

The New European Conflict of Law Rules on Insurance Contracts in Rome I: A Complex Compromise

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1. Introduction¹

Despite many European directives and regulations on insurance², as well as a project on the formulation of principles of European insurance contract law³, the substantive laws on insurance matters still differ considerably within the European Union. Conflict of law rules are therefore still crucial, especially since the insurance market in European countries has internationalised rapidly over the past decade. Moreover, also in cases where [24] non-European parties are involved, or the insured risk is situated outside the EU, conflict rules are necessary to establish the applicable law. Both for the purpose of international jurisdiction and for the applicable law, insurance matters are regarded as a distinct category in European private international law.⁴ 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.⁵ In contrast, the conflict of law rules for insurance contracts in Europe are notorious for their complexity. Firstly, this complexity is inherent to the multiplicity of sources. The conflict of law rules are currently scattered over several insurance directives and the Rome Convention on the Law Applicable to Contractual Obligations of 1980. Whether the directives or the Rome Convention applies depends on the location of the insured risk. Situations even exist in which neither the insurance directives nor the Rome Convention applies, and in these cases, national conflict rules apply. Secondly, the conflict rules laid down

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¹ This article is partly based on and builds upon an earlier article of the author: ‘Conflict of Laws on Insurance Contracts in Europe. The Rome I proposal – Towards Uniform Conflict Rules for Insurance Contracts?’, in: M.L. Hendrikse & J.G.J. Rinkes, *Insurance and Europe*, Zutphen: Uitgeverij Paris 2007, chapter 5, p. 85-102, also published on SSRN at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1122244.

² There are in fact about forty EU directives and regulations relating to insurance matters. However, these mainly relate to the supervision of insurance companies, competition, liability insurance for motor vehicles, credit insurance policies, and insurance brokers.

³ For the principles and further information on the Group on the Restatement of European Insurance Contract Law, see <http://www.restatement.info>. See also H. Heiss, *Principles of European Insurance Contract Law*, in: Hendrikse & Rinkes (see fn. 1), chapter 2, p. 41-59.

⁴ The most comprehensive book on private international law and insurance is: F. Seatzu, *Insurance in Private International Law: A European Perspective*, Oxford-Portland Oregon: Hart Publishing 2003.

⁵ 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 either to his own court or to 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 for refusal of recognition and enforcement (see Article 35). See Seatzu 2003 (fn. 4), 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 verzekeringzaken. Nieuwe ontwikkelingen, Verzekeringssarchieff (VA) 2006*, p. 110-117.

in the insurance directives are excessively complex. Thirdly, these directives leave room for varied implementation. Consequently, the conflict rules are not uniform throughout the Member States.

However, an important development that should improve the current state of affairs is the bringing about of the Rome I Regulation on the Law Applicable to Contractual Obligations, which will replace the Rome Convention. Regulation No 593/2008 was adopted on 17 June 2008⁶, after several years of intensive negotiations and occasionally heated debates. As of 17 December 2009, it will replace the Rome Convention for contracts concluded after this date (see Articles 28 and 29). The Rome I Regulation includes new conflict of law rules for insurance contracts in Article 7. This provision was discussed vehemently and for a long time it was not even sure whether it would be included at all. The Commission proposal of 15 December 2005⁷ did not include a provision on insurance contracts, though most respondents to the consultation launched by the preceding Green Paper of 2003⁸ considered that the current conflict rules for insurance contracts were unsatisfactory. This new rule will be applicable to most insurance contracts and will replace the conflict rules included in the various insurance directives.

[25] This contribution will focus on the new conflict rules for insurance contracts, as laid down in Article 7 Rome I. Firstly, the current system of the conflict of laws on insurance is presented in order to illustrate its complexity; these rules also served as the basis for and are partly incorporated in the new rule of Rome I. Secondly, the coming about of the Rome I Regulation and the difficulties in relation to insurance matters is discussed. Thirdly, the new conflict of law rules for insurance contracts provided in Article 7 Rome I are analysed. The question is whether the new rules are less complex than the current ones and whether they are not primarily the result of a compromise, with hardly any improvement to the contents.

2. The Current Conflicts System in Relation to Insurance Contracts

2.1 Diversity of Sources Depending on the Location of the Insured Risk

Under the current conflict of laws system, three situations are to be distinguished. The first is that the insured risk is located within the EU and is covered by an insurer established in the Community. In this situation, the relevant insurance directives apply, which include several conflict of law rules. The scope of these directives is limited to this situation, since their aim is to regulate the European insurance market. In the second situation, the insured risk is located outside the territory of the EU. In this instance, the general conflict rules of the Rome Convention apply. This can also be derived from Article 1(3) and (4) of the Rome Convention, which provide that this Convention does not apply to insurance contracts, other than reinsurance, covering risks situated within the European Community. In the third situation, the risk is located in the EU and is covered by an insurer not established in the Community. In this uncommon instance, national conflict rules of the Member States apply.

⁶ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), *O.J.* 2008, L 177/6.

⁷ Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I), COM(2005) 650 final, 15 December 2005.

⁸ 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.

With regard to non-life insurance, the location of the risk is regulated by Directive 88/357/EEC, referred to as the second Non-Life Insurance Directive.⁹ 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 the case of a legal person, his establishment. If the insurance policy relates to buildings, it is the Member State in which the building is situated. For motor vehicle insurance, the risk is located in the Member State in which the vehicle is registered. In the event the insurance policy covers travel or holiday risks for a maximum period of four months, the risk is located in the Member State in which the policyholder took out the policy. From Article 1(1g) of Directive 2002/83/EC on Life Assurance (consolidated Life Assurance Directive), it follows that for determining the place of the life insurance risk, the habitual residence or establishment of the policyholder is decisive.¹⁰

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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 as long as the insurer is established in the EU. These rules leave room for varied implementation, and consequently the conflict rules are not the same in the EU Member States.¹¹ In the Netherlands, for example, 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*).¹² In the United Kingdom, the directives were implemented by a series of statutory instruments, which added a new section and a new schedule to the Insurance Companies Act 1982.¹³

2.2.1 Rules Relating to Non-Life Insurance

For the conflict rules relating to non-life insurance, the second Non-Life Insurance Directive as amended by Directive 92/49/EEC (third Non-Life Insurance Directive) is especially relevant.¹⁴

⁹ 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, *O.J.* 1988, L 172/1.

¹⁰ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, *O.J.* 2002, L 345/1.

¹¹ For an overview of the implementation in Belgium, France, Germany, Italy, the Netherlands, Spain and the United Kingdom, see 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.

¹² For a commentary on the Dutch laws, see M.E. Koppenol-Laforce, The Dutch Report on the Implementation of the EC Choice of Law Rules for Insurance, in: Frigessi Di Rattalma 2003 (fn. 11), p. 49-57. See specifically in relation to 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).

¹³ For more details, see I. MacNeil, UK Report on the Implementation of the EC Choice of Law Rules for Insurance, in: Frigessi Di Rattalma 2003 (fn. 11), p. 131-150.

¹⁴ 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, *O.J.* 1992, L 228/1. For a short overview, see Stone 2006 (fn. 5), p. 324-328; for a thorough analysis, see Seatzu 2003 (fn. 4), p. 131-164.

An important distinction is that between large 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 insofar 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.¹⁵

Article 7 of the second Non-Life Insurance Directive is the most important provision.¹⁶ 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 [27] is laid down in Article 7(1)(g). Where all the other elements relevant to the situation are connected with one Member State only, the choice of law cannot set aside the application of mandatory rules of that Member State.¹⁷ 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, the severable part of a contract that 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.¹⁸

Article 7(1)(a-e) provides rules for risks other than large ones. Article 7(1)(a) states that where a policyholder’s habitual residence or central administration is within the territory of the Member State in which the risk is situated, the applicable law is that of the Member State. However, where the law of that Member State allows, the parties may choose the law of another Member State.¹⁹ Article 7(1)(b) provides that where a policyholder’s habitual residence or central administration is not 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’s habitual residence or central administration is located. 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. In the United Kingdom, a free choice is also available as a result of the principle of party autonomy under the Rome Convention.²⁰ As discussed above for large risks, Article 7(1)(h) is applicable when no choice of law has been made. Thus, from amongst those considered in the preceding subparagraphs,

¹⁵ 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.

¹⁶ In the Netherlands, this provision is incorporated in Article 5 Conflict of Laws Act on Non-Life Insurance (*Wet Conflictenrecht Schadeverzekering*).

¹⁷ Cf. Article 3(3) Rome Convention.

¹⁸ For the application of this provision in the Netherlands, see 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).

¹⁹ For the application in the Netherlands, see District Court The Hague 15 October 1997, NIPR 1999, no 69.

²⁰ See *Seatzu* 2003 (fn. 4), p. 195-196; *MacNeil* 2003 (fn. 13), p. 134-135.

the law of the country 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 what are termed priority rules) that is 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 insofar as, under the law of those [28] States, those rules must be applied whatever the law applicable to the contract. This last exception is implemented differently in the Member States. In the Netherlands, for example, 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.²¹ In addition, Article 8 dealing with compulsory insurance, for 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 that 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, the law of the country that imposes the obligation for compulsory insurance is applicable. The United Kingdom, however, has not made use of this provision.²²

2.2.2 Rules Relating to Life Insurance

Rules regarding life insurance contracts are simpler. Several previous life insurance directives were consolidated in Directive 2002/83/EC, otherwise referred to as the consolidated Life Assurance Directive.²³ The conflict rules laid down in the second and third Life Assurance Directives²⁴ are now included in Article 32 of the consolidated Life Assurance Directive.²⁵

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 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.²⁶ However, it may be restricted by Article 5 Rome Convention on consumer contracts.²⁷ Furthermore, pursuant to Article 32(2), where the policyholder is a natural person and his habitual residence is 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 is a national.

²¹ For the Netherlands, see Article 4(4) Conflict of Laws Act on Life Insurance (*Wet Conflictenrecht Levensverzekering*). For the United Kingdom, see Stone 2006 (fn. 5), p. 327.

²² See Stone 2006 (fn. 5), p. 327.

²³ Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance, *O.J.* 2002, L 345/1.

²⁴ Directive 90/619/EEC and Directive 92/96/EEC.

²⁵ On the (identical) rules of the second and third Life Assurance Directives, see Seatzu 2003 (fn. 4), p. 165-191.

²⁶ For the Netherlands, see Article 4 Conflict of Laws Act on Life Insurance (*Wet Conflictenrecht Levensverzekering*). For the United Kingdom, see Stone 2006 (fn. 5), p. 328; Seatzu 2003 (fn. 4), p. 195.

²⁷ 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.

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).

[29]

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 these are incorporated in the domestic law of the Member States, they will apply as *lex fori*.²⁸ Because the Rome Convention does not contain a special provision on insurance, the general provisions apply.

2.3.1 Choice of Law as Point of Departure

The main rule of the Rome Convention is that parties can make a choice 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 only a part of the contract (*dépeçage*). Pursuant to Article 3(2), parties may choose the applicable law in the insurance contract itself, but may also choose the law later on, or change the applicable law. Any variation made by the parties after the conclusion of the contract shall not adversely affect the rights of third parties.²⁹

Under national law, several substantive insurance rules are regarded as mandatory, which means parties cannot derogate from them. The Rome Convention contains several relevant provisions in relation to mandatory rules. Article 3(3) provides that where parties have chosen a foreign law, regardless of whether accompanied by a choice of court or tribunal, and where all 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.³⁰ Furthermore, Article 7 Rome Convention lays down a provision on mandatory rules (priority rules).³¹ Article 7(2) concerns overriding interests of the forum country. It provides that nothing in this Convention shall restrict the application of mandatory rules of the forum country, applicable irrespective of the law otherwise applicable to the contract. 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 insofar as, under the law of the latter country, those rules must be applied irrespective of 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 controversial, and therefore Article 22(1)(a) [30] allows countries to make a reservation not to apply Article 7(1). Several EU Member States, such as the United Kingdom, Germany, Ireland, Luxembourg and Portugal have made use of this reservation.

²⁸ See for example Article 3 of the Dutch Conflict of Laws Act on Non-Life Insurance (*Wet Conflictenrecht Schadeverzekering*). See on this issue also Seatzu 2003 (fn. 4), p. 92-93.

²⁹ Seatzu 2003 (fn. 4), 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.

³⁰ See section 2.2.1 above.

³¹ On this provision, see Stone 2006 (fn. 5), p. 308-311.

Lastly, in exceptional cases the chosen law may be set aside when the rules are manifestly incompatible with the law of the forum, pursuant to Article 16.

2.3.2 The Rule of 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 most closely connected with the country where the party who is to effect the performance that is characteristic of the contract has his habitual residence or central administration at the time of the conclusion of the contract. It is usually assumed that this is the habitual residence of the insurer.³² 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.³³

2.3.3 Insurance Contracts That Qualify as 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 conflict rules of Article 5 apply. According to Article 5(2), the insurance contract is only governed by the special rules of this provision in two situations: firstly, 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 for the conclusion of the contract in that country; secondly, 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. Pursuant to Article 5(3), in the absence of a choice of law, the law of the consumer's habitual residence governs the contract.

[31]

3. Emergence of the Rome I Regulation and the New Rule on Insurance Contracts

3.1 Introduction

The current system of conflict of law rules in relation to insurance contracts has frequently been criticised for being fragmented and lacking in transparency. Moreover, the conflict rules of the directives and those of the Rome Convention are not consistent. The directives

³² See also Report on the Convention on the Law Applicable to Contractual Obligations by Mario Giuliano and Paul Lagarde, *O.J.* 1980, C 282/1, comment 3 on Article 4 (see also <http://www.rome-convention.org>). For the Netherlands, see District Court Rotterdam, 19 November 2003, *Nederlands Internationaal Privaatrecht* (NIPR) 2004, no 248. This rule is sometimes questioned; see Seatzu 2003 (fn. 4), p. 103-104.

³³ 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 has made a reservation) a third country (Article 7), or when it manifestly contradicts public policy (Article 16).

distinguish between large and other risks, whereas the Rome Convention makes a distinction between consumer and other contracts (commercial). As demonstrated by the previous outline, the connecting factors used in the insurance directives and in the Rome Convention also diverge, with different outcomes for the applicable law as a possible result. 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. In addition, the directives at several points give the Member States freedom with regard to the implementation of the rules, which has resulted in differences in the conflict of law rules.

The modernisation of the Rome Convention and its conversion into an EU regulation was therefore a good opportunity to introduce a special rule on insurance contracts that replaces the insurance directives. The conversion into a regulation – that contrary to a convention has direct effect in the EU Member States – results from the Treaty of Amsterdam that came into force on 1 May 1999. This treaty moved “judicial cooperation in civil matters” from the third to the first pillar within the structure of EU competence. Article 61(c) EC Treaty provides that in order to establish an area of freedom, security and justice progressively, the Council has to adopt measures in the field of judicial cooperation in civil matters, as provided for in Article 65. This provision includes a list of measures concerning aspects of private international and procedural law. Article 65(b) provides for measures concerning the conflict of laws. Following the conversion of the Brussels Convention into the Brussels Regulation in 2002, the conversion of the Rome Convention was established.

3.2 Legislative Background: The Green Paper on Rome I and the Commission Proposal

In January 2003, the Commission put forward a Green Paper on the conversion of the Rome Convention of 1980 into a Community instrument and its modernisation.³⁴ The purpose was to launch a wide-ranging consultation on a number of issues regarding the conversion and modernisation of the rules.³⁵ As to insurance contracts, the Commission established that the system of conflict of law rules had been criticised by private international law specialists, in particular because “it is not strictly compatible with the concern for transparency in Community law”.³⁶ The Commission presented three possible solutions: 1) to incorporate a special rule on insurance in Rome I, applicable for risks located outside [32] the EU; 2) to improve the transparency of Community legislation by incorporating the special insurance rules of the directives in Rome I; and 3) to improve the transparency by giving a regular update in the annex of Rome I on the sectoral instruments.³⁷ On the question put forward in the Green Paper as to whether the current rules on insurance were satisfactory, the majority of the responses indicated that it was not.³⁸ Several Member States and most business representatives and consumer organisations stressed the need for clearer and more uniform rules, as did legal practitioners and academics that responded specifically to the question relating to insurance contracts.³⁹

³⁴ See fn. 8.

³⁵ The Green Paper generated over 80 responses, which are published on the website of the European Commission,

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).

³⁶ Green Paper (fn. 8), p. 21.

³⁷ Green Paper (fn. 8), p. 22.

³⁸ See fn. 35.

³⁹ 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

The Commission proposal for a Regulation on the Law Applicable to Contractual Obligations (Rome I) was put forward on 15 December 2005.⁴⁰ This proposal basically adopted the third solution, as set out above. It provided that the Regulation would 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 obligations. These acts, including the insurance directives, were set out in an Annex. This proposal was widely criticised, not only for the lack of a provision on insurance contracts but on the whole.⁴¹ In relation to insurance contracts, the European Economic and Social Committee (EESC) rightfully remarked that “a golden opportunity to simplify and harmonise conflict-of-law rules and to solve problems in the relevant area is being squandered”.⁴²

Already at the outset of the negotiations, the United Kingdom stated that it did not want to opt into the future regulation, as is possible pursuant to its special position in relation to Title IV of the EC Treaty.⁴³ This is actually what happened, though the United Kingdom is still deliberating whether it should opt back in.⁴⁴ It would be a great loss if the United Kingdom in the end will not apply Rome I, [33] especially in relation to insurance contracts, since the United Kingdom is an important player on the European insurance market.

3.3 Further Developments and Adoption of the Regulation

Criticism of 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 to insurance, in October 2006 a provisional version of a new article, Article 5a, was included in a footnote.⁴⁵ In several subsequent Council texts, Article 5a obtained a permanent position, but its content has been amended several times and different options have been presented.⁴⁶ Delegates have been very active in regard to insurance contracts, as demonstrated by the number of documents

International Law. See also the 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’, *O.J.* 2004, C 108/1, p. 20.

⁴⁰ Rome I proposal, see fn. 7.

⁴¹ In relation to insurance contracts, see amongst others the 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, see <http://www.mpipriv.de>. The Institute also formulated a provision on insurance contracts; see for a discussion thereof, Kramer 2007 (fn. 1), p. 96. For criticism see also 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, p. 226-243.

⁴² 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), *O.J.* 2006, C 318/56, p. 61.

⁴³ Ireland and Denmark also have the option not to adhere to the PIL regulations. The UK did opt in to all other PIL Regulations, as did Ireland, whereas Denmark does not directly participate in any Regulation, though it did sign an agreement in relation to two regulations. For the UK position, see 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 matter to English lawyers, *Journal of International Banking and Financial Law* 2007, p. 256-257.

⁴⁴ See further section 4.1.

⁴⁵ 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.

⁴⁶ 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.

in the Council register concerning comments of the Member States on Article 5a.⁴⁷ The United Kingdom, despite its announcement to opt out of Rome I, even launched a consultation for stakeholders on insurance in Rome I in March 2007.⁴⁸ In a revised Council text from 25 June 2007, the provision on insurance contracts was still in brackets.⁴⁹ In the fall of 2007, another consultation on the proposed rule on insurance contracts took place. On 19 November 2007, a final compromise package was presented, including an amended Article 5a on insurance contracts.⁵⁰ In subsequent documents, the provision is transferred to Article 7. The Rome I Regulation was finally adopted on 17 June 2008.⁵¹

4. Insurance Contracts under the Rome I Regulation

4.1 Scope of the Rome I Regulation

Firstly, the effect of the Rome I Regulation is limited to contracts concluded after 17 December 2009, pursuant to Articles 28 and 29. This means that the current conflict rules, as outlined in section 2 above, will remain in force for all insurance contracts that have been or will be concluded prior to this date.

Secondly, Article 1 no longer generally excludes from the substantive scope insurance contracts covering risks located on EU territory. It therefore covers risks situated both in and outside the EU. Further, it also regulates contracts covering risks located on EU territory, concluded by insurers that are not established in the EU. Currently, EU law does not cover these contracts at all.⁵² However, there are still certain limitations. Article 1(2)(j) [34] excludes insurance contracts arising out of operations by on-life insurance companies⁵³, the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or sickness related to work. Moreover, as will be elaborated below (4.3.1), unfortunately not all insurance contracts are covered by the special rule of Article 7; some are still regulated by the general provisions of Rome I. Further, it should be borne in mind that certain questions related to insurance contracts, such as direct action against the insurer of the person liable and subrogation of non-contractual claims, are regarded as tort issues. These are regulated by Regulation No 864/2007 on the Law Applicable to Non-Contractual Obligations (Rome II), which will be applicable as of 11 January 2009.⁵⁴

Thirdly, the Regulation in principle has a universal application. Article 2 provides that any law specified by this Regulation shall be applied, irrespective of whether it is the law of a Member State. However, not all EU Member States will apply Rome I. In accordance with its special position, Denmark is not taking part in the Regulation and thus is not bound by the

⁴⁷ These are, however, not publicly available; see also previous footnote.

⁴⁸ 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).

⁴⁹ 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. or a discussion of this provision, see Kramer 2007 (fn. 1), p. 97-102.

⁵⁰ Council, 19 November 2007, no. 15316/07, JUSTCIV 309, CODEC 1279.

⁵¹ See fn. 6

⁵² See also section 2.1 above.

⁵³ Other than undertakings referred to in Article 2 of Directive 2002/82/EC (consolidated Life Assurance Directive).

⁵⁴ O.J. 2007, L 199/40. See Articles 18 and 19 thereof.

provisions.⁵⁵ Moreover, as mentioned above, the United Kingdom did not opt in on the Regulation.⁵⁶ This is the first time that the United Kingdom did not opt in on a Regulation dealing with judicial cooperation in civil matters. In April 2008, the Ministry of Justice launched a public consultation on whether the UK should opt back in.⁵⁷ It is therefore still not certain whether the UK will take part in the Rome I Regulation.

4.2 *Analysis and Evaluation of the New Conflict Rules on Insurance Contracts*

4.2.1 Article 7 on Insurance Contracts; Scope and Structure

The most relevant provision on insurance contracts is Article 7 of the Rome I Regulation. Article 7 provides the following:

Insurance contracts

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined 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 [16] shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

[35] To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

- (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
- (b) the law of the country where the policy holder has his habitual residence;
- (c) in the case of life assurance, the law of the Member State of which the policy holder is a national;
- (d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
- (e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

- (a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;
- (b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

⁵⁵ See recital 46 of the Rome I Regulation and further fn. 43.

⁵⁶ See recital 45 of the Rome I Regulation and further fn. 43.

⁵⁷ Ministry of Justice, Rome I - Should the UK opt in?, 2 April 2008. Available at www.justice.gov.uk.

[36] 5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the 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 [17] and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

The general approach is to integrate the insurance directives in the Rome Convention and to provide a more uniform conflict of laws system, for risks located both outside and inside the EU. Consequently, the conflict rules included in the insurance directives will become redundant. 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 characterises and complicates the conflict of law rules on insurance contracts in Europe will then belong to the past. However, as mentioned above (section 4.1), the fact that all insurance contracts are covered by the Rome I Regulation does not mean that they are covered by the special rules of Article 7. Firstly, according to Article 7(1) a distinction should be made between large and other risks (mass risks). Large risks are covered by Article 7, regardless of where they are situated. However, all other risks are only governed by Article 7 when they are situated inside the territory of the Member States. Recital 33 of the Regulation further stipulates that where such an insurance contract covers mass risks both outside and inside the Member States, Article 7 only applies to those inside the Member States. Secondly, Article 7(1) provides that it shall not apply to reinsurance contracts. To these two categories of contracts, the general rules of the Rome I Regulation apply. In my view, it is regrettable that Article 7 does not cover all insurance contracts, since this still leads to fragmentation and to the application of conflict rules with different connecting factors. There is no good reason to treat contracts covering large risks differently from reinsurance contracts. Moreover, the exclusion of mass risks located within the EU does not seem to be necessary.⁵⁸ An earlier draft of this provision did include all insurance contracts and at least in this regard was more appropriate.⁵⁹

What are the main rules of Article 7? Three cornerstones can be distinguished, the first being 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 [37] and other (medium and small, or mass) risks. The second is the law of the habitual residence of the insurer, while 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 of the Rome I Regulation in relation to insurance contracts may be outlined as follows. Four types of insurance contracts are distinguished: 1) those related to large risks; 2) those related to other risks situated on the territory of the Member

⁵⁸ See also H. Heiss, Insurance contracts in “Rome I”: Another recent failure of the European legislature, section II.2.a, in: A. Bonomi & E. Cashin Ritaine (eds.), *Le nouveau règlement européen “Rome I” relatif à la loi applicable aux obligations contractuelles*, Actes de la 20e Journée de droit international privé du 14 mars 2008 à Lausanne, Genève/Zurich/Bâle, 2008 (in print), section II.2.a. Thanks are due to the author for providing the text of this article before publication. Reference is made to the relevant section of the article, since the print with page numbers was not available at the time of completion of this contribution.

⁵⁹ See fn. 49.

States; 3) those related to compulsory insurance; and 4) those related to other risks situated in a third country as well as reinsurance contracts. For the first category, the chosen law or the law of the habitual residence is decisive; for the second type of contract, the law of the country where the risk is situated applies, provided limited options for a choice of law. For the third category, an exception may apply in favour of the law of the Member State that imposed the obligation. The fourth category is governed by the general rules of Rome I (i.e. Article 3, 4 or 6).

4.2.2 The Law Applicable to Large Risks

Article 7(2) regulates the law applicable to all large risks. It does not include a definition of a large risk, but refers to Article 5(d) of the first Non-Life Insurance Directive (as amended).⁶⁰ Hence, the insurance directives still have to be consulted for the application of the Rome I Regulation. Further, this reference implies that the rule does not fully conform to the Brussels I Regulation, since Brussels I has an additional list of special risks.⁶¹

Contracts covering large risks shall be governed by the law chosen by the parties in accordance with Article 3 of Rome I.⁶² By and large, this coincides with the current rule under Article 7(1)(f) and (g) of the second Non-Life Insurance Directive.⁶³ Where parties have not chosen the law, the law of the country where the insurer has his habitual residence shall govern the insurance contract. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that country shall apply. According to the current objective conflict rule as provided in Article 7(1)(h) of the second Non-Life Insurance Directive, the applicable law is the one with which the contract is most closely connected, and this is presumed to be the law of the Member State where the risk is situated.⁶⁴ It does, therefore, amend the existing rule and no longer coincides with the rule regarding mass risks, at least as far as it concerns mass risks located on the territory of the Member States (to be discussed in section 4.2.3). It is, however, in conformity with Article 4 Rome I, where the law of the “characteristic performer” (i.e. the insurer) is designated as the applicable law, unless the law of another [38] country is manifestly more closely connected. Therefore, this rule brings large-risk insurance contracts in line with the rule applicable to other (commercial) contracts, which in my opinion makes sense.

4.2.3 The Law Applicable to Mass Risks inside the Territory of the Member States

Article 7(3) Rome I, concerning ‘other risks’ than those covered by Article 7(2), is more complicated. It must be borne in mind that this paragraph only applies to mass risks (small and medium risks) located inside the territory of the Member States, in view of the limited scope of Article 7, as indicated in paragraph 1 thereof. Pursuant to Article 7(6), the country in which the risk is situated shall be determined in accordance with Article 2(d) of the second Non-Life Directive.⁶⁵ In the case of life insurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1) (g) of the consolidated Life

⁶⁰ Discussed in section 2.2.1 above.

⁶¹ See Article 14 Brussels I (see also the Introduction above and fn. 5). In relation to contracts covering these risks a choice of court is allowed. See on this point also Heiss 2008 (fn. 58), section II.2.b.

⁶² See on this provision section 4.2.5 below.

⁶³ See section 2.2.1 above.

⁶⁴ See section 2.2.1 above.

⁶⁵ See section 2.1 above.

Assurance Directive. As is the case for the definition of large risks, the insurance directives thus remain relevant.⁶⁶

Paragraph 3(1) provides for a limited choice of law in accordance with Article 3 Rome I. According to sub (a), parties can choose the law of any Member State where the risk is situated at the time of the conclusion of the contract. 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.⁶⁷ Sub (c) states that in the case of life assurance the law of the Member State of the nationality of the policyholder may be chosen. This enables persons in the EU to arrange for life assurance in accordance with their national law even if they are domiciled and/or habitually resident in another EU Member State. The other side of the coin, however, is that a choice of law included by the insurance company, in a situation where the policyholder is a natural person and does not have bargaining power, a choice of law for the *lex nationalitatis* is valid, even if the policyholder does not have a genuine link with that law.⁶⁸ Further, in an earlier draft this possibility was limited to the situation where the policyholder is a natural person.⁶⁹ I consider this would have been more appropriate and in line with Article 32(2) of the consolidated Life Assurance Directive.⁷⁰ Sub (d) provides that with contracts covering risks limited to events occurring in one Member State other than the one where the risk is situated, the law of that Member State may be chosen. This situation is not likely to occur often in practice. Sub (e) regards policyholders that pursue a commercial or industrial activity or a liberal profession, and the contract covers two or more risks that relate to those activities and are situated in different Member States. In this situation, the law of any of the Member States concerned or the law of the country [39] of the habitual residence of the policyholder may be chosen. This prevents different laws being applied to the risks involved. The addition that the law of the habitual residence may be chosen does not mean anything, in view of the possibility to choose the law of the habitual residence pursuant to sub (b). In my opinion, the regulation of choice of law in this subparagraph is not convincing. Some of the options (a)-(e) are superfluous in view of the objective choice of law rules, or are already covered by another option. Moreover, in commercial contracts these options may be too limited and not in conformity with the principle of freedom of choice as envisaged by Article 3 Rome I. For consumer contracts, under certain circumstances these options lead to a greater freedom than is allowed under Article 6 of the Rome I Regulation, which governs consumer contracts in general. The limitations of that provision seem not to apply to insurance contracts concluded by consumers, and this contradicts the notion of consumer protection.⁷¹

Under the insurance directives – Article 7(1)(a) and (d) of the second Non-Life Insurance Directive and Article 32(1) of the consolidated Life Assurance Directive – Member States may allow greater freedom to choose the law than is granted under the relevant provisions of the directives. Many Member States have made use of this possibility.⁷² In order not to reduce the freedom of choice or to render choices of law common in practice null and void, Article 7(3)(2) Rome I provides that where, in the cases set out in points (a), (b) or (e), the Member

⁶⁶ In an earlier draft, a description of the place of the risk was included (see also fn. 49), which is in my opinion more practical, though it might lead to more complications in case of revision.

⁶⁷ See section 2.2.1 above. Sub (a) does not add much, since also in absence of a choice, the law of the Member State where the risk is situated applies pursuant to Article 7(3)(3).

⁶⁸ See in this regard also Heiss 2008 (fn. 58), section II.4.a.

⁶⁹ See fn. 49.

⁷⁰ See section 2.2.2 above.

⁷¹ See also Kramer 2007 (fn. 1), p. 101; Heiss 2008 (fn. 58), section II.4.e.

⁷² See section 2.2.1 and 2.2.2 above.

States grant greater freedom to choose the law, the parties may take advantage of that freedom. This addition thus keeps the current national laws intact, with the exception of life insurance. Though this addition is to be understood from the background of the directives, it seriously compromises the uniformity and legal certainty that Rome I should establish.⁷³ In my opinion, the choice of law in relation to mass risks should have been carefully reconsidered. This would have been better than including a list of possible laws – that are sometimes too narrow and sometimes too broad – and compromising the choice of law by adding a discretionary clause that leads to differences between the Member States.

Article 7(3)(3) provides that to the extent the law has not been chosen by the parties, the contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract. As mentioned above, pursuant to Article 7(6) Rome I, the location of the risk is to be determined according to the relevant provisions of the insurance directives. In general, this is the law of the habitual residence of the policyholder.⁷⁴ Exceptions apply to insurance contracts that relate to immovable property, motor vehicles and, holiday or (short) travel risks. For life insurance, this is the Member State where the policyholder has his habitual residence or establishment. From a practical point of view, it would have been preferable to include this rule instead of referring to the insurance directives.⁷⁵

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4.2.4 Compulsory Insurance

Compulsory insurance, such as motor vehicle insurance relating to liability, is dealt with in Article 7(4) Rome I. It provides that in the case of insurance contracts covered by Article 7, which covers risks for which a Member State imposes an obligation to take out insurance, the insurance contract shall not satisfy the obligation unless it complies with the specific provisions of that Member State. The law of the Member State that imposes the obligation prevails when it contradicts the law of the Member State in which the risk is situated. These rules are copied from Article 8(2) and (3) of the second Non-Life Insurance Directive. It is not clear what happens if it contradicts a law that has been chosen by virtue of Article 7(2) or (3). Paragraph 4 adds that by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance. This addition is taken from Article 8(4)(c) of the second Non-Life Insurance Directive.

The regulation of compulsory insurance thus remains the same and keeps its compromising nature. It leaves room for the Member States to maintain their own rules and policies and therefore does not contribute to uniformity and legal certainty.

4.2.5 Risks Not Covered by Article 7: Mass Risks outside the EU and Reinsurance Contracts

As has been set out above, pursuant to Article 7(1), contracts covering mass risks situated outside the territory of the Member States are not covered by Article 7. Thus, the general rules of the Rome I Regulation apply. Relevant in this regard are Articles 3 (choice of law), 4 (applicable law in absence of choice) and 6 (consumer contracts). These provisions largely

⁷³ See also Heiss 2008 (fn. 58), section II.4.d.

⁷⁴ See section 2.1 above.

⁷⁵ In a previous draft this was the case, see fn. 49.

coincide with the corresponding Articles 3, 4 and 5 of the Rome Convention, as outlined in section 2.3.

According to Article 3, a contract shall be governed by the law chosen by the parties, who may choose any law, including that of a third country. Article 3(3) provides that where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice shall not prejudice the application of the mandatory rules of that country. Article 3(4) provides the same for mandatory Community law in the situation where all other elements are located in one or more Member States. Another restriction applies in case the contract qualifies as a consumer contract within Article 6. The restrictions for a choice of law for mass risks inside the Member States as regulated by Article 7(3) do not apply, and therefore a difference between risks located inside and outside the EU persists.

The structure of Article 4 Rome I is different from Article 4 of the Rome Convention. Paragraph 1 lists the connecting factors for eight types of contracts. The law of the country where the party required to effect the characteristic performance of the contract has his habitual residence governs contracts not covered by paragraph 1, such as insurance [41] contracts. This coincides with the presumption of Article 4(2).⁷⁶ The characteristic performer is the insurer, and thus the law of his habitual residence applies. According to Article 19 Rome I, the habitual residence of a company shall be the place of the central administration. This rule differs from Article 7(3) as well, since the objective choice of law rule in that provision provides that the law of the situation of the risk – the law of the habitual residence of the policyholder – applies. I consider that there is no legitimate reason for this divergence. For reinsurance contracts, however, Article 4(2) is an appropriate rule, as it coincides with Article 7(2) for large risks.

Article 6 supersedes Articles 3 and 4 (but not Article 7) where the contract was concluded by a natural person outside his trade or profession and the professional party pursues commercial or professional activities in the country where the consumer has his habitual residence or directs such activities to (amongst others) that country. In this situation, the law of the consumer – the policyholder – applies. A choice of law does not deprive the consumer from the protection of mandatory rules of his country. Moreover, this last rule does not fully coincide with Article 7(3) relating to mass risks inside the EU.

5. Conclusion

The conflict of law rules relating to insurance contracts have always constituted one of the bottlenecks of European private international law. Because the conflict rules emanate from diverse sources and lack any cohesion or well-considered system, determining the applicable law to an insurance contract is like trying to find one's way through a labyrinth. Even for private international experts the task demands significant efforts. The conversion of the Rome Convention into the Rome I Regulation was an excellent opportunity to get rid of this maze and to formulate uniform conflict rules for insurance contracts. However, the Commission failed to take up the challenge, despite serious criticism of the current situation. The difficult negotiations on the consequent formulation of a special rule for insurance contracts demonstrated clearly the complexity and delicacy of the matter. Various proposals were put forward and special consultations were launched, but the final result seems to be no more than a complex compromise. Especially compared to a previous proposal enclosed in the Council

⁷⁶ See section 2.3.2 above.

text of 25 June 2007⁷⁷, the final version in Article 7 is a step backward. Apparently the time was not ripe or perhaps was simply too short to arrive at a satisfactory rule. Article 7 still remains unnecessarily complicated. In addition, as opposed to previous drafts, Article 7 is not a catch-all provision. With regard to non-large risks, the distinction between risks located inside and outside a Member State is maintained. The other provisions of Rome I remain applicable to the last category, as well as to reinsurance contracts. This still results in fragmented and incomprehensible conflict of law rules. Moreover, certain issues are not regulated at all, such as the applicable law to group insurances.⁷⁸

[42] In my opinion, therefore, the new rule in Article 7 is disappointing. Though it brings nearly all insurance contracts⁷⁹ under the the Rome Convention, and in this sense leads to more transparency, the division over contracts covered by Article 7 and those covered by the general rules, as well as the complexity of Article 7 itself, still result in a difficult and unintelligible system. Rather than removing the current divergencies, the introduction of Article 7 mainly conceals them. It may be hoped that when the Rome I Regulation is evaluated in 2013, pursuant to Article 27, the conflict rules on insurance contracts will be carefully reconsidered.⁸⁰

⁷⁷ See section 3.3 above and fn. 49.

⁷⁸ On this issue see Heiss 2008 (fn. 58), section II.4.h.

⁷⁹ Except for the life insurance contracts mentioned in Article 1(2)(j).

⁸⁰ For an alternative proposal, see Heiss 2008 (fn. 58), section III.