

The Law Applicable to Contractual Obligations: The Rome I Regulation in Comparative Perspective

Pedro A. DE MIGUEL ASENSIO *

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I. Introduction

The current European choice-of-law rules on contracts are the result of a prolonged evolution. The transformation of the 1980 Rome Convention¹ into an EU instrument, by means of Regulation (EC) No 593/2008 (Rome I Regulation),² represented a major step in that evolution, including a significant revision of some of its basic provisions.³ The unified rules established in the Rome I Regulation (and previously in the Rome Convention) apply to all situations

* Professor at the Law Faculty of the Universidad Complutense de Madrid. This contribution was supported by research project DER 2012-34086 (MEC). All websites cited were last accessed on 16 September 2013.

¹ Rome Convention of 19 June 1980 on the law applicable to contractual obligations, consolidated version in Official Journal of the European Union 2005 C 334.

² 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), Official Journal of the European Union 2008 L 177/6.

³ See, e.g., Paul LAGARDE and Aline TENENBAUM, *De la Convention de Rome au Règlement Rome I*, *Revue critique de droit international privé*, Vol. 97 (2008), pp. 727 et seq.; and Francisco J. GARCIMARTÍN ALFÉREZ, "The Rome I Regulation: Much Ado about Nothing?", *European Legal Forum*, 2008, pp. 61 et seq.

involving a conflict of laws in the field of contractual obligations, both in civil and commercial matters (Article 1(1)). Moreover, they are of universal application (Article 2), and hence the competent courts of the Member States have to apply them to determine the law governing international contracts, regardless of the level of connection of the relevant contract with the Member States. Hence, the unified rules supersede the national provisions of the Member States concerning the conflict of laws in the field of contracts.

Therefore, the EU has succeeded in unifying the conflict-of-laws provisions on contracts in almost thirty States. Furthermore, the Rome I Convention was built on a broader European tradition including certain approaches present in other European codifications of its time, in particular in Austria and Switzerland. The Rome Convention has proved to be a very influential model, frequently used outside the European Union as a blueprint to be followed or to deviate from when drafting national provisions or international texts in this field.⁴ The enlargement of EU membership and the exclusive legislative competence of the EU in this field, leading to the adoption of supranational conflict-of-laws provisions, such as the Rome I Regulation, seem to reinforce the model role of EU legislation for the codification and reform of private international law in other regions of the world.⁵

However, it may be appropriate to refer to some features of the Rome I Regulation that reflect differences between this instrument and national codifications of private international law that include conflict rules on contracts, such as those adopted in 2010 in the People's Republic of China and Taiwan.⁶ The Rome I Regulation has been adopted in the framework of the development of

⁴ The 1980 Rome Convention has been a reference for national and international legislators in Europe and beyond. For instance, in Asia, such influence is widely acknowledged with respect to the recent codifications in Japan, China and Taiwan. See, e.g., Masato DOGAUCHI, *Historical Development of Japanese Private International Law*, Jürgen BASEDOW, Harald BAUM and Yuko NISHITANI (eds.), *Japanese and European Private International Law in Comparative Perspective*, Tübingen, 2008, pp. 27 et seq., pp. 53 et seq.; and Guangjian TU, *China's New Conflicts Code: General Issues and Selected Topics*, *American Journal of Comparative Law*, Vol. 59 (2011), pp. 563 et seq. (at pp. 569, 577, 580 et seq.). In the Americas, discussing the convenience of certain deviations from the Rome Convention, see Friedrich K. JUENGER, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparison*, *American Journal of Comparative Law*, Vol. 42 (1994), pp. 381 et seq.

⁵ Ronald A. BRAND, *The European Union's New Role in International Private Litigation*, *Loyola University Chicago International Law Review*, Vol. 2 (2004–2005), pp. 277 et seq.; and Jürgen BASEDOW, *The Law of Open Societies – Private Ordering and Public Regulation of International Relations*, *Recueil des Cours*, Vol. 360 (2013), at pp. 477 et seq.

⁶ See the translations in this book, pp. 439 et seq. and 453 et seq.

judicial cooperation in civil matters within the EU (Article 81 TFEU).⁷ The EU has enacted in recent years a significant number of separate regulations with conflict rules in different areas of private law, such as non-contractual obligations, succession, insolvency, maintenance, matrimonial matters, cultural goods or financial instruments.⁸ Additionally, the EU has not adopted a single instrument establishing common general provisions on choice of law. Therefore, the Rome I Regulation contains its own provisions on general issues, such as application of mandatory provisions, *renvoi*, public policy, non-unified legal systems and habitual residence. Fragmentation regarding such general issues may lead to some inconsistencies within EU Private International Law (PIL), and the lack of common rules on issues such as the application of foreign law may undermine the level of effective unification.⁹ At any rate, the Rome I Regulation is not an isolated instrument. In particular, it is closely related to the jurisdiction provisions of the Brussels I Regulation¹⁰ concerning contracts, and this affects its interpretation since consistency between both instruments is required.

The nature of the Rome I Regulation as an instrument of European integration, to be applied by the courts of almost 30 States, is connected to the paramount importance of legal certainty and predictability of the applicable law as basic goals of the unified EU rules. Because of the broad scope of the Rome I Regulation, conflict-of-laws rules concerning contractual obligations are basically contained in a single instrument in the EU. Meanwhile, in China it has been noted that, even after the new 2010 PIL Act, a number of PIL provisions dispersed in domestic legislation may remain relevant, including some of the 1986 General Principles of Civil Law (Article 51 Chinese PIL Act 2010), the 1999 Contract Law, and several laws dealing with commercial transactions.¹¹ Particularly relevant are the interpretative rules issued by the Supreme People's Court (SPC) on the basis of its power to develop provisions on how certain laws

⁷ Treaty on the Functioning of the European Union, consolidated version Official Journal of the European Union 2008 C 115/47.

⁸ See for example, Stefania BARIATTI, *Cases and Materials on EU Private International Law*, Oxford, 2011.

⁹ See e.g. Marc FALLON/Paul LAGARDE/Sylvaine POILLOT-PERUZZETTO (eds.), *Quelle architecture pour un code européen de droit international privé?*, Brussels, 2011.

¹⁰ Regulation (EC) no. 44/2001 of 22 December 2000 on jurisdiction, and the recognition and enforcement of judgments in civil and commercial matters, Official Journal of the European Union 2001 L 12/1 and Regulation (UE) of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), Official Journal of the European Union 2012 L 351/1.

¹¹ Qisheng HE, *The EU Conflict of Laws Communitarization and the Modernization of Chinese Private International Law*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 76 (2012), pp. 47 et seq. (at pp. 57 et seq.).

have to be interpreted to cope with concrete issues. Although its applicability after the Chinese PIL Act 2010 raises some uncertainties,¹² the rules developed by the SPC have traditionally been a basic component of Chinese PIL on contracts. The main instruments of judicial interpretation regarding international contracts previous to the Chinese PIL Act 2010 are the SPC Rules 2007,¹³ the SPC Interpretations 2009¹⁴ and the SPC Guiding Opinions 2009.¹⁵ Concerning the 2010 PIL Act, the SPC issued on 10 December 2012 the Interpretations on Several Matters relating to the Implementation of the Law of the People's Republic of China on the Laws Applicable to Foreign-related Civil Relations (Part One), which came into effect on 7 January 2013 (SPC PIL Interpretation 2012).¹⁶ Although not specifically addressing contract issues, the SPC PIL Interpretation 2012 is of great relevance with regard to issues such as party autonomy and mandatory norms.

With a view to discussing the content of European private international law in the field of contracts and assessing possible convergences or divergences between the EU, China and Taiwan, it seems appropriate to select some pivotal issues. Therefore, the present analysis focuses on four questions which are at the centre of the debates on law reform concerning the law applicable to international contracts: party autonomy (section II), closest connection and characteristic performance (section III), special provisions to protect weaker parties (section IV), and overriding mandatory provisions (section V).

¹² Guangjian TU (supra note 4), at p. 579.

¹³ Interpretations on the Relevant Issues Concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters, adopted on 11 June 2007, available in English at <<http://tradeinservices.mofcom.gov.cn/en/b/2007-07-23/17069.shtml>>.

¹⁴ Interpretations Regarding Law Application Matters of the Contract Law of the People's Republic of China (2), issued on 24 April 2009, available in English at <<http://www.cietac.org/index/references/Laws/47607de2e466347f001.cms>>.

¹⁵ Guiding Opinions on Several Issues Concerning the Trial of Civil and Commercial Contract Disputes under Current Circumstances, issued on 7 July 2009, available in English at <<http://www.chinalawandpractice.com/Article/2285816/Channel/9930/Guiding-Opinion-on-Several-Issues-Concerning-the-Trial-of-Civil-and-Commercial-Contract-Disputes.html>>.

¹⁶ Peter LEIBKÜCHLER, Erste Interpretation des Obersten Volksgerichts zum neuen Gesetz über das Internationale Privatrecht der VR China, *Zeitschrift für Chinesisches Recht* 2013, pp. 89 et seq., including a German translation of the Judicial Interpretation at pp. 107 et seq..

II. Party Autonomy

The Rome I Regulation is based on a broad acceptance of party autonomy as a basic principle, in line with the approach previously adopted in the Rome Convention. Indeed, the content of Article 3 is almost the same in the Rome I Regulation as that in the Rome Convention, with the exception of paragraph 4. This additional provision of the Regulation is intended to safeguard the application of EU mandatory law in situations where all relevant elements are located in one or more Member States, but are subject to the law of a third country due to a choice of law by the parties.¹⁷

Choice of the governing law by the parties is favoured by the Rome I Regulation as the preferred option to provide legal certainty and foreseeability as to the law applicable to international contracts. Under Article 3, the choice can be express or tacit, and the parties may select the law of any country even if it has no connection with the contract. The choice may refer to the law applicable to the whole or to only part of the contract, and parties may choose (change) the law of the contract at any time, provided that it does not prejudice the rights of third parties. The rationale behind the ample freedom granted to the parties to choose a law unrelated to their transaction is to facilitate a choice by the parties. Sometimes a choice is only possible if the parties may refer to a "neutral" law, different from their respective domestic legal orders. In some situations, the parties may be interested in choosing a given law because of its superior quality in ordering the relevant transaction or with a view to coordinating the choice of law with a choice-of-forum agreement.

In order to achieve a proper balance between the freedom of the parties to choose the law of the contract and the protection of other relevant interests, the Rome I Regulation imposes certain restrictions on party autonomy. Some refer to categories of contracts, due to their peculiar nature, in particular with a view to protecting weaker parties. Although party autonomy as such is not excluded, restrictions apply to contracts for the carriage of passengers (Article 5(2)),¹⁸ consumer contracts (Article 6), insurance contracts (Article 7) and employment contracts (Article 8). Moreover, protection of the public interests of the forum (including those of the EU) may justify recourse to the exceptions based on public policy (Article 21) and overriding mandatory provisions that prevail over the law of the contract (Article 9). Furthermore, with a view to taking account of the public interests of States other than the forum and that of the law of the contract,

¹⁷ Helmut HEISS, Party Autonomy, in: Franco FERRARI/Stefan LEIBLE (eds.), *Rome I Regulation (The Law Applicable to Contractual Obligations in Europe)*, Munich, 2009, pp. 1 et seq. (at pp. 4 et seq.).

¹⁸ Under Article 5(2), only the law of a country having at least one of the connections with the relevant transaction listed in that provision is eligible.

the Regulation allows giving effect to the overriding mandatory provisions of the law of the country of performance of the contractual obligations (Article 9(3)).

Under Article 3 Rome I Regulation, the parties only may choose as the law of the contract the law of a country (or a territory having its own rules of law in respect of contractual obligations), and not a mere set of non-State principles and rules of substantive contract law. In contrast with the initial Proposal made by the Commission,¹⁹ the final text of the Regulation addresses this issue only in its Preamble.²⁰ In particular, Recital 13 states that the Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Therefore, the situation remains the same as that under the Rome Convention. The lack of progress in this respect might in principle be regarded as disappointing, for instance in the light of the recent developments at the Hague Conference.²¹ Notwithstanding this, from the practical point of view, it is important to stress that non-State bodies of substantive contract law usually focus on issues addressed by non-mandatory rules in State laws,²² and that they do not provide a complete and comprehensive legal order by contrast

¹⁹ Proposal for a Regulation on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, 15.12.2005.

²⁰ Eric LOQUIN, "Rome I et les principes et règles de droit matériel international des contrats", Sabine CORNELOUP/Natalie JOUBERT (eds.), *Le Règlement communautaire Rome I et le choix de loi dans les contrats internationaux*, Dijon, 2011, pp. 119 et seq.

²¹ According to Article 3 of the Draft Hague Principles on the Choice of Law in International Contracts (as approved by the November 2012 Special Commission meeting) <http://www.hcch.net/upload/wop/contracts2012principles_e.pdf>, a reference to law in the Principles "includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise". However, note that the nature and scope of the Hague Principles are very different from those of the Rome I Regulation. In particular, pursuant to its Preamble, the Hague Principles are intended to be applied by courts and by arbitral tribunals. In this connection, it is widely acknowledged that private international law systems traditionally limit the parties' freedom of choice to domestic laws and hence only allow the incorporation of non-State instruments as terms of the contract, see UNIDROIT, *Model Clauses for Use of UNIDROIT Principles*, <<http://www.unidroit.org/english/modellaws/2013modelclauses/main.htm>>, at p. 5. Therefore, parties are advised only to choose the UNIDROIT Principles of International Commercial Contracts as the sole rules of law governing their contract if such a choice is combined with an arbitration agreement.

²² Concerning the application of the UNIDROIT Principles, it has been noted that even "ordinary" mandatory rules are rather rare in the field of general contract law. Such rules can exist, if at all, concerning special form requirements, standard terms, illegality, public permission requirements, contract adaptation in case of hardship, exemption clauses, penalty clauses and limitation periods, see UNIDROIT (supra note 21), Model Clause No. 2, Comment § 5, at p. 15.

with State laws.²³ In practice, this means that if parties choose only a non-State set of principles, under the Rome I Regulation, the non-State body of law will prevail over the law of the contract (without prejudice to the application of the provisions of the law of the contract which cannot be derogated from by agreement). Therefore, to the extent that non-State bodies of law become more detailed and elaborated, in practice the application of the law of the contract may be unnecessary, even in proceedings covered by the Rome I Regulation, when parties have chosen a non-State body of law. That would be the case when the non-State rules chosen by the parties settle all relevant issues in dispute and do not conflict with the mandatory rules of the law of the contract. Additionally, under the Rome I Regulation it is clear that a mere choice of an incomplete set of principles and rules is to be supplemented, if necessary, by the law of the contract. Given the typical lack of completeness of non-State bodies of law, a choice of non-State law as the law of the contract in a technical sense could be a source of legal uncertainty in situations where the chosen rules do not settle all relevant issues. However, in the current global context, the development and increasing recognition of high quality sets of non-State law, such as the UNIDROIT Principles, favours a progressive development. In this context, it could be appropriate that in international contracts where parties are free to choose the law of the contract, the rules of a non-State body of law chosen by the parties could prevail over the "ordinary" mandatory provisions of the law otherwise applicable to the contract.²⁴ Even in such a scenario, parties would be well advised to choose the non-State body of law supplemented by a particular domestic law,²⁵ since otherwise the issues not covered by the non-State instrument, would be governed in State courts by the law applicable to the contract in the absence of choice.

From the European perspective, a significant development concerns the interaction between the Rome I Regulation and the efforts to create substantive contract law within the EU. As a benchmark in the long process of developing European private law, the Commission made public in 2011 the Proposal for a Regulation on a Common European Sales Law (CESL).²⁶ The Proposal contains a self-standing uniform set of contract law rules including provisions to protect

²³ As to the proper functions of the law of the contract and the possible shortcomings of non-State bodies of laws to fulfil them, see Pedro A. DE MIGUEL ASENSIO, *Contratación comercial internacional*, in: José Carlos FERNÁNDEZ ROZAS/Rafael ARENAS GARCÍA/Pedro A. DE MIGUEL ASENSIO, *Derecho de los negocios internacionales*, 4th ed., Madrid, 2013, pp. 259 et seq. and pp. 324 et seq.

²⁴ Pedro A. DE MIGUEL ASENSIO, *Armonización normativa y régimen jurídico de los contratos mercantiles internacionales*, *Diritto del Commercio Internazionale*, Vol. 12 (1998), pp. 859 et seq. (at pp. 877 et seq.).

²⁵ UNIDROIT (supra note 21), Model Clauses No. 1.2 (a) and (b), at pp. 9 et seq.

²⁶ COM(2011) 635 final.

consumers, which is intended to be a second contract law regime within the national law of each Member State.²⁷ Leaving aside other deficiencies of the proposal,²⁸ it is relevant here to focus on its implications concerning party autonomy in international contracts. Due to the optional nature of the CESL, its application would be subject to the parties' agreement. The Proposal stresses that the agreement to use the CESL should not amount to "a choice of the applicable law within the meaning of the conflict-of-law rules and should be without prejudice to them" (Recital 10). Notwithstanding this, under the proposal, if the parties agree to use the CESL for a contract, "only the CESL shall govern the matters addressed in its rules" (Article 11). Therefore, the provisions of the CESL prevail over the "ordinary" mandatory rules of the law applicable to the contract, but in a context in which the CESL would be a second contract law regime in the country (an EU Member State) whose law is applicable to the contract. Considering the limited content of the CESL as a contract law instrument not belonging to a comprehensive legal order, the idea that all questions concerning matters falling within its scope which are not expressly settled by it "should be resolved only by interpretation of its rules without recourse to any law" (Recital 29), seems an additional source of uncertainty. This could further erode the attractiveness of a choice in favour of the CESL.²⁹

In line with its previous acceptance in both systems, the recent codifications in China and Taiwan establish party autonomy as the first connecting factor to determine the law applicable to international contracts. In the case of Taiwan, party autonomy in the field of contracts is now established in Article 20 of the Taiwanese PIL Act 2010 in very simple terms.³⁰ The same principle was found

²⁷ For a critical appraisal of the Proposal, see Sixto SÁNCHEZ LORENZO, *Common European Sales Law and Private International Law: Some Critical Remarks*, *Journal of Private International Law*, Vol. 9 (2013), pp. 191 et seq.

²⁸ For instance, although the CESL is aimed at reducing transactions costs resulting from the need for traders to adapt to different national contract laws, the scope of application of the envisaged instrument raises significant concerns and could become a source of additional complexity and uncertainties. The CESL would lead to different regimes being applied between domestic and cross-border transactions, since it is only intended to be used for cross-border contracts. Furthermore, it would lead to different regimes being applied to contracts with consumers and contracts between certain traders, since where all the parties to a contract are traders, the CESL is only to be used if at least one of the parties is a small or medium-sized enterprise (see Articles 4 and 5 of the proposed Regulation).

²⁹ Discussing the potential role of the CESL in transactions between Chinese and European companies, see Jürgen BASEDOW, *The Europeanization of Private Law: Its Progress and its Significance for China*, *The Chinese Journal of Comparative Law*, Vol. 1 (2013), pp. 49 et seq. (at pp. 62 et seq.).

³⁰ Despite the broad scope of party autonomy, the wording of the provision refers to a choice made "in an explicit way".

already in the Article 6 of the Taiwanese PIL Act 1953³¹ that has been replaced by the new Act. Concerning the scope of party autonomy, one of the most striking features of the new Taiwanese Act, in the light of the current developments both in the EU and China, is the lack of specific provisions restricting party autonomy in certain categories of contracts where a weaker party is involved.

The Chinese PIL Act of 2010 establishes party autonomy as one of its general principles in Article 3, which states the possibility of the parties to "explicitly choose" the applicable law.³² In the field of contracts, Article 41 acknowledges the freedom of the parties to choose the law applicable to the contract without any reference as to the form of the choice.³³ Article 8(2) of the SPC PIL Interpretation 2012 has made clear that an implicit choice in court is possible, as previously admitted under Article 4 SPC Rules 2007. Pursuant to this clarification, in case the parties invoke the law of the same country and neither raises any objection to the choice of law, the court may conclude that the parties have chosen the law applicable to the contract. Due to the trend of Chinese courts to apply forum law, it has been noted that parties interested in the application of a foreign law should make it explicit at the start of the proceedings.³⁴ At present, the provision of the SPC PIL Interpretation 2012 that also establishes that the parties may choose the law and change their choice at any time until the conclusion of the oral hearings at first instance – Article 8(1) – is of the utmost importance regarding the possible object of the choice and the scope of party autonomy.

The SPC PIL Interpretation 2012 also clarifies that a link between the law chosen and the contract is not necessary. Article 7 of this Interpretation states that where a party claims that the choice of law is invalid on the grounds that the law chosen by the parties has no real connection with the civil relationship in dispute, such claim will not be upheld by the courts. Therefore, the selection of a neutral law unconnected to the contract is possible in line with the approach in

³¹ Act Governing the Application of Laws Foreign Elements, promulgated on 6 June 1953, English translation by Rong-Chwan CHEN (Materials submitted to the IACL 2010 Congress).

³² Concerning the traditional requirement for an express choice of law, see, Mo ZHANG, Choice of Law in Contracts: A Chinese Approach, *Northwestern Journal of International Law & Business*, Vol. 26 (2006), pp. 289 et seq. (at p. 317).

³³ Noting that "the expansion of the doctrine of party autonomy without recognizing implicit choices will amplify the tension between the law and reality", see Guangjian TU (supra note 4), at p. 568. On the liberal attitude shown by some Chinese courts in this regard, see Yongping XIAO/Weidi LONG, Contractual Party Autonomy in Chinese Private International Law, *Yearbook of Private International Law*, Vol. 11 (2009), pp. 193 et seq. (at p. 198).

³⁴ Peter LEIBKÜCHLER (supra note 16), p. 94.

the Rome I Regulation and common international business practice. The SPC PIL Interpretation 2012 addresses also the possibility for the parties to refer in the contract to an international convention that is not yet binding upon China. Pursuant to Article 9, if the parties have made such a choice, the courts may determine the rights and obligations between the parties according to the content of the international convention, provided that the convention is not in violation of the "socio-public interests" or mandatory provisions. This approach is also in line with the situation prevailing under the Rome I Regulation, since the provision only envisages an incorporation of the international convention by reference into the contract, and not its selection as the law of the contract in a technical sense.³⁵ Moreover, Article 5 of the SPC PIL Interpretation 2012 refers to the application of international uses but only envisages their possible application as gap-fillers in the absence of provisions settling the relevant issues. The incorporation by reference of international uses was already possible under the previous regime.³⁶

As to the scope of party autonomy, Article 6 of the SPC PIL Interpretation 2012 clarifies that where Chinese law does not explicitly allow the parties to choose the applicable laws for foreign-related civil relations, and the parties choose the applicable law, such choice of law shall be invalidated by the courts. Article 3 of the Chinese PIL Act 2010 that establishes party autonomy as a general principle must be understood in the light of this clarification. In the field of contracts, party autonomy is admitted explicitly in Article 41 of the Chinese PIL Act 2010. However, the extent of the restrictions established in Chinese PIL is critical in assessing the scope of party autonomy. The Chinese PIL Act 2010 lays down certain restrictions in contracts with weaker parties (Articles 42 and 43 on consumer and employment contracts) and includes general safeguards regarding public policy and Chinese mandatory provisions. All these restrictions are subject to comparison with the situation in the EU in other sections of this paper.

A peculiar feature of the Chinese PIL system is the traditional exclusion of other categories of contracts from party autonomy. In this connection, it has been noted that the restrictions established on the basis of Article 126 of the Contract Law remain applicable after the adoption of the 2010 PIL Act,³⁷ in the absence of further judicial interpretations of the new text.³⁸ Article 126 of the Contract Law

³⁵ Peter LEIBKÜCHLER (supra note 16), p. 94.

³⁶ Yongping XIAO/Weidi LONG (supra note 33), pp. 200 et seq.

³⁷ Jieying LIANG, Statutory Restrictions on Party Autonomy in China's Private International Law of Contract: How Far Does the 2010 Codification Go?, *Journal of Private International Law*, Vol. 8 (2012), pp. 77 et seq. (p. 107).

³⁸ However, on the view that such unilateral conflicts rules in favour of the law of the forum constitute excessive limitations on the principle of party autonomy, see Weizuo CHEN, *The Necessity of Codification of China's Private*

mandates the application of Chinese law to some contracts to be performed in China: Chinese-foreign equity joint-ventures, Chinese-foreign contractual joint-ventures, and certain agreements on natural resources. Furthermore, pursuant to Article 8 of the SPC Rules 2007, the performance in China of other contracts is subject to the law of China, in particular certain contracts concerning the acquisition of shares or assets of Chinese companies.³⁹ To the extent that these provisions are interpreted as totally excluding choice of law for those transactions in general, it can be noted that they establish a more restrictive model than the current situation in the EU. There are no similar restrictions in the EU excluding choice of law in those types of international contracts concerning companies or acquisition of shares of companies. This is without prejudice to appreciating that questions governed by the law of companies and other bodies fall outside the material scope of the Rome I Regulation (Article 1(2)(f)), and that as concerns performance issues, regard to the law of the country in which performance takes place is required (Article 12(2) Rome I Regulation). Notwithstanding this, parties have the freedom to choose the law applicable to those contracts under the Rome I Regulation.

III. Applicable Law in the Absence of Choice

The comparison between the developments in the EU, China and Taiwan regarding the general provisions on the determination of the applicable law in the absence of choice shows the adherence in the recent codifications in China and Taiwan to the more flexible approach that prevailed in Europe under the Rome Convention. Such an approach does not reflect the significant evolution experienced in this field by EU law under the Rome I Regulation. Article 41 Chinese PIL Act 2010 is a very simple provision, establishing that the law applicable in the absence of choice shall be "the law of the habitual residence of

International Law and Arguments for a Statute on the Application of Laws as the Legislative Model", *Tsinghua China Law Review*, Vol. 1 (2009), pp. 1 et seq. (at p. 14).

³⁹ That provision also excludes other contracts from party autonomy: contracts on the transfer of shares in a Chinese-foreign equity joint venture, Chinese-foreign contractual joint venture or wholly foreign-funded enterprise; contracts on the operation by a foreign person of a Chinese-foreign equity joint venture or a Chinese-foreign contractual joint venture established within the territory of China; contracts on the purchase by a foreign person of share equity held by a shareholder in a non-foreign-funded enterprise within the territory of China; contracts on the subscription by a foreign person to the increased registered capital of a non-foreign-funded limited liability or company limited by shares within the territory of China; and contracts on the purchase by a foreign person of assets of a non-foreign-funded enterprise within the territory of China.

the party whose performance of contractual obligations can best embody the characteristics of the contract or any other law with which the contract is most closely connected". The Chinese PIL Act 2010 does not provide any additional indication as to how the characteristic performance or the closest connection should be determined. Moreover, no clear indication is given as to the relationship between the characteristic performance rule and the closest connection test.⁴⁰ However, as far as the Chinese codification is concerned, judicial interpretations by the SPC may prove of great value in providing additional rules and enhancing legal certainty. The Taiwanese PIL Act 2010 refers first to the application of the law of the closest connection (Article 20(2)). Secondly, it establishes a presumption of closest connection in favour of the law of the domicile of the party in charge of the characteristic performance, except for contracts on real property, which are presumed to be most closely connected with the place where they are located (Article 20(3)). No additional indications are provided. Both codifications, and especially the Taiwanese rules, seem modelled directly on Article 4 of the Rome Convention. Nevertheless, the judicial rules of interpretation approximate the situation in China to the system under the Rome I Regulation.

The provisions on the law applicable in the absence of choice are among those in which the adoption of the Rome I Regulation resulted in the introduction of relevant amendments in the text of the Convention.⁴¹ A basic underlying principle of Article 4 both in the Rome Convention and the Regulation is the so-

⁴⁰ For diverging views on the understanding of the alternative wording of the provision, see Knut Benjamin PISSLER, "Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 76 (2012), pp. 1 et seq. (at p. 32), and Zhengxin HUO, Highlights of China's New Private International Law Act: From the Perspective of Comparative Law, *Revue Juridique Thémis*, Vol. 45 (2011), pp. 637 et seq. (at pp. 673 et seq.).

⁴¹ On these issues, see Dieter MARTINY, in: Christoph REITHMANN/Dieter MARTINY (eds.), *Internationales Vertragsrecht*, 7th ed., Köln 2010, at pp. 138 et seq.; Richard PLENDER/Michael WILDERSPIN, *The European Private International Law of Obligations*, 3rd ed., 2011, London, pp. 167 et seq.; Benedetta UBERTAZZI, *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, Milan, Giuffrè, 2008, pp. 67 et seq.; Ugo VILLANI, *La legge applicabile in mancanza di scelta dei contraenti*, Nerina BOSCHIERO (ed.), *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I)*, Torino, 2009, pp. 149 et seq.; Ulrich MAGNUS, Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice, in: Franco FERRARI/Stefan LEIBLE (eds.), *supra* note 18, pp. 27–50; Ole LANDO/Peter Arnt NIELSEN, *The Rome I Regulation*, *Common Market Law Review*, Vol. 45 (2008), pp. 1687 et seq. (at pp. 1700 et seq.); and Pedro A. DE MIGUEL ASENSIO, *Applicable Law in the Absence of Choice to Contracts Relating to Intellectual or Industrial Property Rights*, *Yearbook of Private International Law*, Vol. 10 (2008), pp. 199 et seq., with further references.

called proximity principle that is founded on the idea that the applicable law should be that of the country with which the contract is most closely connected. However, this basic principle may lead to uncertainty in the law-finding process since, in the absence of specific criteria regarding its application, courts have a significant degree of discretion in determining the applicable law. The changes introduced in Article 4 are to a great extent aimed at achieving a clearer and more precise balance between conflicts justice – or proximity – and legal certainty with a view to ensuring a sufficient level of predictability.

Article 4 Rome I Regulation envisages a four-step process to determine the law applicable to a contract. First, it has to be ascertained whether the relevant contract can be categorized as falling within one of the types of contracts set forth in Article 4(1). If the response is negative, it will be necessary to find out if it is possible to determine the habitual residence of the characteristic performer under paragraph 2. It is only if the law applicable cannot be determined on the basis of the characteristic performance that it shall become necessary to establish which country is most closely connected with the contract under Article 4(4). Finally, the law applicable by virtue of paragraphs 1 and 2 may be disregarded only in exceptional cases by virtue of the escape clause of Article 4(3) of the Rome I Regulation.

The first paragraph of Article 4 Rome Convention has as such disappeared in the Regulation. That paragraph proclaimed the basic principle that the contract is to be governed by the law of the country with which it is most closely connected. A similar approach may be found now in the Taiwanese PIL Act 2010. By contrast, Article 4 Rome I Regulation begins with a provision establishing the law applicable to certain categories of contracts by means of fixed and direct rules that only in exceptional circumstances may be disregarded. However, a crucial element to the functioning of Article 4 Rome Convention was the existence of three presumptions concerning the law most closely connected with certain categories of contracts. Under the general presumption of paragraph 2, it was presumed that the contract is most closely connected with the country of the habitual residence of the party who is to effect the performance which is characteristic of the contract. Specific provisions were provided for in paragraphs 3 (certain rights concerning immovable property) and 4 (contracts for the carriage of goods). The application of that system by national courts raised significant difficulties that seriously undermined the predictability of the law applicable and the uniform interpretation of Article 4 Rome Convention. The determination of which performance is characteristic (or even if it is possible to establish a performance as characteristic) was frequently a source of controversy and led to different solutions in different Member States. Since the determination of the characteristic performance becomes more difficult as the relevant contract

becomes more complex, the issue was controversial concerning many contracts frequently used in international business.

To reduce such difficulties and to reinforce legal certainty, Article 4 Rome I Regulation rests on a different approach concerning the role of the characteristic performance. The determination of the characteristic performance is not necessary when the contract falls within one of the categories of contracts listed in paragraph 1. The rules specified in Article 4(1) Rome I Regulation for the types of contracts listed in that provision lay down fixed connecting factors that are considered the relevant elements to locate each group of contracts in the country where its centre of gravity is situated. Sometimes, the criterion chosen is the habitual residence of one of the parties. Indeed, some rules make explicit the widely accepted result of applying to the relevant groups of contracts the characteristic performance concept. That is the case, in particular, with point (a), concerning contracts for the sale of goods, and point (b) on contracts for the provision of services. Points (e) and (f) also refer to the habitual residence of one of the parties as the connecting factor. Franchise contracts are governed by the law of the country where the franchisee has his habitual residence, and distribution contracts are subject to the law of the country where the distributor has his habitual residence. However, these two provisions seem to have their own rationale. They are not the product of a new consensus as to which is the characteristic performance of those types of contracts but rather reflect a choice related to the fact that EU law seeks to protect the franchisee and the distributor as the weaker parties.⁴² The centre of gravity idea is clearly the rationale behind the connecting factors used in points (c), (d), (g) and (h) of Article 4(1) Rome I Regulation. Points (c) and (d) refer to contracts relating to a right *in rem* in immovable property or to a tenancy of immovable property, and state that they shall be governed by the law of the country where the property is situated.⁴³

Contrary to paragraphs 2 to 4 of Article 4 of the Rome Convention, Article 4(1) of the Regulation is not drafted as a series of presumptions but as rules that determine the law of the country applicable to each of the categories of

⁴² As it was expressly stated in the Explanatory Memorandum of the 2005 Commission's Proposal, COM (2005) 650 final, at p. 6. This represents the inclusion of new policy goals in Article 4, see, Stefan LEIBLE/Matthias LEHMANN, *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht ("Rom I")*, *Recht der Internationalen Wirtschaft* 2008, p. 528 et seq. (at p. 535).

⁴³ Special rules are provided by certain contracts relating to a tenancy of immovable property concluded for temporary private use. Under point (g) the relevant connecting factor in the sale of goods by auction is the country where the auction takes place, if such a place can be determined. Finally, according to point (h), the law applicable to contracts concluded within regulated markets in financial instruments shall be the law of the country that governs the relevant market.

contracts listed. This evolution increases legal certainty, especially regarding those categories of contracts in which the determination of the characteristic performance is controversial and that are now listed in Article 4(1), such as distribution and franchise contracts.

In the light of the Chinese and Taiwanese codifications and their general reliance on characteristic performance and closest connection, it seems appropriate to recall that the wording and complex structure of Article 4 of the Rome Convention made possible different interpretations regarding the interaction between the presumption based on the characteristic performance and the escape clause contained in paragraph 5. According to this provision, the presumptions laid down in paragraphs 2, 3 and 4 were to be disregarded if it appeared from the circumstances as a whole that the contract was more closely connected with another country. Diverging views regarding the interplay between the presumptions and the escape clause resulted in different approaches by courts when examining the balance between 'conflicts justice' (proximity) and legal certainty, and resulted in different solutions when determining the governing law for similar situations under Article 4 of the Rome Convention. If a broad and flexible view is taken regarding the ability to disregard the presumptions, this may in practice seriously undermine legal certainty because it may lead to a case-by-case assessment of the particular contacts that a contract has with the different countries even in the situations covered by the presumptions. That approach broadens the degree of judicial discretion by weakening the significance of the presumptions. By contrast, other courts have favoured an interpretation of the escape clause that stresses its nature as an exception in those cases in which one of the presumptions applies. The ECJ held that under Article 4(5) of the Convention, the presumptions can be disregarded where it is "clear" from the circumstances as a whole that the contract is more closely connected with a country other than that determined on the basis of one of the presumptions.⁴⁴ The Chinese and Taiwanese Acts also use as connecting factors both the domicile of the party who effects the characteristic performance and the closest connection, but no clear indication is provided as to the interaction between the two factors. The Taiwanese PIL Act 2010, in line with the Rome Convention, refers to the characteristic performance test as a presumption and includes a specific rule for certain contracts on real property.

Within the EU, in order to enhance legal certainty, the wording of the Rome I Regulation now reinforces the view that only a restrictive interpretation of the escape clause is compatible with the general objective of the Regulation. Indeed, the escape clause of Article 4(3) Rome I Regulation makes it clear that it is only to be applied in cases in which the contract is "manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2".

⁴⁴ ECJ Judgment of 6 October 2009, C-133/08, *ICF*.

Additionally, paragraphs 1 and 2 are not drafted as presumptions, although their rules may be disregarded when the conditions to apply the escape clause are met. Hence, as regards the role of the escape clause, the wording of Article 4 was revised in order to make clearer its nature as an exceptional device. The final result is in line with the approach that favoured a strong presumption and a restrictive interpretation of the escape clause of Article 4(5) of the Convention. At any rate, the Regulation grants a certain degree of discretion to the courts, which is in contrast to the initial 2005 Proposal made by the Commission that not only envisaged the conversion of the mere presumptions into fixed rules, laying down hard-and-fast connecting factors, but also was intended to abolish the escape clause.⁴⁵

In conclusion, the evolution in Article 4 from the Convention to the Rome I Regulation seems to be coherent with the significance of legal certainty in the European judicial area, as a basic goal of EU private international law that favours the adoption of highly predictable conflict-of-law rules. This approach enhances the uniform interpretation of conflict-of-law rules by the courts of all Members States. This positive overall assessment of Article 4 Rome I Regulation does not mean that the new provisions do not pose interpretative challenges. For instance, the new model raises new issues as to the characterization of the contracts to determine if they can be categorized as one of the types specified in paragraph 1. There is no reference among the categories listed in Article 4(1) to significant groups of contracts, such as contracts on intellectual property, where the determination of the characteristic performance may be controversial. Furthermore, very limited guidance is provided as to the determination of the country with which the contract is most closely connected.

Compared to the Rome I Regulation, the extreme flexibility of the Chinese and Taiwanese Acts grants a high degree of discretion to courts. Such judicial discretion may result in excessive uncertainty, in particular in the absence of guidance as to the determination of the characteristic performance, the application of the closest connection text, or as to how both connecting factors interrelate. Nevertheless, as far as China is concerned and pending possible future judicial interpretations, it is remarkable as a possible source of guidance

⁴⁵ Paul LAGARDE, *Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuels (Rome I)*, *Revue critique de droit international privé*, 2006, p. 331 et seq.; Max Planck Institute For Foreign Private And Private International 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)", *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, Vol. 71 (2007), p. 225 et seq.; and Franco FERRARI, *Objektive Anknüpfung*, in Franco FERRARI/Stefan LEIBLE (eds.), *Ein neues Internationales Vertragsrecht für Europa*, Jena 2007, pp. 57 et seq. (at p. 72).

that the SPC Rules 2007 provide connecting factors for 17 categories of contracts as a means to determine the closest connection. Under Article 5 of the SPC Rules 2007, in order to establish the country with the closest connection to the contract, reference is made to the need to consider the particularities of the contract and in particular the characteristic performance. However, a list of rules is provided laying down the law that shall be applicable to 17 categories of contracts. It is a list of fixed connecting factors that are only to be disregarded in case a contract has an "obvious and closest connection" to another country. Therefore, the system adopted under Article 5 of the SPC Rules 2007 seems rather similar to the model envisaged in Article 4 Rome I Regulation.⁴⁶ Notwithstanding this, significant differences may be found between the groups of contracts listed in the two provisions and in some cases between the connecting factors used.⁴⁷ It has been noted that the underlying logic of Article 41 of the Chinese PIL Act 2010 does not diverge from the SPC Rules 2007,⁴⁸ and the prevailing view favours the applicability of Article 5 of the SPC Rules 2007 under the new codification, in the absence of more recent guidelines.⁴⁹

IV. Protection of Weaker Parties

A novelty in the recent codification in China has been the introduction of special conflict rules for the protection of weaker parties, in particular in consumer and employment contracts. By contrast, the Taiwanese PIL Act 2010 does not provide for specific protection concerning consumer and employment contracts. Therefore, policy considerations in favour of consumers and employees involved in international transactions, such as those underlying Articles 6 and 8 Rome I Regulation, do not receive similar attention in Taiwan. In this context, the present comparison will focus on some issues raised by the recent developments

⁴⁶ See A. LÓPEZ-TARRUELLA, "El litigio judicial en los contratos con empresas chinas. Aspectos de Derecho internacional privado", in: Aurelio LÓPEZ-TARRUELLA (coord.), *El comercio con China*, Valencia, 2010, pp. 429 et seq. (at p. 452).

⁴⁷ A detailed comparison of both lists is beyond the scope of this contribution. The contracts referred to in the 2007 SPC Interpretations are: sales contracts, contracts on processing with supplied materials, contracts on supplying plant equipment, certain contracts on real estate, leases of movables, pledges of movables, loans, insurance contracts, financial leasing, construction projects, warehousing contracts, guaranty contracts, entrustment, contracts on bonds, auctions, brokerage contracts and contracts on intermediation. See Guangjian TU (supra note 4), pp. 580 et seq.

⁴⁸ Qisheng HE (supra note 11), at p. 64.

⁴⁹ Knut Benjamin PISSLER (supra note 40), at p. 33.

in the EU and China. First, consumer contracts will be addressed and, then, employment contracts.

Article 42 of the Chinese PIL Act 2010 represents a significant innovation in Chinese PIL. The underlying policy is similar to that of Article 6 Rome I Regulation, intended to protect consumers as weaker parties in certain international contracts. However, both provisions differ as regards their structure, the relevant connecting factors and scope of application. Article 42 Chinese PIL Act 2010 is a brief provision laying down a special rule for consumer contracts that establishes the law of the consumer's habitual residence as the applicable law. Party autonomy is admitted and prevails, but only if the consumer chooses the law of the place where the commodity or the service is provided. Finally, the law of the place where the commodity or service is provided shall also be applied in case the business operator does not engage in any business activity in the habitual residence of the consumer. Since no definition of consumer is provided under Article 42, some uncertainties may arise in this regard.⁵⁰

Specific conflict rules concerning international consumer contracts were already present in the Rome Convention and in the European system run parallel to the jurisdiction provisions of the Brussels I Regulation. Article 6 Rome I Regulation is basically aimed at ensuring adequate protection for the consumer, as the party deemed to be economically weaker and less experienced and informed in legal matters. It responds to the importance of consumer policies in the EU and the view that substantive standards, policy options and mechanisms of enforcement concerning consumer protection vary widely around the world. For contracts falling under its scope of application, Article 6 Rome I Regulation establishes, as a default rule, that consumer contracts shall be governed by the law of the country where the consumer has his habitual residence. Therefore, a special connecting factor is provided for these contracts. It establishes the law applicable in the absence of choice and is also determinative of the limits placed on party autonomy in order to protect the consumer against a choice detrimental to his interests. Parties are free to choose the law applicable to the contract, but the choice may not deprive the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement under the law of the country where the consumer has his habitual residence. These rules are intended to provide adequate protection to consumers in international transactions in order to prevent local consumers from being deprived of the level of protection granted to them by their domestic legislation. To assess the protection granted under this special regime, the attention has to focus on the personal and substantive scope of the provision, as well as on the technique used to determine who is to be qualified as a passive consumer benefiting from protection.

⁵⁰ See Jieying LIANG (supra note 37), at pp. 101 et seq., reaching also the same conclusion with regard to employment contracts.

Article 6 Rome I Regulation is closely related to the provisions on jurisdiction over consumer contracts of the Brussels I Regulation (Articles 17–19 Brussels I recast). Pursuant to these provisions, a consumer contract is “a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)”. The ECJ has clarified that to determine whether a person is a consumer, reference must be made to his position in a particular contract, having regard to the nature and aim of that contract, since the same person may be regarded as a consumer in relation to certain transactions and as an economic operator in relation to others.⁵¹ Furthermore, concerning activities which are partly business and partly private, a party may only rely on the special protection granted to consumers if that person shows that in the dual purpose contract the business use is only negligible, and the supposed consumer has not given the other party the impression that he was acting for business purposes.⁵² As to the substantive scope of application, Article 6 Rome I Regulation applies to all consumer contracts, with the exception of carriage and insurance contracts (Article 6(1)), as well as the contracts listed in Article 6 paragraph 4. The latter include contracts for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence; and contracts relating to a right *in rem* in immovable property or a tenancy of immovable property other than timesharing contracts.

The protection granted to consumers by Article 6 Rome I Regulation is not absolute. To determine when consumers are protected it imposes certain conditions that relate to the trader, in line with the Brussels I Regulation. These conditions determine who is to be regarded as a passive consumer and hence beneficiary of special protection. Pursuant to Article 15(1)(c) Brussels I Regulation – Article 17(1)(c) Brussels I recast- and Article 6(1) Rome I Regulation, the trader must pursue its commercial activities in the country of the consumer’s domicile or, by any means, direct such activities to that country or to several countries including that country, and the contract must fall within the scope of such activities. Application of the requirement that the professional directs his activities to the country where the consumer has his habitual residence deserves particular attention in the context of the information society. Those provisions do not define the concept of activity “directed to” the country of the consumer’s domicile. This condition has been developed to adapt the previous regime to the context of Internet activities, where international contracts involving passive consumers have greatly expanded. According to a joint declaration by the Council and the Commission on Article 15 Brussels I

⁵¹ ECJ Judgment of 3 July 1997, C-269/95, *Benincasa*, at para. 16.

⁵² ECJ Judgment of 20 January 2005, C-464/01, *Gruber*, at paras. 46 and 51.

Regulation, the mere fact that an Internet site is accessible is not sufficient for the protection to be applicable (Recital 24 Rome I Regulation).

In the absence of a definition, the ECJ has been requested to clarify under which circumstances activities are regarded as being directed to the country of the consumer's domicile. Determinative in this regard is whether, before the contract was concluded, there was evidence demonstrating that the trader was envisaging doing business with consumers domiciled in the country of that consumer's domicile. Therefore, in the context of the Internet, in order to establish whether a trader directs its activities to a country, attention has to be paid to the content and settings of the trader's Internet presence and its overall activity. Significance guidance has been provided by the ECJ in its *Pammer* judgment.⁵³ The well-known distinction between active websites, in the sense of sites enabling the conclusion of electronic contracts, and passive websites is not deemed decisive in this regard, since also websites that are not interactive may be intended to do business and promote the conclusion by other means of contracts with consumers. In fact, the application of the special protection to consumers does not require the contract between the consumer and the trader to be concluded at a distance.⁵⁴ In its *Pammer* judgment, the ECJ clarified that among the evidence establishing whether an activity is 'directed to' the country of the consumer's domicile are all clear expressions of the intention to solicit the custom of that country's consumers. Such clear expressions include mention by the trader that it is offering its services or its goods in one or more countries designated by name, and recourse by the trader to advertising and marketing mechanisms that promote access to its site by consumers domiciled in the country concerned. The ECJ even provided a non-exhaustive lists of items of evidence that possibly, in combination with one another, are capable of demonstrating the existence of an activity 'directed to' the country of the consumer's domicile. The relevant factors may include: the international nature of the activity at issue; mention of telephone numbers with the international code; use of a top-level domain name other than that of the country in which the trader is established, or use of a non-national top-level domain name; the description of itineraries from foreign countries corresponding to the place where

⁵³ ECJ Judgment of 7 December 2010, C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, paras 76 et seq.

⁵⁴ ECJ Judgment of 6 September 2012, C-190/11, *Mühlleitner*, para 45. Furthermore, the ECJ has clarified that the application of the special provisions protecting consumers (of the Brussels I Regulation) does not require the existence of a causal link between the means employed to direct the commercial or professional activity to the Member State of the consumer's domicile. However, the existence of such a causal link constitutes evidence of the connection between the contract and such activity. See ECJ Judgment of 17 October 2013, C- 218/12, *Emrek*.

the service is provided; mention of an international clientele; use of a language or a currency other than the language or currency generally used in the country in which the trader is established.⁵⁵ The progressive development and availability of geolocation tools may become very significant when assessing the trader's Internet presence and its overall activity for these purposes.

Although based on similar policy goals, the comparison between Article 42 Chinese PIL Act 2010 and Article 6 Rome I Regulation shows significant differences in structure, content and scope. Under the Rome I Regulation, all the consumer contracts not covered within the scope of Article or not meeting the conditions for the special protection to be applied, are subject to the general rules of the Regulation, in particular Articles 3 and 4. Contrary to the EU model, Article 42 Chinese PIL Act 2010 seems to include in its scope of application all cross-border consumer contracts. Three different connecting factors are envisaged: party autonomy, the consumer's habitual residence and the place where the commodity or the service is provided. Party autonomy is significantly restricted, since parties may only choose the law of the place where the commodity or the service is provided. Pursuant to the wording of Article 42 Chinese PIL Act 2010, this restriction on party autonomy seems to extend to all cross-border consumer transactions. Under the Rome I Regulation, the restrictions to party autonomy only apply to those consumer contracts falling within the scope of Article 6 provided that they meet the conditions to which the special protection is subject. Furthermore, even in these cases the parties are free to choose the law they prefer.⁵⁶ This approach may allow traders that direct their activities to many countries to organize more efficiently their contractual dealings with consumers (and businesses), for instance, by including in all contracts a clause choosing the law of the trader's habitual residence. Regarding contracts where protection is justified under Article 6 Rome I Regulation, such a choice may not have the result of depriving the consumer of the protection afforded to him by the mandatory provisions of the country of his habitual residence. Comparative substantive law is key in the application of this provision, due to the prevalence, under paragraph 2, of the law having a higher level of protection between the law chosen by the parties and the law of the country where the consumer has his habitual residence. This approach intends to achieve a reasonable balance between the interests of traders and the adequate protection of consumers that engage in international transactions.

In the absence of choice, the Chinese codification establishes that the law applicable to consumer contracts shall be the law of the consumer's habitual

⁵⁵ ECJ Judgment of 7 December 2010, C-585/08 and C-144/09, *Pammer and Hotel Alpenhof*, para. 93.

⁵⁶ See e.g., Paola PIRODDI, *La tutela del contraente debole nel Regolamento Roma I*, Milan, 2012, p. 173.

residence. This is in line with the default rule laid down also in Article 6(1) Rome I Regulation.⁵⁷ Furthermore, an additional factor of convergence results from the fact that, pursuant to Article 42 Chinese PIL Act 2010, such a default rule only applies in cases where the business operator engages in business activity in the habitual residence of the consumer. Pending further clarification of this concept, it seems based on foundations similar to the concept of activity "directed to" the country of the consumer's domicile in the EU system. However, in China an additional special connecting factor – one that deviates from the general rules on contracts – is foreseen with respect to all consumer contracts that do not meet the condition required for the law of the consumer's habitual residence to be applied. All those other consumer contracts are subject to the law of the place where the commodity or the service is provided. Although this approach may in principle seem to guarantee a significant link between the law applicable and the contract, in practice the connecting factor used may become a source of significant uncertainty in connection with international consumer contacts. Determination of the place where a commodity or service is provided may be particularly controversial.⁵⁸ Furthermore, in the context of electronic commerce, of particular significance for cross-border consumer transactions, it can be a fictitious element.

Turning attention now to employment contracts, it is remarkable that by introducing a specific provision in Article 43, the Chinese PIL Act 2010 has to a great extent evolved into a protective model based on the adoption of bilateral conflict rules in a field traditionally dominated by unilateralism and territoriality. Notwithstanding this converging trend, significant differences may be found between Article 43 Chinese PIL Act 2010 and Article 8 Rome I Regulation. The latter introduced only very minor changes to the wording of Article 6 Rome Convention.

Pursuant to Article 8 Rome I Regulation, party autonomy is allowed in employment contracts. However, the choice by the parties (typically introduced by the employer) is subject to restrictions similar to those laid down for consumer contracts.⁵⁹ The choice of law may not have the result of depriving the employee of the protection afforded to him by mandatory rules of the law

⁵⁷ The evolution of Chinese conflict-of-laws rules in this area and their current approach in line with the European model raises the question as to the possible convergence of the underlying consumer protection policies and substantive law standards that influence the functioning of Article 6(2) Rome I Regulation.

⁵⁸ Pedro A. DE MIGUEL ASENSIO, "El lugar de ejecución de los contratos de prestación de servicios como criterio atributivo de competencia", *Entre Bruselas y La Haya – Liber amicorum Alegría Borrás*, Madrid, 2013, pp. 291 et seq.

⁵⁹ See Stefania BARIATTI, *Les limites au choix de la loi applicable dans les contrats impliquant une partie faible*, Sabine CORNELOUP/Natalie JOUBERT (eds.), (supra note 20), pp. 325 et seq. (at pp. 334 et seq.).

applicable in the absence of choice. In the absence of a choice by the parties, the individual employment contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract (Article 8(2)). The "from which" expression was introduced in the Regulation with the view to establishing the base as connecting factor with respect to flight personnel. Article 8(2) further clarifies that the country where the work is habitually carried out shall not be deemed to have changed if the employee is temporarily employed in another country.⁶⁰ Recital 36 provides additional guidance concerning whether a posting is deemed temporary for these purposes. It states that work carried out in another country should be regarded as temporary if the employee is expected to resume working in the country of origin after carrying out his tasks abroad. Additionally, Recital 36 lays down that the conclusion of a new employment contract with the original employer or an employer belonging to the same group of companies should not preclude the employee from being regarded as carrying out his work in another country temporarily. Its inclusion as a mere recital favours the view that this statement and the reference to the group of companies have an illustrative character.⁶¹ Where no habitual workplace can be established, pursuant to Article 8(3), the applicable law shall be the law of the country where the place of business through which the employee was engaged is situated. Finally, the two objective connecting factors are subject to an escape clause found in Article 8(4). Article 8 must not automatically result in the application, in all cases, of the law most favourable to the worker.⁶² Pursuant to Article 8(4), where the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply. The ECJ has established that even where an employee carries out the work in performance of the contract habitually, for a lengthy period and without interruption in the same country, the national court may, under the escape clause, disregard the law of such country if it appears from the circumstances as a whole that the contract is more closely connected with another country. As significant factors for this purpose, the ECJ has referred to the country in which the employee pays taxes on the income from his activity and the country in which he is covered by a social security scheme

⁶⁰ The case law of the ECJ regarding Article 6 Rome Convention has favoured a broad interpretation of the place of the habitual workplace as connecting factor, see ECJ Judgment of 15 March 2011, C-29/10, *Koelzsch*, para. 47; and ECJ Judgment of 15 December 2011, C-384/10, *Voogsgeerd*.

⁶¹ Peter MANKOWSKI, Employment Contracts under Article 8 of the Rome I Regulation, Franco FERRARI/Stefan LEIBLE (eds.), (supra note 17), pp. 171 et seq. (at p. 192).

⁶² ECJ Judgment of 12 September 2013, C-64/12, *Schlecker*, para. 34, concerning the parallel escape clause in Article 6 Rome I Regulation.

and sickness insurance, as well as the parameters relating to salary determination and other working conditions.⁶³

Because of the relevant public interests involved in social standards, internationally mandatory rules may play a significant role in this area, raising the issue of the coordination between Articles 8 and 9 of the Rome I Regulation. Recital 34 of the Rome I Regulation specifically refers to the existence of overriding mandatory provisions concerning the posting of workers. It states that Article 8 should not prejudice the application of the overriding mandatory provisions of the country to which a worker is posted in accordance with Directive 96/71/EC.⁶⁴

The introduction in the Chinese PIL Act 2010 of a specific provision on employment contracts intended to protect employees as the weaker party aligns the Chinese system to a significant extent to the European model. It is remarkable that the traditional unilateral approach has been overcome and that there has been an adoption of bilateral rules that have recourse to the habitual workplace and the principal place of business as connecting factors. Pursuant to Article 43 Chinese PIL Act 2010, the latter connecting factor only applies where the workplace of the employee – first connecting factor – cannot be ascertained. Furthermore, the provision clarifies that a labour posting may be governed by the law of the place where the posting is arranged. Although the connecting factors of Article 43 Chinese PIL Act 2010 are similar to the objective factors of Article 8 Rome I Regulation, acute differences may be found.

To begin with, under the EU model the first connecting factor is party autonomy, a possibility that is not envisaged in Article 43 Chinese PIL Act 2010 as regards employment contracts. Pursuant to Article 8 Rome I Regulation, the parties are free to choose the law applicable to an individual employment contract. To find a proper balance between such freedom and the safeguarding of the employees' interests, strict limits are imposed. The choice of law may not have the result of depriving the employee of the protection afforded to him by the mandatory provisions of the law that would be applicable in the absence of choice. Therefore, under the Rome I Regulation the chosen law prevails to the extent that its standard of labour protection is higher, and it prevails in general with regard to issues not governed by mandatory rules under the law applicable in the absence of choice. Under these circumstances, it has been noted that compared to Article 43 Chinese PIL Act 2010, the EU approach provides an additional mechanism favouring legal certainty that may be particularly useful in

⁶³ Ibid, paras. 41 and 44.

⁶⁴ Directive 96/71/EC of 16 December 1996 concerning the posting of workers in the framework of the provision of services, Official Journal of the European Union 1997 L 18/1.

a time of increasing workforce mobility.⁶⁵ Additionally, Article 43 diverges from the European model since it does not include an escape clause based on the closest connection test. Notwithstanding this, the final provision on labour posting as found in Article 43 introduces some flexibility when referring to the possibility of applying the law of the place where the posting is arranged.

V. Overriding Mandatory Rules and Public Policy

Both the Rome I Regulation and the Chinese PIL Act 2010 include specific provisions on mandatory rules and public policy. The basic idea that overriding mandatory rules of the forum prevail over the foreign law which is applicable as determined by the conflict of laws rules has been generally accepted as resulting from the position of those mandatory rules under forum law. Article 9(2) Rome I Regulation states: "Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum". A similar provision may be found now in Article 4 Chinese PIL Act 2010, laying down that mandatory provisions of Chinese law "shall be applied directly". The connection between Article 4 and Article 5 on public policy has been regarded as a clear indication that only internationally mandatory rules are covered by Article 4.⁶⁶ Recourse to the public policy of the forum as a device to prevent the application of a foreign law is established in Article 21 Rome I Regulation and Article 5 Chinese PIL Act 2010.⁶⁷ The wording of the Regulation seems more precise in stressing the exceptional nature of this device, since it requires the foreign provisions to be "manifestly incompatible with the public policy". Article 5 Chinese PIL Act 2010 establishes that Chinese law shall be applied where the application of a foreign law is prejudicial to the social and public interest of China. The doctrine of public policy is not a novelty in Chinese PIL legislation, although traditionally its application has been burdened both by the diverse wordings used in the different laws referring to public policy and by their vagueness, which has resulted in judges having significant discretion.⁶⁸ Compared to the Rome I Regulation, Article 5 Chinese PIL Act 2010 is more explicit as to the result of having recourse to public policy, i.e. specifying not

⁶⁵ Jürgem BASEDOW (supra note 5), at pp. 393 et seq.

⁶⁶ See Ruiting QIN, "Eingriffsnormen im Recht der Volksrepublik China und das neue chinesische IPR-Gesetz", *Praxis des internationalen Privat- und Verfahrensrechts*, 2011, pp. 603 et seq. (at p. 604).

⁶⁷ In the Taiwanese PIL Act 2010, the public policy exception is established in Article 8.

⁶⁸ Yongping XIAO and Zhenxin HUO, "*Ordre Public* in China's Private International Law", *American Journal of Comparative Law*, Vol. 53 (2005), pp. 653 et seq.

only a rejection of the foreign law but also the application of forum law to the dispute.

The comparison between the Rome I Regulation and the Chinese PIL Act 2010 shows some additional divergences, in particular concerning the characterization of overriding mandatory provisions and the possibility of giving effect to provisions of the law of third countries (other than forum law and the law of the contract). As an innovation, Article 9(1) Rome I Regulation defines "overriding mandatory provisions" as "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation". By contrast, the wording of Article 4 Chinese PIL Act 2010 does not provide any indication as to what provisions are to be regarded as internationally mandatory rules or as to where they are to be found in Chinese law. These issues raised significant uncertainties in the light of the previous Chinese case law.⁶⁹ Under these circumstances, the inclusion of a specific article on mandatory provisions in the SPC PIL Interpretation 2012 is to be welcomed. Article 10 of the recently adopted Interpretation refers to the characterization of internationally mandatory provisions of China and their applicability. It also provides a list of areas where such provisions may be found in Chinese law.⁷⁰

Within the EU, even after the abovementioned definition, some room for debate remains in certain areas of the law as to the rules falling within that category. Typical examples of overriding mandatory provisions include antitrust law and certain measures restricting international trade, e.g. measures implementing trade embargoes; restrictions on the export of dual-use technologies; limitations on international transfer of personal data that are intended to guarantee the protection of a fundamental right; and certain restrictions based on the protection of cultural heritage, public health or animal life. However, it has become especially controversial whether certain mandatory norms which may be aimed, among other social goals, at protecting a weaker party are covered by the definition of overriding mandatory provisions contained in Article 9(1). Although the reference in the definition to the safeguarding of public interests may be invoked as an argument to limit the concept of overriding

⁶⁹ See Ruiting QIN (supra note 66), pp. 604 et seq.; and Weidi LONG, "L'autonomia privata e le norme imperative nella prima codificazione cinese delle norme sui conflitti di leggi", Renzo CAVALIERI and Pietro FRANZINA (eds.), *Il nuovo diritto internazionale privato della Repubblica Popolare Cinese*, Milan, 2012, pp. 83 et seq. (at pp. 90 et seq.).

⁷⁰ Furthermore, Article 11 of the new Interpretation states that the laws of a foreign country shall not be applied if one party creates a foreign link with a view to circumventing the application of the mandatory provisions of China.

mandatory provisions, in line with the restrictive concept of *Eingriffsnormen*, there are good reasons to sustain a broader interpretation of the concept in this respect, so that it encompasses provisions that may protect a weaker party. In this connection, it is remarkable that the origin of the definition used in Article 9 is to be found in the *Arblade* judgment⁷¹ of the ECJ, dealing with the protection of employees. Furthermore, not only the foundations of Article 7 Rome Convention as predecessor of Article 9 Rome I Regulation, but also the case law of the ECJ concerning the protection of agents⁷² and consumers⁷³ may be invoked to sustain the view that certain provisions that may protect a weaker party can also be considered as crucial by a country for safeguarding its political, social or economic organization under the terms of Article 9(1) Rome I Regulation. Notwithstanding this, in practice the existence of specific regimes for the protection of weaker parties in the Rome I Regulation limits to a great extent the significance of Article 9 in areas such as consumer, insurance or employment contracts.

In China, Article 4 of the Chinese PIL Act 2010 focuses on direct application as the effect of mandatory provisions, but no clear indications are given to define such rules.⁷⁴ With a view to developing Article 4, the newly adopted SPC PIL Interpretation 2012 refers to mandatory provisions and contains a list of legal areas that can be governed by internationally mandatory rules. First, Article 10 of the SPC PIL Interpretation 2012 characterizes mandatory provisions as rules that (i) concern the general social interests of China, (ii) cannot be excluded by the parties and (iii) are of direct application to international relations. Then it refers to the following five categories where mandatory norms may be found: labour protection; food safety and public health; environmental safety; financial safety such as foreign exchange control; anti-monopoly and anti-dumping matters. The list is not exhaustive, and the last indent of the provision makes clear as a general clause that other areas may also be governed by Chinese mandatory provisions. The wording of Article 10 has been criticized as imprecise and potentially confusing, in particular with regard to the characterization of the rules in the five listed areas as mandatory provisions and with regard to the existence of mandatory provisions in other areas. The better view seems to be that the list in Article 10 is to be understood as a mere guideline and that in determining whether a concrete provision is mandatory under Article 4 of the Chinese PIL Act 2010, regard shall be had to its objectives.⁷⁵ However, traditionally the

⁷¹ ECJ Judgment of 23 November 1999, C-369/96 and C-376/96, *Arblade*, para. 30.

⁷² Judgment of 9 November 2000, C-381/98, *Ingmar*.

⁷³ See e.g. Judgments of 26 October 2006, C-168/05, *Mostaza Claro*; and 6 October 2009, C-40/08, *Asturcom*.

⁷⁴ Jieying LIANG (supra note 37), p. 104.

⁷⁵ Peter LEIBKÜCHLER (supra note 16), at pp. 95–96.

acceptance of party autonomy in international contracts has been combined in China with the imposition of significant restrictions in provisions regarded as mandatory. It seems that even after the new Interpretation, significant uncertainty remains as to the identification of mandatory provisions in Chinese law for the purposes of Article 4.

In contrast to the Chinese legislation, which only refers to the mandatory provisions of the forum, Article 9 Rome I Regulation establishes in paragraph 3 the possibility of giving effect to the overriding mandatory provisions of a country which is not the forum and whose law is not the law of the contract. Such a possibility has been subject to significant controversy within the EU, as illustrated by the debate on the amendment of Article 7(1) Rome Convention into Article 9(3) Rome I Regulation. The Rome Convention allowed Member States to make a reservation not to apply Article 7(1). Under the Regulation such a reservation is not possible. While the Rome Convention referred to the possibility of giving effect to the mandatory rules of the law of "another country with which the situation has a close connection", Article 9(3) Rome I Regulation restricts such a possibility to "the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful". Therefore the Regulation is drafted more narrowly. Article 7(1) was criticized as being too vague, broad and flexible, and a potential source of uncertainty that could undermine the confidence of the parties in the courts of Member States. Its intended introduction in the Regulation gave rise to significant concerns in the City of London.⁷⁶ The final text of Article 9(3) is a compromise,⁷⁷ but differences in practice between both provisions may be limited, since the case where performance is to take place in a country where it is unlawful, is the most typical situation where the possibility of giving effect to the law of a third State becomes relevant.⁷⁸ Furthermore, the better view is that the contract obligations relevant for the purposes of Article 9(3) are not only the characteristic obligation of the contract or the obligations in dispute.⁷⁹

⁷⁶ Jonathan HARRIS, "Mandatory Rules and Public Policy under the Rome I Regulation", Franco FERRARI and Stefan LEIBLE (eds.), (supra note 17), pp. 269 et seq., (at pp. 284 et seq.).

⁷⁷ Andrea BONOMI, "Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts", *Yearbook of Private International Law*, vol. 10 (2008), pp. 285 et seq. (p. 296).

⁷⁸ Mario GIULIANO and Paul LAGARDE, "Report on the Convention on the law applicable to contractual obligations", *Official Journal of the European Union* 1980 C 282/1, p. 27.

⁷⁹ Richard PLENDER and Michael WILDERSPIN (supra note 41), pp. 347–348.

Although restricting the third States whose laws may be given effect, Article 9(3) Rome I Regulation grants ample discretion to the courts as to the effect to be given to those provisions and the factors to be considered in determining whether effect is to be given. As noted in the official report to the Rome Convention, the expression "effect may be given" imposes on the courts of Member States the extremely delicate task of combining the mandatory provisions with the law applicable to the contract in the relevant situation.⁸⁰ It is a flexible reference that allows courts to consider that the foreign mandatory rule may lead to a situation in which a party is not in a position to perform its obligations under the contract. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application. The fact that the nature and purpose of the rules are shared by other States, including the forum, seems to be a relevant factor when deciding whether and to what extent effect is to be given to them.

Compared to the EU, in other jurisdictions, in particular in China and Taiwan, the possibility of giving effect to overriding mandatory provisions of third countries does not receive similar attention. However, such a possibility seems to be a relevant safeguard mechanism in the field of contractual obligations, given the ample freedom parties enjoy to choose the applicable law even if such a country has no connection with the relevant contract. This mechanism seems appropriate to balance the interests involved and to prevent parties from evading certain foreign rules and from committing unlawful acts in a foreign country.

⁸⁰ Mario GIULIANO and Paul LAGARDE (supra note 78), p. 28.