a risk for which a country imposes compulsory insurance shall be governed by the law of that country.

If this country, in the case of a contract covering a risk within the meaning of paragraph 1, grants a free choice of the law applicable to the contract, the parties may choose any law in accordance with the provisions of Article 3 and, irrespective of the law chosen, must comply with the provisions of the law of this country which cannot be derogated from by agreement.

3. An insurance contract which is not subject to paragraphs 1 or 2 shall be governed by the law of the country where the risk is situated at the time of the conclusion of the contract.

The parties may choose as the law applicable to the insurance contract in accordance with Article 3:

[98] (a) the law of any country where the risk is situated at the time of the conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) [in the case of a life insurance,] the law of the country of which the policy holder is a national, if the policy holder is a natural person and if, at the time of the conclusion of the contract, he has his habitual residence in a country other than that of which he is a national;

[(d) for an insurance contract limited to events occurring in one country, the law of that country].

3a. For the purposes of (...) paragraph 2 and of paragraph 3, first subparagraph, where the insurance contract covers risks situated in more than one country, the contract shall be considered as constituting several contracts each relating to only one country.

4. (...)⁶⁷

5. The country in which the risk is situated is

a) for insurance of risks associated with immovable property, particularly buildings and facilities as well as the property located therein which are covered by the same insurance contract, the country in which such property is situated;

b) for insurance of risks associated with vehicles of all types which are subject to entry in an official or officially recognised register and to which a distinguishing sign is attached, the country of registration;

c) for insurance of travel or holiday risks in insurance contracts with an effective term of a maximum of four months, the country in which the policy holder took out the policy;

d) in all other cases, the country in which the policy holder (...) has his habitual residence.]

Footnotes to this text provide some further guidelines. The first footnote indicates that the text of Article 32 of the consolidated Life Assurance Directive, Article 5(d) of the first Non Life Insurance Directive and Articles 2, 7 and 8 of the second Non Life Insurance Directive, as amended, have served as a model for large parts of Article 5a. These have been outlined in section 2.2 above. As to paragraph 2, it is noted this rule implements Article 8 of the second

⁶⁴ Council, 13 April 2007, no 8022/07, JUSTCIV 73, CODEC 306.

⁶⁵ Council, 25 June 2007, no 11150/07, JUSTCIV 175, CODEC 716, 25 June 2007.

⁶⁶ Council document no 13441/07, JUSTCIV 249, CODEC 1018 of 4 October 2007 is not yet publicly available.

⁶⁷ The contents of this paragraph, included in previous Council texts, moved to paragraph 1a.

Non Life Insurance Directive⁶⁸, and it should be specified that, whatever the law applicable to the contract, the content of the compulsory insurance must meet the conditions set out by the law of the country whose law imposes the obligation to take out insurance.⁶⁹ In regard of paragraph 3(a) it is noted that a recital could indicate that this provision covers both cases where the insurance contract covers a risk situated in only one country and cases where it covers risks situated in more than one country. A point of consideration is whether in paragraph 3(d) it should be specified that it only applies when the events occur in a country other than that where the risk is situated.

As has been remarked in the Introduction, in September 2007 at a meeting of the European Parliament's JURI Committee a new set of compromise amendments to the Commission proposal was presented, in order to prepare a final text of the report for [99] the plenary session of the European Parliament.⁷⁰ This includes a provision on insurance contracts that is almost identical to the Council text. The only difference on the contents is that the addition of the phrase "if the policyholder is a natural person" in paragraph 3(c) is missing in the Parliament's text.⁷¹ This, however, might be a mistake, since this rule is taken from Article 32(2) and that provision does include the requirement that the policyholder is a natural person.

At this moment, it is not clear whether Article 5a as currently under deliberation will be part of the final Rome I Regulation.⁷² Some countries, in particular the United Kingdom, have problems with the inclusion of insurance contracts in Rome I, or with the current proposal. As was noted in the Introduction, the forecast is that the Council will reach a political agreement on the common position by the end of this year, and that the Parliament's vote at first reading will take place at the beginning of 2008.⁷³

5.4.5 *Analyses and Evaluation of the Proposed Provision on Insurance Contracts*

The approach that has been taken is to integrate the insurance directives in the Rome Convention and to provide a uniform conflict of laws system both for risks located outside and risks inside the EU. Consequently, the conflict rules included in the insurance directives will become abundant. In view of the 'universal' territorial scope of Rome I, the same goes for the national conflict of law rules, largely based on these directives. The triple system that currently characterizes and complicates the conflict of laws on insurance contracts in Europe will then belong to the past. The complex rules of the insurance directives are not plainly duplicated, but simplified and as far as possible brought into line with the existing Rome framework.

What is the main conflicts rule? Three corner stones can be distinguished. First, the law chosen by the parties. The extent to which a choice of law is allowed, depends upon the type of risk. As in the insurance directives, a distinction is made between large risks, and other (medium and small, or mass) risks. The second corner stone is the law of the habitual residence of the insurer. The third is the law of the country where the risk is situated. Whether the connecting factor of the habitual residence of the insurer or the situation of the risk applies, also depends upon the type of risk. An exception to this system is made for contracts regarding compulsory insurance.

The conflict of laws system can be outlined as follows. Three types of insurance contracts are distinguishable: 1) contracts related to large risks as well as reinsurance contracts; 2) contracts related to compulsory insurance; and 3) contracts related to all other (medium or small) risks. Large risks and reinsurance are regulated in Article 5a(1) and (1a) of the Council

⁶⁸ See section 2.2.1 above.

⁶⁹ See also Article 8(2) and (3) of the second Non Life Insurance Directive.

⁷⁰ See fn. 7.

⁷¹ In the Parliament's text this is paragraph 4 (continuous numbering from 1 to 6).

⁷² Probably either as Article 6 or 7 (dependent on the position of the proposed provision on the carriage of goods).

⁷³ See the Legislative Observatory: <<http://www.europarl.europa.eu/oeil/file.jsp?id=5301232>>.

text, compulsory insurance in Article 5a(2) and all other risks in Article 5a(3-5). For the first category, the chosen law and the law of the habitual residence are decisive, for the second the law of the country that imposes the obligation, unless that country allows a choice of law, and for the third type of contract the law of the country where the risk is situated, provided limited options for a choice of law.

A large risk is defined according to Article 5(d) of the first Non Life Insurance Directive (as amended by the second Non Life Insurance Directive), pursuant to Article 5a(1a) of the Council working text.⁷⁴ Article 5a(1) of [100] the Council text provides that an insurance contract covering a large risk as well as a reinsurance contract shall be governed by the law of the country in which the insurer or reinsurer has his habitual residence, unless the applicable law has been chosen in accordance with Article 3. The reason that reinsurance contracts, which are also already included in the Rome Convention, are put on the same footing as large risks is that all parties involved in these contracts are professional parties. Thus, for large risks and reinsurance contracts the main rule is that parties have freedom to choose the applicable law, in accordance with Article 3. In the Council text of Rome I, Article 3 stays largely the same as it is under the Rome Convention, which means parties have an almost unlimited freedom to choose any law they want.⁷⁵ Where the law has not been chosen, the law of the habitual residence of the insurer applies. Under the second Non Life Insurance Directive (Article 7(1)(h) thereof) this is the law with which the contract is most closely connected.⁷⁶ This is presumed to be the law of the Member State where the risk is situated. Article 5a would therefore mean a substantial change to the conflict rules, though it is submitted that in virtually all cases involving large risks parties will make a choice of law. The rule included in Article 5a is in line with Article 4 Rome Convention, which refers to the law of the characteristic performer (the insurer)⁷⁷, as well as Article 4 of the Rome I proposal, where the characteristic performers are identified per type of contract.⁷⁸

Compulsory insurance is dealt with in Article 5a(2) of the Council text. It provides that an insurance contract covering a risk for which a country imposes compulsory insurance shall be governed by the law of that country. This rule is derived from Article 8(4)(c) of the second Non Life Insurance Directive. In the Directive, this rule is not compulsory and thus Member States are free to implement this rule or not.⁷⁹ Previous Council texts did not give the Member States freedom in this regard. Since several Member States found this rule too rigid, by way of compromise the second part of paragraph 2 was added. If it concerns a large risk and the country that imposes the compulsory insurance grants a free choice of law applicable to the contract, parties may choose the applicable law. They, however, must comply with the provisions of the law of that country which cannot be derogated from (mandatory or priority rules).

The last category consists of medium and small sized risks, other than compulsory insurance. According to Article 5a(3) these shall be governed by the law of the country where the risk is situated at the time of the conclusion of the contract. The place where the risk is situated also plays an important role under the insurance directives and is a natural connecting factor for insurance contracts. The place where the risk is situated is described in paragraph 5. For immovable property this is the country where it is situated, for motor vehicles the country of registration, for travel or holiday risks for a maximum of four months the country in which the policyholder took out the insurance, and in all other cases, the country in which the policyholder has his habitual residence.⁸⁰ Parties have a limited possibility to make a choice of law. According to sub (a), they can choose the law of any country where the risk is situated at the

⁷⁴ Discussed in section 2.2.1 above.

⁷⁵ Discussed in section 2.2.2 above. See also section 4.3 above for the original Commission proposal.

⁷⁶ See section 2.2.1 above.

⁷⁷ See also section 2.3.2 above.

⁷⁸ E.g. the seller, franchisee, distributor.

⁷⁹ See section 2.2.1 above.

⁸⁰ See also Article 2(d) second Non Life Insurance Directive, mentioned in section 2.1 above.

time of the [101] conclusion of the contract. It is noted that this provision covers both cases where the insurance contracts covers a risk situated in only one and cases where it covers risks situated in more than one country.⁸¹ Sub (b) provides that parties may also choose the law of the country where the policyholder has his habitual residence. Sub (a) and (b) are derived from Article 7(1)(a) and (b) of the second Non Life Insurance Directive.⁸² Sub (c) states that in the case of a life insurance the law of the nationality of the policyholder may be chosen, provided he is a natural person and has habitual residence in another country than that of which he is a national. This coincides with Article 32(2) of the consolidated Life Assurance Directive.⁸³ Sub (d) provides that for events occurring in one country, the law of that country may be chosen. A footnote specifies that this only applies when the events occur in a country other than that where the risk is situated. Compared to the current situation under the insurance directives, the possibility to make a choice of law for these risks may be reduced, dependant upon the Member State involved. Article 7(1)(a) and (d) of the second Non Life Insurance Directive and Article 32(1) of the consolidated Life Assurance Directive provide that a Member State may allow a greater freedom to choose the law than is granted under the relevant provisions of the directive. Many Member States made use of this possibility.⁸⁴ For consumer contracts a limitation, or even full exclusion of the possibility to choose the applicable law, as is provided for in Article 5 of the Rome I proposal, is desirable. For contracts where a professional party is involved, this limitation of the freedom to choose law, however, is less appropriate. It is inconsistent with the current rules under the insurance directives as well as the basis of the Rome Convention, consisting of the freedom of choice for contracts. It will actually render part of the currently used choice of law rules in practice null and void, especially those where the law of the insurer has been selected. It is submitted that also a choice of court for other than large risks is excluded under the Brussels I Regulation⁸⁵, but the differences between Brussels I and Rome I in this regard may lead to a difference between the competent court and the applicable law anyway. In order to be consistent with the insurance directives and the system of the Rome Convention, a more appropriate rule would be that parties can make a choice of law in accordance with Article 3, except when the policyholder is a natural person and the insurance is for a purpose which can be regarded as being outside his trade or profession (*cf.* Article 5). For life insurance where the policyholder is a natural person, a special provision should indicate that a choice of law of the country of which he is a national is nevertheless allowed (*cf.* Article 5a(3)(c) proposal).

With this proposal, the Council has attempted to integrate the insurance directives in the Rome Convention. The overview provided in this section shows that this is not an easy task. Some of the rules of the insurance directives are hard to grasp, and it is even harder to simplify them and bring them into line with the general scheme of the Rome Convention. Nevertheless, the current proposal for the greatest part seems to succeed in its aim. The provision is still complex, but it is better than the current conflict of laws system. At this point, the only serious objection relates to the limitation of [102] the choice of law for risks other than large risks as far as professional parties are involved, as explained above.

5.5 Concluding remarks

Grey mist has surrounded the conflict rules on insurance contracts as a result of their being included in the insurance directives without being carefully thought through. This has led to an

⁸¹ See also section 4.4. above.

⁸² See section 2.2.1 above.

⁸³ See section 2.2.2 above.

⁸⁴ See section 2.2.1 and 2.2.2 above.

⁸⁵ Unless it is entered into after the dispute has arisen, or it allows the policyholder, insured or beneficiary to bring proceedings in another court, or where policyholder and insured are habitually resident in the same Member State and conferred jurisdiction upon a court of that Member State, or where the policyholder is not domiciled in a Member State. See Article 14 Brussels I Regulation.

unsystematic and incoherent structure of insurance conflict rules, scattered over various directives, the Rome Convention and national law. Even for a private international law specialist these rules require effort and time to fully understand.

The Rome I proposal was an excellent opportunity to get rid of this puzzlement and to formulate uniform conflict rules for insurance contracts. The Commission unfortunately has not taken the challenge. However, during the negotiations on the proposal initiatives have been employed to bring about uniform conflict rules for insurance contracts. Though the current Council proposal contains compromises, has some shortcomings and still does not stand out in simplicity, including this rule would certainly be an improvement compared to the current situation.