

# **OCHRANA SPOTŘEBITELE A EVROPSKÉ MEZINÁRODNÍ PRÁVO SOUKROMÉ A PROCESNÍ**

## **THE CONSUMER PROTECTION AND EUROPEAN INTERNATIONAL PRIVATE AND PROCEDURAL LAW**

**NADĚŽDA ROZEHNALOVÁ**

Právnická fakulta, Masarykova univerzita

### **Abstrakt**

Ochrana spotřebitele představuje v moderních právních úpravách právní regulaci spojující oblast práva soukromého i veřejného (viz například otázku tzv. bezpečnosti výrobku a odpovědnost za výrobek). V případech s mezinárodním prvkem je nutné právní regulaci postavení spotřebitele sledovat nejenom v rovině hmotného práva (veřejného i soukromého), ale také v oblasti práva procesního a mezinárodního práva soukromého. Příspěvek analyzuje právní úpravu v oblasti mezinárodního práva soukromého. Předmětem zájmu je jednak stávající úprava v článku 5 Úmluvy o právu rozhodném pro smlouvy (Řím I), jednak návrhy nové úpravy v nařízení. Společně s touto problematikou je krátce uvedena i otázka evropského mezinárodního práva procesního tak, jak je upravena v člancích 15 – 17 nařízení Brusel I.

### **Klíčová slova**

spotřebitel, ochrana spotřebitele, evropské mezinárodní právo soukromé, evropské mezinárodní právo procesní, článek 5 Úmluvy o právu rozhodném pro smlouvy (Řím I), transformace úmluvy do nařízení, ochrana zájmů spotřebitele v. zájmy obchodníků, článek 15 – 17 nařízení Brusel I

### **Abstract**

The protection of the consumer represents in the modern legal systems the legal regulations connecting the area of the public and private law (see for example the safety product v. product liability). In cases with the international element is necessary to consider the legal regulation and its impact on the position of the consumer not only on the level of the

substantive law (private and public), but on the level of the international private and procedural law too. The paper analyses the legal regulation in the area of the European international private law. In the paper is discussed as the article 5 of the Convention on the law applicable on contractual obligations, as the draft of the new regulation Rome I. Together with these questions are shortly analysed the articles 15 – 17 of the regulation Brussel I.

### **Key words**

the consumer, the consumer protection, European international private law, European international procedural law, the art. 5 of the Rome Convention on the law applicable to contractual obligations (Rome I), the transformation of the Convention into the regulation, the interests of the businessmen v. the protection of the consumer's interests, articles 15 – 17 of the regulation Brussel I

### **I. Introduction**

The existence of an international element adds a new dimension to the regulation of the contract - it is possible not only to use the foreign law as the result of the application of the conflict rules, but the parties may directly choose the foreign law and exclude the application of the *lex fori*. The choice of law - regularly the choice of law of the State without any restriction - presents a generally adopted principle of the international private law. Although where exists an interest to protect the weaker party of the contract (in the area of the substantive law or procedural law), it is not suitable to use this principle without any exemption. The legal orders seek to influence the position of the weaker party and seek to use the different legal methods to protect it. For example - some legal orders or rules exclude the possibility to choose the law in these kind of contracts, other restrict the choice of law by parties or use the regulation through so called international mandatory rules. Usually the regulation is different depending on whether the customer is active (the customer who travels abroad and concludes the contract) or passive.

In the European international private law exist two sets of rules, which reflect the existence of the foreign, international, element in the private law relations.

Firstly, it is the Convention on the law applicable on contractual obligations( Rome I),<sup>1</sup> which is the subject of the transformation into the regulation on the present.

Secondly, the directives<sup>2</sup> besides the substantive law regulation also content other demands on the situation, when the choice of law could exclude a protection of the consumer introduced in the directive, respectively in the harmonized law. The similar situation is in the area of the procedural law – the regulation Brusel I contents the jurisdiction in the consumer s matters in the special articles, limits forum shopping and the party autonomy to choice the forum.

The content of my contribution is the short analyse of the article 5 of the Rome Convention and the discussion about the article 5 of the draft of the new regulation. In the conclusion I will make some remarks on the articles 15 – 17 of the Brusel I.

The aim of the paper is to describe the technics of the cross-border consumer protection in the european international private and procedural law.

## **II. The protection of the consumer on the level of the Rome I**

The article 5 of the Rome I ( Rome convention) presents lex specialis as against article 3, as against the article 4. Both mentioned articles content the basic rules for the determination of the applicable law – the choice of law without the restriction and the law applicable in the situation, when parties do not choose the law or the choice of law is invalid. This regulation of the consumer contract was the object of the critique by businessmen and by consumers too. No wonder that this article has been newly drafted during the re-working.

First, a few words to the current version.

---

<sup>1</sup> This convention came into force on 1 April 1991. Czech republic is the party of this convention since 2006.

<sup>2</sup> For example: Directive 93/13/EEC on unfair terms in consumer contracts, Directive 94/74/EEC on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of right to use immovable properties on a timeshare basis, Directive 94/74/EEC on the protection of consumers in respect of distance contracts and others.

**What is the object** of the article 5 de lege lata? This question is important from the view that this article is applied only to „*certain consumers contracts*“. These contracts are possible to delimitate according to the type, the purpose of the regulation and the way of its conclusion.

The positive definition of these „*certain contracts*“ is given by the paragraph one by the following words: the **object of this contract is the supply of goods or services or a contract for the provision of credit for that object. The contract of carriage or the contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence are excluded.**

**To the purpose of the regulation of this article 5.** The purpose is to protect the weaker party – the consumer. The definition is determined by the purpose of the transaction: the **purpose which can be regarded as being outside persons trade or profession.** It is possible to accept the determination of the concept of the consumer given by the Brussels I and by the ECJ cases.<sup>3</sup>

It is also important to take into account if the other party of the contract knows or should know that a conclusion of the contract is for personal purposes.

For the specifying if the contract is the consumer contract according the regulation of the art. 5 it is also important **how this contract was concluded.**

The following conditions have to be fulfilled:

- the negotiations were conducted mainly in the country in which the consumer then had his habitual residence and he took there the steps necessary for his part for the conclusion of the contract, or
- the seller or his representative received the order in the country of the consumers habitual residence, or the order was preceded by a specific invitation addressed to the consumer in the country of his habitual residence or by advertising undertaken in and directed to that country, and the consumer there took the steps necessary for his part for the conclusion of the contract, or

---

<sup>3</sup> See Journal Právni fórum 2007 – cases by ECJ on Brusel Convention

- the seller arranged for the consumer to travel from the country of his habitual residence to another country for the purpose of inducing the consumer to give his order there.

The special connection factor in article 5 is used for passive consumer only. Active consumer is not protected by this provision.

**The second question** is - how is the protective mechanism of the article 5? This article works with **the double protective mechanism**. On the one hand, it is the restriction of the choice of law - the law chosen by the parties does not need deprive the consumer of the protection afforded by the mandatory rules of the internal law of the country in which he had his habitual residence at the time when the order was given (art. 5 par. 2). This rule is the waiver from the art. 3. On the other hand, the paragraph 3 contains the derogation from the general rule in the art. 4. In the absence of the choice of law (or this choice is invalid) the contract is governed by the internal law of the country in which the consumer had his habitual residence at the time of the order (art. 5 par. 3).

The regulation of the art. 5 has been widely criticised and there have been numerous calls for its revision. The so called **Green Paper of the EC Commission**<sup>4</sup> devoted noticeable space to the revision of Art. 5. Which arguments were mentioned for its revision?

- the need to increase the consistency between the european rules of conflict law (applicable law) and those on jurisdiction in art. 15 Brusel I,
- the need to harmonise the conflict rules of the Rome I with the rules on the applicability laid down in several EC directives,
- the need to revise the article 5, especially:
  1. the scope of the application – some contracts such as timeshare agreements on immovable property, independent loans - were excluded from the protective mechanism in the art. 5 of the Rome Convention,
  2. the mechanism of the protection - the existence of the hybrid solution because of arises the competence between the law applicable to the professional and the mandatory provisions of the law applicable to the consumer. This solution was less economic – the consumer s claim tends to be quite small and using of the balancing test (if the parties

---

<sup>4</sup> 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

choose the law different from the law of the consumer domicile) entails additional procedural costs,

3. the question of the protection of passive and active consumer,
4. the interpretation of the term „conclusion“. The determining of this term can be very complicated in distance contracts or online contracts,
5. the interaction between the protective mechanism (the special connecting factor) of art. 5 a art. 7 (internationally mandatory rules).

And we have to add another argument: difficult and cumbersome wording of the art. 5.

The current text needs not only the revision of the notion of the consumer contract covered by the special connecting factor, the revision of the protective mechanism, but the simplifying of the current formulation too.

### **III. Draft of the regulation Rome I<sup>5</sup>**

The last published draft of the regulation had regards to the some of the above mentioned remarks. The new version of the definition of the customer and new system of the protective mechanism were created and drafted. The system of the harmonising with the EC directives has been discussing.<sup>6</sup>

Some words to the newly drafted version of the art. 5.

- The new version of the art. 5 left the definition of the consumer in which were excluded certain consumer contracts. The new definition is in conformity with the art. 15 of the regulation Brussel I. The „categorizing“ of the consumer contracts disappeared and the scope of the application of the protective rule was extended to all consumer contracts except those expressly excluded by paragraph 3 of this article.

The new (last drafted) definition is: a contract must be concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (it is by a consumer)

---

<sup>5</sup> Proposal for a Regulation of the European Parliament and the Council, Brussels, 15.12.2005, COM(2005) 650 final, 2005/0261 (COD)

<sup>6</sup> There were more proposals. For example the last one was given by Polish delegation and was directing to the deleting of the conflict between the art. 5 which excluded the possibility to choose any law, and five consumer directives which contain the possibility to choose a law.

with another person acting in the exercise of his trade or profession (professional). The other condition is that this contract is concluded provided that

- a) the professional pursues his commercial or professional activities in the country where the consumer has his habitual residence, or
- b) by any means, directs such activities to that country or to several countries including that country.

The last mentioned conditions replace the condition of Article 5(2) of the Convention Rome I by the criterion, which was used in art. 15 of the Brussels I Regulation: *targeted activity* criterion. This newly formulated criterion takes account of developments in distance selling techniques.<sup>7</sup>

- In comparison to the Convention Rome I where was the choice of law restricted, the newly drafted regulation **excluded the possibility to choose a law** in consumer contracts at all. There were wide discussion about this new solution. We think that one argument was decisive: in practise we meet only rare the situation where the consumer has the chance free to choose a law. If the consumer contract contents the clause of choice of law, it is usually the law of the domicil of the professional. Also the consumer makes his/her cross borders purchases only rare and occasionally. The professional who makes cross borders transactions regularly may spread his costs on getting informations about the legal systems over his all business activities.
- **the applicable law** is the law of the habitual residence of the consumer.
- the clarification of the relationship between art. 7 and 5, it is between internal mandatory rules and international mandatory rules is the advantage of the draft.

#### **IV. Conclusion**

The conversion of the Rome Convention into the regulation was the necessary step for the creation of the system of the european international private law. This conversion brought the chance to re-thinking certain rules and adapting them to the new situation or to the experience which had brought the application of the Rome Convention. We will see in the future how has been this transformation succesfull.

---

<sup>7</sup> Art. 15 .....c)in all other cases, the contract has been concluded with a person **who pursues commercial or professional activities in the Member State of the consumer's domicile** or, by any means, **directs such activities** to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

