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LEGAL ANALYSIS AND CRITICS OF EXCEPTION CLAUSES BETWEEN ROME I AND II REGULATION AND IN OTHER EU REGULATIONS

Análisis jurídico y crítica de cláusulas de excepción entre el Reglamento Roma I y II y en otros reglamentos de la UE

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DIMITRIS LIAKPPOULOS[1]
Full Professor of European Union Law at the Fletcher School[2]
Tufts University (EE.UU)
prof.d.liakopoulos.984@gmail.com

Resumen
El presente trabajo se propone después de un examen preliminar necesario sobre la terminología y el nivel de clasificación para analizar las cláusulas en cuestión en virtud de la legislación de la UE y la jurisprudencia a nivel convencional. En esta reconstrucción será necesario identificar no solo el contenido y el alcance de los datos normativos, sino también comprender, en la medida de lo posible, con referencias prácticas, las hipótesis que pueden justificar y concretar concretamente la no aplicación de la regla de conflicto destinada a Funcionan en general, así como el uso de la cláusula de excepción.
Palabras clave: Reg. Roma I; Reg. Roma II; Reg. 650/2012; Reg. 2016/1103; Cláusulas de excepción; Derecho internacional privado; Derecho internacional privado de la Unión Europea.

Abstract
The present work is proposed after a necessary preliminary examination on the terminology and classification level to analyze the clauses in question under EU legislation and jurisprudence at a conventional level. In this reconstruction it will be necessary to identify not only the content and scope of the normative data but also to understand with examples where possible supported by practical references, the hypotheses that can concretely justify and concretize the non-application of the conflict rule destined to operate in general as well as the use of the exception clause.
Keywords: Reg. Rome I; Reg. Rome II; Reg. 650/2012; Reg. 2016/1103; Clauses of exceptions; International private law; European Union international private law.

[1] ORCID ID: https://orcid.org/0000-0002-1048-6468.
[2] Full Professor of European Union Law at the Fletcher School-Tufts University (MA in international law and MA of Arts in Law and diplomacy). Full Professor of International and European Criminal and Procedural Law at te De Haagse Hogenschool-The Hague. Attorney at Law a New York and Bruxelles.

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SUMARIO

SUMMARY

2016/1104 ON ENHANCED COOPERATION OF REGISTERED PARTNERSHIPS; 14.- ART. 26, LETT. 2 OF REGULATION (EU) 2016/1103 ON ENHANCED COOPERATION IN MATTERS OF MATRIMONIAL PROPERTY REGIMES; 15.- CONCLUDING REMARKS; 16.- BIBLIOGRAPHY.

1. INTRODUCTION. THE EXCEPTION CLAUSE NOTION

The expression clause exception, escape clause, exemption clause[3], clause èchappatoire ou d'excpetion, clause de escape, Ausnahmeklauseln, Ausweichklausel or even Berichtigungsklausel appears relatively recently in private international law[4] and constitutes the fruit of a doctrinal elaboration.

Consider the use of the expression escape clause or clause èchappatoire which enhances its functional profile. It is not only an exception to the rule but also an instrument to escape the concrete application of a rule where this application produces results that are not compatible with the principles underlying the rule itself. And having regard to the function that they perform in relation to the functioning of the rule of private international law, the exceptional clauses are defined by the doctrine also as corrective clauses of the localization in the discipline of the applicable law[5]. Noting that the legal basis of the exception clause is to be found in the proximity principle, it can be deduced that in the light of this principle it can be detected not only for an appropriate location but also for the purpose of correcting the location made by the conflict rule.

The combination of the exception[6] with the clause term[7] assume a detail

[3]A. ABBASSI, H. BAZRPACH, "Distinction between exception clause and exemption clause", in *International Journal of Humanities and Cultural Studies*, 2016, pp. 1906ss.

[4]K. SIEHR, "General problem of private international law in modern codification. De lege lata and de lεge europea ferenda", in *Yearbook of Private International Law*, 7, 2005, pp. 28ss. A.E. VON OVERBECK, *Les questions gènèrales du droit international privè à la lumioère des codifications et projects rècents,* in Recueil des cours, 176, ed. Brill, The Hague, 1982, pp. 178ss. P. HEY, *Advanced introduction to private international law and procedure,* Edward Elgar Publishers, Cheltenham, 2018. From the CJEU see: C-133/08, Intercontainer of 6 October 2009, ECLI:EU:C:2009:617, I-09687. See also the green paper on the transformation of the convention of Rome of 1980 applicable to contractual obligations into a community instrument and on the renewal of the same sub-section COM (2002) 654 final, where it is stated: "(...) the judge may not apply this presumption when from all the circumstances it appears that the contract has a closer connection with another country (...) "(art. 4, par. 5). In this case, we return to the general rule of looking for the law with which the contract is most closely connected. This mechanism that makes it possible to return to the general rule is called an exception clause (...) in general it can be said that it is a rule that under certain preconditions such as the closest connection of the facts to another jurisdiction allows the deviation form the relevant written conflict rule (...)".

[5]A. GONZALEZ CAMPOS, *Diversifcation, spècialisation, flexibiliation et matèrialisation des règles de droit inernational privè, Cours gènèral, in Recueil des cours*, ed. Brill, The Hague, 287, 2000, pp. 253, which states that: "(...) clauses correctives de la localization dans le domaine du droit applicable (...)". In argument see also: F. KNOEPFLER, *Utilitè et danger d'une clause d'exception en droit international privè, in Hommage à Raumond jean prêtre,* Neuchâtel, 1982, pp. 114ss.

[6]Leaving aside any linguistic and etymological in-depth analysis, we limit ourselves to recalling how the function of what represents an exception in a juridical sphere is

significant on the hermeneutic plane: just as the exception comes to oppose the rule term, so that the first assumes value and meaning precisely because it is combined with the second, in the same way this combination is reinforced by the clause term. As can be deduced from its etymological derivation, the clause is part of a broader proposition of which it determines the meaning or more technically it completes, defines to delimit the meaning and the scope of the rule. As such, the clause is devoid of autonomy but operates in an integrative or substitute function of a rule[8].

The aforementioned combination also results in different characterizations in private international law system[9]. A characterization can emerge in order to mitigate the rigor of the general rule and this by introducing a different and specific discipline in the hypothesis they present, in addition to the assumptions of applicability of the general rule, additional peculiarities that can justify a different treatment of the right.

In a peculiar perspective, the terminology used by EU legislator appears to be subdivided into material matter. Both Rome I[10] and Rome II Regulation use a safeguard clause[11]. So in recital n. 20 of the first

highlighted by the doctrine under a double perspective. On the one hand, the exception may constitute the new treatment of a category that turns out to be different from the one in which it was so far included. On the other hand, it can constitute the old treatment of a category that turns out to be the same as that from which it was kept divided.

[7]Here to be understood not so much as a general clause, which evokes profiles of semantic indeterminacy from which derives the need for an evaluation integration and obviously does not under a negotiating profile but as a forecast-limit to the general rule, in accordance with the relative etymology of claudēre or close.

[8]D. LIAKOPOULOS, *Giustizia materiale nel diritto internazionale privato e comunitario,* ed. Giuffrè, Milano, 2009.

[9]F.M. WILKE, *A conceptual analysis of European private international law. The general issues in the EU and its member states*, ed. Intersentia, Antwerp, Oxford, 2019.

[10]Commission Regulation n. 593/2008 on the Law Applicable to Contractual Obligations (Rome I), 2008 O.J. (L 177). For further details see: F. FERRARI, S. LEIBLE, *Rome I Regulation. The law applicable to contractual obligations in Europe,* European Law Publishers, The Hague, 2009, pp. 180ss.P. STONE, Y. FARAH, *Research Handbook on European Union private international law*, Edward Elgar Publishers, Cheltenham, 2015. M. MCPARLAND, *The Rome I Regulation on the law applicable to contractual obligations,* Oxford University Press, Oxford, 2015.

[11]It should be noted that the term safeguard clause is used in other areas such as public international law, making reference to it to indicate the exceptions for reasons of emergency in international law. On the terminological level, from the perspective of European Union law, the use of the expression in question in the communication from the commission to the council that provides additional information in relation to the committee's report on the exception clause of 13 July 2011, sub COM/2011/0829 final which concerns art. 10 of Annex XI to the Regulation of council which defines the statute of EU officials. This provision establishes that in the event of a serious and sudden deterioration of the economic and social situation within the community, assessed in the light of the objective data provided by the commission, the latter presents appropriate proposals to the council which decides by qualified majority after consulting the other institutions involved, according to the procedure provided for in art. 283 TEC. For further details and analysis see: A. HATJE, J.P. TERHECHTE, P.C. MÜLLER-GRAFF, *Europarechtswissenschaft,* ed. Nomos, Baden-Baden, 2018. J. SCHWARZE, V. BECKER, A. HATJE, J. SCHOO, *EU-Kommentar,* ed. Nomos, Baden-Baden, 2019.

Regulation it is clarified that if the contract manifestly has a closer connection with a country other than that indicated by the general rule (article 4, par. 1 and 2) a safeguard clause should provide that it should apply the law of this different country. In similar terms, the second regulation cited in recital n. 14 specifies how, in concrete cases it models its own connection criteria according to the achievement of objectives, on the other hand it must set itself alongside a general and specific rule and in certain provisions a safeguard clause that allows to depart from the latters if it is clear from all the circumstances of the case that the unlawful act manifestly has a closer connection with another country.
Of the two terminological options just indicated, the one that uses the term exception seems to be more focused on the effects of the clause that operates in the sense of extracting from the general rule a narrower scope from otherwise regular due to the presence of specific assumptions, while the one that uses the term safeguard[12] it appears to be predominantly oriented towards the aims of the discipline in derogation from the common provision, which can be included in the protection of the interest in the application of a law that ultimately, in the light of the circumstances existing in practice[13] is the most consistent with the proximity principle[14].
The study of the exception clause involves specific aspects relating to its concrete application in the relationship between exception and general rule, as well as questions of general theory of private international law. The use of the exception clause in domestic laws, in EU Regulations and in particular in terms of the law applicable to contractual and non-contractual obligations makes the interest in examining the exception clause further up to date. From this it follows that the supranational practice referable to EU and mainly to the Court of Justice of the European does not appear relevant both for its exclusive suitability and to clarify the provisions relating to Regulations and to establish with specific reference to orientations formed in the Convention of Rome of 1980, the functioning of the closest connection and presumptions in the relationship with the exception clause.

[12]It should be noted that the safeguard appeal is specific to the Rome I and Rome II Regulation, while it does not appear in other regulations such as those operating in the field of reinforced cooperation in the field of registered partnerships and in the matter of law application to property relations between spouses, as well as to cite another example at Regulation n. 650/2012 concerning the law applicable to succession. For further details see: G. PALAO MORENO, G., ALONSO LANDETA, I., BUÍGUES, (dirs.), *Sucesiones internacionales. Comentarios al Reglamento (UE) 650/2012,* Marcial Pons, Valencia, 2015, pp. 58ss.
[13]This is particularly shown in the recital n. 20 of Regulation Rome I on the law applicable to contractual obligations. See also recital n. 14 of Regulation Rome II. D. EINSELE, "Kapitelmarketrecht und Internationales Privatrecht", in *Rabels Zeitschrift für ausländisches und internationales Privatrecht,* 81, 2017.
[14]P. LAGARDE, *Le principe de proximitè dans le droit international privè contemporain. Cours gènèral de droit international privè,* ed. Brill, Leiden, Boston, 1986, pp. 10ss. A.E. VON OVERBECK, "De quelques règles gènèrales de conflits de lois dans les codification rècentes", in J. BASEDOW (a cura di), *Private law in the international arena. Liber amicorum Kurt Sieh*r, Asser Press, The Hague, 2000, pp. 545ss. pp. 550ss.

On a systematic level we will try to deepen some aspects of comparison and coordination between exceptional clauses[15] and main institutes of private international law with particular reference to its operating names for the purpose of verifying similarities and possible interferences. This in order to achieve the most exhaustive identification possible of what may fall within the regulatory framework of European private international law in the notion of an exception clause, identifying its operational spaces and compliance with the basic principles of the matter.

2. TYPES OF EXCEPTION CLAUSES IN PRIVATE INTERNATIONAL LAW

The notion of exception clauses focuses on a phenomenon that appears in the unitary substance on a conceptual level, it describes a type of forecast, of exceptional pruning, which is called to apply in connection with a conflict rule, in the presence of certain presuppositions and subordinately with specific limits it is possible to make some categorical distinctions with respect to it, whose usefulness lies in the fact that the belonging of the clause and one or the other category can be attributed a different relevance on the reconstructive and interpretative level depending on the results of an analysis such as that carried out in the present analysis aimed at drawing general conclusions on the nature and functioning of the clause as such, as part of the system of conflict rules. Moreover and more generally, if the functional profile is valued, the exception clauses list each mechanism at a regulatory level capable of correcting the functioning of the conflict rule in relation to specific legislative objectives such as the protection of fundamental interests or coordination between rules belonging to different legal systems. It was considered possible to include the concept of exception clause instruments such as law fraud and public order[16].

[15]For further analysis see: T. HIRSE, *Die Ausweichklausel im Internationalen Privatrecht,* Mohr Siebeck, Tübingen, 2006. S. SCHREIBER, *Ausweichklauseln im deutschen, österreichischen und schweizerischen Internationalen Privatrecht,* Kovac Verlag, Hamburg, 2001. W. KREUZER, *Berightigungsklauseln im internationalen privatrecht, in Festschrift für Imre Zajtay*, Mohr Siebeck, Tübingen, 1982, pp. 296ss. K.H. NADELMANN, "Choice of law resolved by rules or presumptions with an escape clause", in *American Journal of International Private Law*, 33, 1985, pp. 298ss. C.E. DUBLER, Les clauses d'exception en droit international privè. Etudes suisses de droit international, Genève, 35, 1983. H. DIETZI, *Zur Einführung einer generellen Ausweichklausel im schweizerischen IPR, in Festgabe zum Schweizerischen juristentag,* Helbing & Lichtenhahn, Basel, 1973, pp. 50ss. F. JAULT-SESEKE, *Conflit de lois. Mise en oeuvre de la clause d'exception,* in Recueil Dalloz, Paris, 2010, pp. 1586ss. F. KNOPPFLER, *Utilitè et dangers d'une clause d'excpetion en droit international privè,* op. cit., pp. 118ss. F. MOSCONI, Exceptions to the operations of choice of law rules, in Recueil des cours, ed. Brill, The Hague, 217, 1989, pp. 189ss. A.E. VON OVERBECK, *De quelques règles gènèrale de conflits de lois dans le codification prècentes*, op. cit., pp. 550ss. P.G. MONATERI, *Comparative contract law*, Edward Elgar Publishers, Cheltenham, 2017, pp. 534ss. S.C. SYMEONIDES, *Choice of law,* Oxford University Press, Oxford, 2016.

[16]F. MOSCONI, Exceptions to the operations of choice of law rules, op. cit., pp. 194ss, which is affirmed that: "(...) the exception clause thus has its place within the conflict rules system and conforms to the philosophy inherent therein. The designation of he

Three specific exception clauses must distinguish between clauses that use the narrowest link criterion and specific criteria. Among the first, the known provision referred to in art. 4 (3) of the Rome Convention on the law applicable to contractual obligations, the analogous provision pursuant to Regulation Rome II and art. 13 (2) of the Convention of Hague on the international protection of adults. The clause envisaged by art. 5 Protocol of 23 November 2007 on the law applicable to maintenance obligations.
The exception clause can assume a subordinated nature with respect to conditions of public order and in particular to establishes specific legal effects[17]. Finally, but the most recent acquisition in EU legal order, the exception or safeguard clause can assume an optional value or be subordinated not only to the existence of specific requirements, but also to a manifestation of will in this sense[18].

3. RELEVANCE OF THE FLEXIBILITY OF THE CONNECTING CRITERION IN THE RECENT EVOLUTION OF PRIVATE INTERNATIONAL LAW

The twofold ambivalent nature of the exceptional clauses determines the dissapplication of the connecting criterion that should have operated under the general rule[19], on the other hand they allow the conflict rule to materialize or make more consistent with the characteristics of the specific case.
The exception clause is commonly interpreted by commentators as a tool to overcome the rigidity inherent in the classical conflictual method, rigidity that is contrasted with the different and more flexible solutions

legal system with which the case is more strongly connected and which, for this very reason, is the most appropriate one to govern it. The exception clause intervenes when the codified connecting factor is unable to carry out its typical role, considering that given the special circumstances of he case, contrary to what the legislator had assumed, this does not lead to the legal system with which the case is more closely connected (...)".

[17]Art. 26, lett. 2 of Regulation 2016/1104 relating to registered partnerships. Council Regulation (EU) 2016/1104 of 24 June 2016 implementing enhanced cooperation in the area of jurisdiction, applicable law and the recognition and enforcement of decisions in matters of the property consequences of registered partnerships,OJ L 183, 8.7.2016. See also: G. CUNIBERTI, S. MIGLIORINI, T*he European account preservation order Regulation. A commentary*, Cambridge University Press, Cambridge, 2018, pp. 265ss.

[18]See art. 62.2. of Regulation 2016/1104 of Council of 24 June 2016, op. cit., 30ss, according to which in the absence of an agreement chosen by the parties pursuant to art. 22, the law applicable to the property consequences of registered partnerships is that of the state pursuant to whose law the registered union was established. Exceptionally and at the request of one of the partners, the judicial authority competent to decide on matters concerning the property consequences of a registered partnership may decide that the law of a state other than that whose law is applicable pursuant to par. 1 regulates the property effects of the registered partnership and if the applicant shows that a) the partners had the last common habitual residence in that state for a significantly long period; b) both partners have relied on the law of that other state in the organization or planning of their property relations.

[19]The comment is related to the decision of the Court of appeal of Paris of 10 June 1092, confirmed by the Court of Cassation with sentence of 1974 relative to the personal statute.

including those elaborated by the American doctrine[20]. In this respect, in clause functioning the search for the prevalent connection is less tied to formal criteria, such as the common citizenship of the parts[21]. It has been observed that the problem of opportunity of inserting an exception clause into the general discipline arises with reference, on the one hand, to the fact that the rules of classical private international law may arise due to the use of a predetermined connection criterion, excessive rigidity due to lack of adaptability, on the other to the fact that such rules may not be appropriate in certain cases and to remedy this rigidity, the granting of ample autonomy to the parties or the provision of a dense network of differentiated conflict rules.

Assuming that the presence of the exception clause in the system of private international law depends on how the legal nature of the clause is understood. If it is considered to be an expression of the principle of proximity rather than an instrument of flexibility, it translates into an instrument to make the general rule more efficient in the sense that the connection wanted by this rule must express an effective and prevalent connection. If we understand the exception clause as a further rule that, operating parallel to the general rule, can be used to correct the excessive rigidity of this, then flexibility represents an element that characterizes the exception clause on the teleological level.

It should be noted in relation to the foregoing that the search for flexible criteria is typical of the evolution of private international law private international law of EU also with regard to the different issue of jurisdiction. The evolution towards more flexible forms of connection criterion was first of all manifested through the replacement of the criterion of nationality and domicile with that of habitual residence thanks to the conventions of unification of private international law adopted by the Hague Conference[22]. On the one hand exists a greater "concretization" of the connecting criterion on the other, given the need to proceed through a survey of the facts that characterize the case in practice, a less predictability of the result in terms of determination of the applicable law.

It should be noted that the flexibility of private international law rules found in the recent evolution of the codifications on the subject, is developed through the introduction of factual or open connection criteria, as well as through the provision of a plurality of connection criteria for the same case. In this regard, it has also been observed that the most significant evolution of modern conflict systems derives from the affirmation of the proximity principle which tends to replace abstract and general modes of localization of the cases. This operates both with "attributive" methods, in the case of establishing the applicable law on the

[20]B. AUDIT, "A continental looks at contemporary american choice of law principles", in *American Journal of Comparative Law*, 27 (4), 1979, pp. 590ss. O. LANDO, "New american choice of law principle and European conflict of laws of contracts", in *American and European Conflicts of Law,* 30 (1), 1982, pp. 19ss.

[21]B. AUDIT, *Droit international privè,* LGDJ, Paris, 2013, pp. 692ss.

[22]G. DROZ, "A comment on the role of the Hague conference on private international law", in *Law and Contemporary Problems*, 57, 1994, pp. 5ss.

basis of the closest connection and with "corrective" methods, in the case of applying exceptional clauses.
The issue of flexibility of the connection criteria therefore appears to characterize the most recent development of private international law[23], like other expressions of this phenomenon, or the introduction of conflict rules with alternative connection criteria and forms of choice of the applicable law[24]. For the alternative connection criteria, the relevance in terms of flexibility is given by the openness to the possibility for the judge to apply different laws, even if this can happen in the context of the options admitted through the different and alternative criteria contemplated by the conflict norm. As for the flexible connection criteria, they are linked to a plurality of circumstances to be evaluated in practice. In this regard, consider how the criterion of the closest connection[25] can operate with different methods and functions, or in order to fill some regulations, were a specific conflict rule cannot be found, as the main connection criterion, as a presumptive criterion regarding contracts and illicit, as a means of resolving conflicts between connection criteria (tie-breaker) and this with particular regard to the plurality of citizenship or solutions to the problems of conflict of laws in the context of plurilegislative regulations, thus determining the extension of the discretion of the judge in identifying and assessing the relevant elements, in place or in law in the light of which to reconstruct the relevant or prevalent link between applicable law and the case in point.

4. THE TRANSITION FROM THE CONVENTION OF ROME TO ROME I REGULATION: THE COMMISSION'S POSITION ON THE EXCEPTION CLAUSE

Under art. 4 of the 1980 Rome Convention, the rule in paragraph 2 contains a presumption that presupposes the determination of the

[23]P. HAY, *Flexibility versus predictability and uniformity in choice of law: reflection on current European and United States conflicts law*, in Recueil des cours, ed. Brill, the Hague, 226, 1991, pp. 226ss. It is also observed that the most recent codifications of private international law introduce conflict rules that have a material effect (multiple connection criteria to ensure the formal validity of the act). In argument see: P.M. PATOCCHI, *Règles de rattachement localisatrices et règles de rattachement à caractère substantiel,* Geneve, 42, 1985. S.C. SYMEONIDES, *Codifying choice of law around the world: an international comparative analysis,* Oxford University Press, Oxford, 2014.
[24]S.C. SYMEONIDES, *Codification and flexibility in private international law. General reports of the XVIIIth Congress of the international academy of comparative law,* New York, 2011, pp. 18ss.
[25]We recall the definition as in the Anglo-Saxon jurisprudence the notion of "closest and most real connection" is linked to the search for "proper law of the contract" is identified as "the law of the country with which the contract has its most real connection". This is the formula proposed by Morris in his own article entitled: J.H.C. MORRIS, "The proper law of the contract in the conflict of laws", in *Law Quarterly Review,* 46, 1940, pp. 322ss. See also in argument: A.J.E. JAFFEY, "The english proper law doctrine and the EEC Convention", in *International and Comparative Law Quarterly,* 33 (3), 1987, pp. 438ss. N. BENTWICH, *Westlake private international law*, Sweet & Maxwell, London, 1925, pp. 212ss.

characteristic performance[26]. Not so in the Rome I Regulation where the characteristic performance becomes relevant in the residual rule, the relevant services being defined and typified and operating the first only when the contract is not covered by paragraph 1 of art. 4 or the elements of the contract are covered by more than one of the hypotheses envisaged in the same paragraph 1.

The European Commission (EC) puts in antithetic terms the two objectives that the rule could pursue or that of the maximum possible proximity that is accompanied by a flexible interpretation of the regulatory provision and that of legal certainty that leads to a strict application to the presumption of art. 4, sub-paragraph 2 of the Convention of Rome[27]. In the green book[28] EC proposes two solutions. The pure and simple deletion of par. 1 of art. 4 of the Convention in order to emphasize the exceptional character of par. 5, highlighting how the preliminary draft of board's proposal for a regulation on the law applicable to contractual obligations could be traced by requiring the presence of a "substantially" closer connection with another law where there is no significant connection between this case and the country whose law would be applicable under the general rule[29]. Furthermore EC in the light of the jurisprudential orientation takes a position in support of the favorable orientation to the priority use of the presumptions expressed among other things by the Hoge Raad in its judgment of 25 September 1992, observing that the judge initially and provisionally should make the presumption of art. 4, par. 2 and only if the law thus determined turns out to be inappropriate, since the high circumstances clearly testify in favor of a different law, he could resort to the exception clause[30].

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[26]Caledonia Subsea Ltd v Microperi sel 2002 SLt 1022 (35), which is stated: "(...) it is clear, in my view, that one of the aims of art. 4 is to provide, by means of use of par. 2 as answer which is certain, provided, of course, that the characteristic performance can be determined (...)".

[27]Max Planck Institute for Foreign Private and Private International law. Comments on the European Commission's Green paper on the conversion of the Rome Convention o 1980 on the law applicable to contractual obligation into a community instrument and its modernization, which is stated that: "(...) the presumptions in paragraph 2 and 3 may exceptionally be disregarded if it is clear from all circumstances of the case that the contract is manifestly more closely connected with another country (…).

[28]Com (2002) n. 654.

[29]The Commission's analysis focuses on the consequences in terms of legal certainty and predictability of the applicable law in light of the orientations assumed by national judgments in the application of the exception clause contained in art. 4, paragraph 5 of the Convention of Rome of 1980. Recalling how this clause should be applied only for good reason and recourse to it had to be extremely rare since frequent application would have ended up reintroducing the applicable law, while the presumption pursuant to art. 3 aimed precisely at reducing this unpredictability, the Commission reiterates how the analysis of the jurisprudence shows that in numerous decisions the national courts have applied the exception clause ab initio.

[30]Which is stated that: "(...) legal certainty and the uniform application of the future community instrument (...) very little space to balance commercial interests and flexibility to adopt the rule to the needs of commerce and thereby departs from the practice of most European countries prior to the enactment to the Rome Convention (...)".

5. THE OPERATION OF THE CLAUSE ON CONTRACTUAL MATTERS WITHIN THE ROME I REGULATION AND THE COMBINATION WITH THE PREDETERMINED CRITERIA

The exception clause in the species outlined as a "safeguard" clause is taken up in 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), in art. 4, lett. 3 according to which "if from the set of circumstances it is clear that the contract has manifestly closer links with a country other than that indicated in par. 1 and 2, the law of this different country applies. It is observed that art. 4, lett. 3 of Regulation is intended to operate in extremely limited cases and only when the connection criteria set forth in the same art. 4 appear to be manifestly inadequate.

Compared to the provision of art. 4, lett. 5 of the Convention of Rome on the law applicable to contractual obligations, the reference to presumptions has ceased to exist, although it is entirely removed by art. 4 concerning applicable law in the absence of choice. The provision contained in Reg. 593/2008 appears to reinforce the idea of the exceptional nature of the use of this solution for the purpose of determining the applicable law using the adverbs clearly.

Art. 4 of Reg. accessed by the exception clause of application in the light of paragraph 1, subject to the lack of choice of the applicable law[31]. This leads to the exception referred to paragraph 4. This does not apply not only in relation to transport, individual employment and insurance contracts with respect to which there is a specific clause but also in relation to contracts concluded by consumers; except in the case where the requirements of par. 1, lett. a) and b) of Regulation are not met[32] since in such a case under the provisions of art. 6, lett. 3 of Reg. the law applicable to a contract between a consumer and a professional is determined by virtue of the general rules (articles 3 and 4) including the exception clause pursuant to art. 4[33].

On a systematic level with regard to relationships between art. 4, lett. 3 of Regulation and the other paragraphs of the same article 4 it should be noted that the exception clause determines a non-application of the

[31]For a comparison between art. 4 of the Rome Convention of 1980 and relevant provision of Rome I Regulation see what is observed in art. 4 Rome I Regulation. The applicable law in the absence of choice, par. 30, which is stated that: "(...) the comparison shows that both provisions contain almost the same ingredients but have them differently ordered. This change was intended and its has more than a mere formal effect. The intention behind the new order-and some change formulations-was to reduce the possible discretion and to create grater certainty with respect to the objectively applicable law. Parties should be sure in advance which law applies to their contract even in the absence of a choice of law (...)".

[32]It is the fact that the professional: a) carries out his commercial or professional activities in the country where the consumer has his habitual residence; or b) directs these activities, by any means to that country or various countries including the latter.

[33]The same must be said for the hypotheses envisaged by art. 6, let. 4 of Reg., for which the provisions on contracts concluded by consumers do not apply.

criteria indicated in paragraphs 1 and 2 of art. 4. In the case that in which none of the criteria indicated by paragraph 1 of art. 4 may be applied and the inapplicability of said criteria cannot be overcome in light of lett. 2 which refers to the law of the country in which the party who must perform the characteristic performance of the contract has his habitual residence, he will then apply the clause envisaged by letter 3. In this regard it should be recalled that the notion of habitual residence within the Rome I Reg. is given for obvious reasons of certainty and predictability of the norm[34], by its art. 19 which makes a necessary distinction between individuals and institutions. For the former, in the case of a natural person acting in the exercise of his professional activity, his principal place of business is intended; for companies, associations and legal persons we mean instead the place where their central administration is located with assimilation of the secondary office to an autonomous entity[35]. Without the foregoing, by not referring to the aforementioned sub-paragraph 3, the provision referred to in sub-paragraph 4, according to which, if the applicable law cannot be determined pursuant to par. 1 and 2 the contract comes to be governed by the country with which it has the closest connection.

Recourse to the clause is also linked to the fact that the circumstances relating to the contract, if a lasting relationship is established, may change over time. The recourse to it can therefore allow the exploitation of circumstances that have arisen with respect to the time of conclusion of the contract[36]. Among these, the hypothesis in which the habitual residence of the characteristic lender is changed after the conclusion of the contract but in the permanence of latter's strength must be considered.

In relation to the clause in question, as well as with regard to the residual application of the criterion of the closest connection due to the inability of the contract to one of the enumerated cases, Rome Reg. attaches importance to the connection with another contract or other contracts[37], i.e. the presence of a connection accessory[38]. This element, which is also reflected in the Rome I Reg. in terms of liability from unlawful act,

[34]See Recital n. 39 Reg. Rome I.

[35]Lett. 2 of art. 19 by virtue of which when the contract is concluded within the framework of the exercise of the activity of an agency branch or any other place of business or if, according to the contract, the service must be provided by such a branch, agency or place of business, the place where the branch is located, the agency or other place of business is considered habitual residence.

[36]See Caledonia Subsea Ltd v. Microperi srl 2002 SLT 1022, which is affirmed that "(...) par. 1 and hence par. 5 enables account to be taken of factors supervening after the conclusion of the contract. While this point may be relevant to the interpretation of the paragraphs it does not feature in the present case. There was no suggestion that events after the conclusion of the contract with which the present case is concerned affect the resolution of the issue before us (...)".

[37]See recital nn. 20 and 21 of Reg.

[38]C.S.A. ADESINA OKOLI, The significance of the doctrine of accessory allocation as a connecting factor under art. 4 on the Rome I Regulation, in Journal of Private International Law, 9, 2013, pp. 450ss.

extends the scope of evaluation of the relevant elements for the purpose of determining the prevalent connection. This presupposes the identification of a negotiating link, variously configurable on the objective and subjective level in the hypotheses in which two or more contracts that appear independent and distinct from each other, are directed to the same purpose, or to the pursuit of unitary interests (teleological link)[39]. An example of the recourse to the accessory connection can be identified in the case in which the parties to a supply contract have their habitual residence in the same state and even if they do not provide for such a contract, a choice of the applicable law, there is an accessory agreement between the same parties that is built according to the law of a different state than that of the common habitual residence. This although other elements such as those relating to the fulfillment of contractual obligations, converge towards the state of habitual residence of the parties[40].

6. TRANSPORT, CONSUMER AND INSURANCE CONTRACT

On the systematic level it should be noted that the exception clause, besides being included in art. 3, lett. 3 of Reg., is also regulated in art. 5, lett. 3 regarding transport contracts and art. 8. also for these hypotheses the provision of the Regulation makes the recourse to the exception clause more stringent than previously occurred on the basis of the Rome Convention.

With regard to relationship contracts, art. 3, lett. 3 Rome I Regulation provides for an exception clause modeled in the same term as the clause envisaged in general by its art. 4, lett. 3. It is established that if all the circumstances of the case clearly indicate that the transport contract in the absence of choice of law has manifestly closer links with a country other than that identified according to general rules, the law of that different country applies. It should be noted that the general provisions, contained in sub-paragraphs 1 and 2 of art. 5 are distinguished in relation to the fact of being related to the contract for the transport of goods or to the contract for the transport of passengers. In the freight transport contract the applicable law is identified with reference to seller's habitual

[39]The negotiating link is that mechanism through which the parties pursue a unitary and complex economic result that is achieved through a single contract but through a coordinated plurality of contracts which retain their own cause even if each is aimed at a single Regulation of mutual interests.

[40]C.S.A. ADESINA OKOLI, T*he significance of the doctrine of accessory allocation as a connecting factor under art. 4 on the Rome I Regulation,* op. cit., in speciem the author affirms that: "(...) assume a contract is entered into any a Norwegian Company (the operator) habitually resident in Aberdeen, Scotland with a scottish company habitually resident in Aberdeen, Scotland with a scottish company habitually resident in Aberdeen, Scotland (the contractor) for the supply of heat exchanges has no express choice of law, but there is a mutual indemnity and hold harmless (MIHH) agreement contained in the main contract between the operator and contractor that is to be construed in accordance with norvegian law. The contract for the supply of heat exchanges is negotiated and concluded in Aberdeen. The place of payment is in Aberdeen and payment to be made in Scottish pounds sterling. The contract is also written in english language (...)".

residence, subject to the fact that it coincides with a series of relevant connection elements concerning the performance of the contract or the place of receipt or delivery, or relating to figure of the sender, noting his habitual residence[41]. This criterion does not apply if, in the absence of these conditions, the elements indicated by the aforementioned provision cannot converge. In this case it takes over the law of the place where the parties have agreed to deliver the goods. With respect to this hypothesis, it must be assumed that the lack of a habitual residence of the carrier which coincides with the sender's habitual residence or place of receipt or delivery of the goods may result in recourse to the exception clause and this in the event that the choice of the place of delivery of the goods does not take on such relevance as to express the closest connection. The same must be said with reference to the passenger transport contract, where the connection criterion is identified in the country of habitual residence of the passenger provided that in that country the place of departure or the place of destination are also applied, failing where the law of the place of destination applies. Also in this case, where carrier's habitual residence does not express a close connection between the passenger transport contract and the applicable law, the exception clause can be applied.
The aforementioned clause concerning transport contracts therefore has a limited and subordinate operation, the connection criterion of the carrier's habitual residence when the connection drawn from this criterion is "reinforced" by other elements, applying the law of the country of habitual residence of the carrier if the place of receipt or delivery of the goods or the habitual residence of the sender are also located in that country. By way of example, it can be assumed that in the absence of the first "reinforced" connection criterion, the second connecting criterion, i.e. that of the place of delivery agreed by the parties, is not suitable for expressing the closest connection. In other words, if the coincidence between habitual residence of the carrier and additional connection elements mentioned in art. 5, lett. 1, the delivery of the goods takes place in practice in a place other than that agreed by the parties; and this in particular due to default or for reasons of force majeure or unforeseeable circumstances. In this case the relevance of the exception clause can be assumed, where from the set of circumstances there is clearly a

[41]It should be noted that an application of the exception clause in this matter in the validity of the Convention of Rome of 1980 results to be that carried out by the Cour de Cassation in case of 4 March 2003 by not applying the assumption under paragraph 5 at. 4 in the opinion of the re-organization within the context of a transport operation, of the place where the goods were drawn. In the sepia the Cour de Cassation has raised: "(...) qu'à défaut de choix des parties, la loi applicable devait être déterminée selon l'article 4.5 de la convention de Rome du 19 juin 1980 ratifiée peur la France et l'Allemagne, qui prévoit que les présomptions de l'article 4.4 de cette Convention, relatif au contrat de transport de marchandises, sont écartés lorsqu'il résulte de l'ensemble des circonstances que le contrat présente des liens plus étroits avec un autre pays, comme en l'espèce avec la France où devaient être livrées les marchandises à Rungis à la sociètè tropicale de Mexico par un transporteur allemand à l'issue d'un transport du Mexique à destination de Rungis, via les États-Unis et la Belgique et que, par suite, la loi française est applicable au contrat de transport (...)".

connection with a state different from that identified with the aforementioned criteria. If this applies to the transport of goods, the same can be said with reference to the passenger transport contract[42]. In passenger transport contracts, subject to failure to choose the parties, the applicable law is that of habitual residence of the passenger, provided that this criterion is "reinforced" by coincidence with the place of departure or destination of the same. In this regard, it can be assumed that the habitual residence of the carrier, applied in the alternative, is not suitable for expressing the closest connection. This is particularly the case where the habitual residence does not coincide with the central administration office of the carrier, which is admitted by art. 5, lett. 2, second paragraph, lett. b) and c). In this case, by not expressing habitual residence the closest connection to its central administration site in conjunction with other connection elements may express a more significant connection pursuant to art. 5, lett. 3 of Reg. in relation to contracts concluded by consumers art. 6 of Reg. does not provide for a specific regulation on the exception clause. In this regard, it is known that consumer contracts do not constitute a contractual category, such as transport or insurance contracts, but a type of negotiation characterized by a necessary subjective profile, i.e. the fact that one of the contracting parties is a natural person who operates outside of its commercial or professional activity and the other contractor is a subject acting in the exercise of a commercial or professional activity. In relation to consumer contracts, there is a reference to art. 5 and 7 of Reg. It follows that where the consumer concludes a transport or an insurance contract the safeguard clause for each of these types of contract will be applied. Beyond these hypotheses, it is necessary to coordinate the discipline of art. 6 with the general rules provided by art. 3 and 4. Therefore, where the choice of the applicable law is lacking, the contract will be subject to the law of the country in which the consumer has his habitual residence provided that the professional carries out his commercial or professional activities in the same country or directs such activities towards such country. In the absence of this condition, the applicable law in the absence of choice[43] will be identifiable for the contracts concluded by consumers based on art. 4 and consequently the exception clause referred to in sub-paragraph 3 of art. 4[44].

[42]It must be remembered that under the recital n. 22 of Reg. With regard to the interpretation of the contracts for the transport of goods, no substantial modification is envisaged with respect to art. 4, par. 4th sentence of the convention of Rome. Consequently, rental contracts for travel and other contracts whose essential object is the transport of goods should be considered as contracts for the transport of goods. On the distinction between contracts for the transport of persons and contracts for the transport of goods on an international level.

[43]It should be noted that in the case of contracts concluded by consumers, the choice of the applicable law is permissible, however, that the protection that derives from the non-derogable rules of the place of habitual residence of the same is ensured to the consumer, subject to the fact that the conditions are met referred to in paragraph 1 of art. 6 Reg.

[44]It should be noted that in relation to some types of contracts, based on art. 7 of Rome I

With regard to insurance contracts, innovating with respect to 1980 Convention of Rome, Reg. 593/2008 introduces a specific discipline in this regard and in its art. 7, sub-paragraph 2, second paragraph includes a special exception clause. This provision concerns insurance contracts relating to major risks, with respect to which the Regulation is applied regardless of whether the risk covered is located in a member state or not. The application of the clause to the contracts relating to sparse risks presupposes that the choice of the applicable law by the parties has not been made. It implies that the insurer's habitual residence is not able to express an actual connection as the contract has manifestly closer links with a different country. This can be assumed in the event that both the location of the risk and the location of the insured converge with another state, be it a member state or an extra EU state. On the interpretative level, as in the relevant case, art. 7, lett. 2 second paragraph of the Rome I Regulation, use the same terminology used by the exception clause operating at general level according to art. 4, lett. 3 of the same Regulation. In both cases, in fact, the deviation from the connection criterion that operates according to the general rule presupposes that the contract has manifestly closer links with a different country.

With regard to insurance contracts other than for large risks[45], the discipline of art. 7 of Rome I Regulation whose application presupposes the location of the risk in the territory of member states[46], in the absence of a specific exception clause leads to the belief that the general clause pursuant to art. 4, lett. 3 of Regulation can be find application. To this we are led on the interpretative level in the light of applicable law do not appear to be mutually exclusive. Art. 4, par. 1 contained in the determination of the applicable law contained therein with regard to the determination of the applicable law in the absence of the choice of the specific bribery application "without prejudice to art. 5 and 8", so that it seems correct to assume that where said articles 5 and 8 do not regulate

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Regulation, the provisions regarding contracts concluded by consumers pursuant to art. 6 are not applicable. This concerns in particular the contracts for the supply of services when the services due to the consumer must be provided exclusively different from the contracts concerning an "all-inclusive" journey pursuant to Directive 90/314/ECC the contracts concerning a real estate right rental of a property other than the contracts concerning a part-time right of enjoyment pursuant to Directive 94/47/ECC the rights and obligations that constitute a financial instrument the contracts concluded within the type of system that falls within the field of application of art. 4, par. 1, lett. b) or contracts concluded in a multilateral system. See also: A. MANGAS MARTÍN, *Tratado de la Uniòn Europea, Tratado de Funcionamiento*, ed. Marcial Pons, Madrid, 2018. N. FOSTER, *Foster on EU law,* Oxford University Press, Oxford, 2017.

[45]It is considered that the Rome I Regulation pursuant to the provisions of its art. 1, lett. j) does not apply to insurance contracts that derive from transactions carried out by parties other than the companies referred to in art. 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 relating to life insurance, with the aim of providing workers, employees or non-members, within the framework of a company or a group of companies or a professional or inter-professional sector benefits in the event of death in the event of life or in the event of termination or reduction of activity or in the case of occupational illness or accident at work.

[46]Art. 7, lett. 1 of Reg. Rome I.

a specific aspect and may resort to general forecasts. Consider, on the basis of this relief the connection criterion used of art. 7, lett. 3 last paragraph of Rome I Regulation in the matter of insurance contracts different from the contracts related to major risks consists of the place, located in a member state, where the risk is located at the time of the conclusion of the contract. For the purpose of determining the location of the risk, art. 7, lett. 6 of Rome I Regulation refers to the rules contained in the sector Directives and to Directive 88/357/ECC of Council of 22 June 1988 on direct insurance[47], and to 2002/83/EC Directive on life insurance[48]. The application of the exception clause therefore presupposes that there may be a closer connection with a different country than the location of the risk at the time the contract is concluded. This could be assumed in the event that the location of the risk at the time the question of the determination of the applicable law arises is different with respect to the location of the risk at the time the insurance contract is concluded. This provided that the different state is represented by a member state. In the event that the risk comes to be located in a state other than a member state, art. 4 Rome I Regulation will not be applied but it could detect the general discipline of art. 4 of the same Regulation with recourse, and the conditions for the exception clauses contained therein[49].

7. FRANCHISE, DISTRIBUTION, AUCTIONING AND THE CONTRACT CONCLUDED IN A MULTILATERAL SYSTEM

For the affiliation or franchising contract, the Rome I Regulation identifies the general connection criterion for the franchisee's place of habitual residence. In this regard, in the proposed Regulation of the European

[47]By virtue of ar. 2, lett. d) of the aforementioned directive the place where the risk is identified on the basis of a plurality of criteria or the Member State in which the assets are located, when the insurance refers to both real estate and real estate and their contents, if this is covered by the same insurance policy; the member state of registration when the insurance refers to registered vehicles of any type, the Member State in which the contractor has signed the contract in the case of contracts with a duration of less than or equal to 4 months relating to risks inherent to a journey or a vacation whatever the branch in question; the Member State in which the policyholder resides habitually, or, if the policy holder is a legal person, the member state in which the establishment of the legal person to which the contract relates is located in all cases not expressly provided for in the previous provisions.

[48]In this case the location of the risk coincides with the country of the commitment or pursuant to art. 1, par. 2, lett. g) of the aforementioned directive, the member state in which the contractor has his habitual residence or if the contractor is a legal person the member state in which the establishment of that legal person to which the contract relates is located.

[49]Consider that based on the recital n. 3 of Rome Reg. When an insurance contract not related to major risks covers more than one risk of which at least one located in a Member State and at least one in a third country, the special rules on insurance contracts referred to in the Regulation they should only apply to the risk or risks located in the relevant Member State. The splitting of the contract also operates on the basis of paragraph 5 of art. 7 under examination, based on which for the purposes of paragraph 3, third paragraph, and par. 4 when the contract covers risks located in more than one member state the contract is considered as consisting of several contracts of which refer to only one member state.

Parliament and of Council on the law applicable to contractual obligations (Rome I) presented by the European Commission on 15 December 2005[50] it can be seen that this solution is explained by the fact that EU law protects the franchisee as a weak party[51].

In terms of legal qualification, according to a concept operating in EU law, the franchise contract is the contract by which a company, the franchisor, grants another, the franchisee, for direct or indirect financial consideration, the right to exploit a franchise for the purpose of marketing certain types of goods and/or services[52]. In the franchise agreement, the relationships between the parties are characterized by particular complexity, having as their object the corresponding performance and duration, variously articulated, distinguishing between service, production and distribution franchises[53]. Its regulation also involves heterogeneous profiles such as investments and entrance fees charged to the franchise for the determination of royalties, the identification of the know-how provided. This peculiarity is addressed by the recital n. 17 of Rome I Regulation, where it is acknowledged that this type of contract is more qualifiable as relative to services "subject to specific rules"[54]. The complexity of the type of contract is appreciable also in light of the UNIDROIT model law adopted in 2002 with particular regard to disclosure obligations to be borne by the franchisor. The undoubted complexity of the performances reflects the choice of the connection criterion adopted

[50]COM/2005/650.

[51]P. LAGARDE, "Remarques sur la proposition de règlement de la Commission europèenne sur la loi applicable aux obligations contractuelles (Rome I)", in *Revue Critique de Droit International Privè,* 95, 2006, pp. 332ss.

[52]L. GARCÍA GUTIÉRREZ, "Franchise contracts and the Rome I Regulation on the law applicable to international contracts", in *Yearbook of Private International Law*, 10, 2008, pp. 234ss.

[53]CJEU, C-161/84, Pronuptia of 28 January 1986, ECLI:EU:C:1986:41, I-00353, which in par. 3, it is reported that: "(...) it should be noted that the franchise contracts, the legitimacy of which CJEU was never called upon to examine, are very varied. From the discussions held at the hearing it emerges that a distinction must be made between various kinds of contracts of franchising and in particular the franchising contracts relating to services, on the basis of which the concessionaire offers services using the sign, the commercial name, and sometimes the franchisor's trademark and complying with the directives of this; of production, within which the concessionaire produces directly, on the basis of the indications and the grantor, products that he sells under the latter's trademark, and finally in franchising contracts in the field of distribution in which the concessionaire is limited to sell certain goods in a shop bearing the sign of the grantor (...)". In argument see also: G. ROBINSON, *Optimize European Union law,* ed. Routledge, London & New York, 2014.

[54]The aforementioned complexity is manifested from a general point of view where the characteristic characteristic of such products is desired, which requires a complete evaluation of the agreements adopted by the parties. It is noted in this regard that: "in hard cases (e.g. Franchising contracts, publishing contracts, research cooperation) it should be left to the judges appraisal of the circumstances of he case whether there is a characteristic performance and which party has promised it. In such contracts, the determination of the characteristic performance will very often depend on the individual form of the contractual rights and duties of each party and is therefore not amenable to any abstract form of statutory definition (...)".

by the Rome I Regulation and further reflection on the application space of the safeguard clause for this specific contractual category.
In the aforementioned perspective, the overcoming of the criterion for connecting the franchisee's habitual residence due to the application of the safeguard clause could be admitted if the actual connection of the contractual relationship with one or more places other than the habitual residence of the affiliate depends on the execution of the contract from customer relations. In particular, international franchising can also be articulated in the conclusion of a main agreement or master franchise[55] to which further contracts between the main franchisee and sub-affiliates are destined to fulfill in this way creating a scheme of related contracts. Thus the hypothesis in which the internationality of the contract does not reside in the act that franchisor and affiliate are located in different states but in the fact that the affiliate must operate in a different state compared to that of common habitual residence, can be envisaged. In this context, franchisee's appeal could be accepted but the place of execution of the franchising business is the expression of a real connection between the contract and the applicable law.
Observations partly similar to those above in relation to the commercial affiliation contract can be developed with regard to the distribution contract[56], for which the Rome I Regulation provides in the absence of choice that is governed by the law of the country in which the distributor has the habitual residence. In this case distributor's habitual residence will generally coincide with the principal place of performance of the contract and this due to the territorial constraint that can access the related agreements[57]. However, beyond the profiles inherent to the presence or absence of exclusivity in the distribution contract, the main obligations of

[55]The definition adopted by the aforementioned Regulation EEC 4087/88 according to which the agreement has to settle the agreement through the franchise agreement, grants the franchisor the right to exploit a franchise for the purpose of concluding franchise agreements with third parties.
[56]With regard to the distribution fee in relation to the discipline referred to in the Rome Convention of 1980, see the Cour de Cassation of 25 November 2003 Amman-Yanmar which decided not to depart from the presumption pursuant to art. 4.2. of the 1980 Rome Convention. In the present case, the Cour found: "(...) attendu que, selon ce texte en l'absence de choix par les parties, le contrat est régi par la loi du pays avec lequel il présente les liens les plus étroits, qu'est présumé présenter de tels liens celui où le débiteur qui doit la prestation caractéristique a, au moment de la conclusion du contrat, sa résidence habituelle, que pour un contrat de distribution, la fourniture du produit est la prestation caractéristique (...)". See also: M.E. ANCEL, "Les contrats de distribution et la nouvelle donne du règlement Rome I", in *Revue Critique de droit International Privè*, 97, 2008, pp. 562ss.
[57]In this regard, reference may be made to the matters identified in EU Regulation 330/2010 of the European Commission of 20 April 2010 in the form of vertical agreements which it defines in its art. 1 (e) as a selective distribution system a distribution system in which the supplier undertakes to sell the goods or services covered by the contract directly or indirectly only to distributors selected on the basis of specified criteria and in which these distributors undertake not to sell such goods or services to unauthorized resellers in the territory that the supplier has reserved for that system. For further details see: F. WIJCKMANS, F. TUYTSCHAEVER, *Vertical agreements in EU competition law,* Oxford University Press, Oxford, 2011, pp. 14ss.

the distributor, such as the sale in its own name and on its own account in a given territory of the products supplied by the manufacturer, also using an organization of sales, as well as the obligations regarding minimum purchases that do not compete with the use of brands[58], may result to be followed in a country other than that of distributor's head office (or habitual residence), so that the place of performance may be referred to to determine the country with respect to which the contract has a manifestly closer connection.

With regard to the additional criteria envisaged for the subject of auction sales and contracts concluded in multilateral systems and to financial instruments, it must be observed as the provision of art. 4.1. lett. g) of Regulation Rome I in assuming the objective determinability of the relative criterion (admittedly if such place can be determined) provides that the applicable law is that of the country in which the auction takes place. However, it should not be excluded in terms of the applicability margin of the clause that the place of the auction sale or the one in which the relative procedures are completed with the consequent transfer of the asset to the contractor may not coincide with the place of location of the asset or location of the contractor or subject is put up for auction nor is it possible to exclude that these different elements of a subjective and objective nature and not coinciding with that of carrying out the auction procedures all converge towards another and different country, thus envisaging a potential application for the exception to the rule. Moreover, with regard to contracts relating to assets subject to auction, art. 4 (1), lett. g) of Rome I Regulation uses in terms of connection criteria "what would have been the result under the Rome convention based on the idea of a closer connection (...)"[59].

As for contracts concluded in a multilateral system that allows or facilitates the meeting of multiple interests in buying and selling third parties relating to financial instruments[60] in accordance with non-discretionary rules and subject to a single law, they are governed by this law: compared to them the use of the clause appears difficult to present in concrete terms, given the characteristics of the trading system that abstracts from the characteristics of the subjects recently involved in terms of ownership of the instruments themselves.

8. EMPLOYEE PROTECTION AND EXCEPTION CLAUSE PURSUANT TO ART. 8, SUB-PARAGRAPH 4 OF REGULATION ROME I OF A COUNTRY

With regard to individual employment contracts, the Regulation in its art. 8, sub-paragraph 4 provides for a specific exception clause. By virtue of this provision, if the set of circumstances shows that the employment

[58]ICC Model distributorship contract, ICC Publication n. 646, Paris, 2002.

[59]V. BEHR, "Rome I Regulation. A-mostly-unified private international law of contractual relationship within most of the European Union", in *Journal of Law and Commerce,* 29 (2), 2011.

[60]See art. 4, par. 1, par. 17 of Directive n. 2004/39/EC which refers to what is reported in section C of its Annex I.

contract has a closer connection with a country other than that indicated on the basis of the general rule, the law of that different country applies. The application of this clause presupposes that the general criterion does not express an actual connection. First of all, the country in which or in the absence from which the worker performing the contract habitually carries out his work does not express the closest connection[61]. In this regard it was observed that the regulation of the connection criteria contained in the Rome I Regulation on the subject of a subordinate employment contract is in fact not very innovative with respect to that already provided for by the 1980 Rome Convention. Moreover, according to the clause in art. 8 of Rome I Regulation does not appear to be consistent with the search for certainty and predictability of the applicable law which also characterizes the compulsive system of the Regulation in question.

The normal course of work must be determined regardless of the indications that can be found in the regulations of individual member states[62]. Moreover, if the work is performed in more than one state, the criterion of habituality must be understood in the sense of the place in which the worker fulfills the substantial part of his obligations towards his employer, having to refer to the place where or to start from which the worker actually exercises his professional activities and in the absence of the place where he performs most of his activities.

For the operation of the aforementioned provision, it is also necessary that not even the place where the head office that employed the worker is located expresses the closest connection. In reality it is precisely this last provision that appears more easily to be able to detect for the purpose of resorting to the exception clause. It can be assumed that where the law applicable to the individual employment contract cannot be determined on the basis of the general rule as it is not possible to identify a place in

[61]In relation to the usual nature of subordinate work, it is opposed to temporary employment (according to article 8, paragraph 2, of the Rome I Regulation, in fact the country in which the work is usually carried out is not deemed to be changed when the worker temporarily works in another country). To clarify this profile the recital n. 36 of Regulation Rome I according to which the work performed in another country should be considered temporary if the worker must resume his work in the country of origin after carrying out his task abroad. Furthermore, on the basis of the same recital, the conclusion of a new employment contract with the original employer or with an employer belonging to the same group of companies as the original employer should not exclude that the worker performs his work in a other country temporarily.

[62]The clarification that, moreover, is inherent in the purpose of the Regulation of creating a uniform discipline, has been the subject of clarifications with regard to the analogous provisions concerning the law applicable to the individual work contract contained in the Convention of Rome of 1980, by CJEU in case C- 29/10, Koelzsch of 15 March 2011, ECLI:EU:C:2011:151, I-01595, where it is observed that the criterion of the country in which the worker "habitually performs his work" must be interpreted autonomously in the sense that the content and the scope of this rule of reference cannot be determined in based on the applicable national law according to the rules of private international law of the court seized, but they must be defined according to uniform and autonomous criteria to ensure the full effectiveness of the Rome Convention in accordance with the objectives that it pursues.

which or failing which the worker performing the contract habitually carries out his work, he can find the subsidiary criterion constituted by the place where the head office that hired the worker is located. It must therefore be pointed out in practice that the location which has hired the worker from the set of circumstances of the case does not appear to express the closest connection and it should be given another link of more genuine nature.

It notes the presence of a pre-existing ration having the EC highlighted-moreover, both with reference to the employment relationship and with the relationship between professional and consumer-that "the pre-existing relationship consists of a consumer or employment contract and the contract contains a choice-of-law clause in favor of a law other than the law of the consumer's habitual place of residence the place where the employment contract is habitually performed or exceptionally the place where the employee was hired the secondary connection mechanism cannot have the effect of depriving the weaker party of the protection of the law otherwise applicable (...)"[63].

The aforementioned profiles and the operation of the clause could be reflected in the cases of posting of the worker[64], or of the employee who for a limited period of time carries out his work in a different state than the one in which he is normally employed. Jurisprudential data emerges in this regard that highlight the prevalent relevance of the place where work is actually performed, which prevails over other elements such as the place where the employment contract is concluded and the location of the employer[65].

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[63]Proposal for a Regulation of the European Parliament and the council on the law applicable to non-contractual obligations (Rome II) of 22 July 2003. The EC precise that: "(...) the proposed Regulation does not contain an express rule to this effect since the commission considers that the solution is already implicit in the protective rules of the Rome Convention: articles 5 and 6 would be deflected form their objective if the secondary connection validated the choice of the parties as regards non contractual obligations but their choice was at least partly invalid as regards their contract (...)".

[64]As is known, the institution of secondment is regulated both internally and at a Union level. At EU level, see 2014/67/EU Directive of the European Parliament and of the Council of 15 May 2014 on the application of Directive 96/71/EC concerning the posting of workers in the context of a service provision modification of Regulation (EU) n. 1024/2012 concerning administrative cooperation through the information system in the internal market. About the notion of posting see also art. 2 of Directive 96/71/EC of the European Parliament and of the Council of December 16, 1996 on the detachment of workers in the context of the provision of services: by virtue of this provision per posted worker means the worker who performs for a limited period their work in the territory of a member state other than that in which they normally work.

[65]Cour d'appel de Paris of 7 June 1996, Boikov. The ruling concerns the application of the discipline referred to in the Rome Convention of 1980 specifying that: "(...) en application de l'article 6-2 a) de la convention de Rome du 19 juin 1980, le contrat de travail qu'un salarié russe, détaché par son employer, une société russe, a conclu avec la filiale anglaise de cette société et qu'il a exécuté exclusivement dans l'établissement français de cette filiale est, à défaut de choix exprès des parties, soumis à la loi française comme l'est aussi le contrat distinct conclu avec la société russe, à Moscou, en langue russe et entre parties de nationalité russe dont il n'apparaît pas qu'elles aient choisi la loi russe alors que le travail s'exécutait uniquement en France et que tout état de cause ce

Finally, it does not appear in the clause pursuant to art. 8, lett. 4, the reference to a manifest connection but only to the fact that the relationship "is more closely connected" with another order. This aspect appears on the hermeneutic (literal data) and systematic level (correlation with the further decisions of the same regulation) of relevance. Excluding the obvious or manifest nature of a closer connection with a country other than that indicated by the general rule means implying that the national judge, in an intuitive prospect of favor laboris, may not apply the general connection criterion or that of the place of habitual execution of work performance even in the absence of a clear different connection, the outcome of a reconstruction of the characterizing elements of the employment relationship, those emerge from the examination of the existing elections and from the relative context (i.e. place in which the result of the subordinate employment is intended to be explicit, together with other profiles of a subjective nature aimed at confirming the prevailing and different connection).

9. THE CONNECTION CRITERION OF THE PLACE WHERE THE DAMAGE OCCURRED AND ART. 4, SUB-PARAGRAPH 3 OF THE ROME II REGULATION

Regulation Rome II is clearly inspired by the certainty of the applicable law. In this perspective the recourse to the exception clause expressly referred to as a "safeguard" clause is placed in the indication that results from its recital n. 14 in reiterating that legal certainty and the need to administer justice in concrete cases are essential aspects of the area of justice, this recital identifies the elements aimed at ensuring this result or a general rule but also specific rules in certain provisions, a safeguard clause that allows to depart from these rules if it is clearly evident from all the circumstances of the case that the illicit fact manifestly has a closer connection with another country[66]. The first profile recalled that of legal certainty is more generally linked to the proper functioning of the internal market and is invoked in various capacities as the foundation of the regulatory choices made.

In recital n. 14 also notes the reference to the flexibility of the conflict rules and the need to allow the judge to treat the individual cases adequately. It should be noted, moreover, that in the Rome II proposal presented by the EC of 22 July 2003, one of the objectives pursued is to allow the parties to determine in advance and with reasonable certainty the rules applicable to a specific case, also in light of the act that the uniform rules are the subject of uniform interpretation by CJEU.

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contrat indissociable du précèdent les liens les plus étroits avec la France (...)".

[66]This set of rules is observed in the same recital creates a flexible framework of rules of conflict of laws. It also allows the judge to handle individual cases appropriately. As stated in recital n. 31, the objective of legal certainty also operates on the source of the choice of the applicable law in observance of the principle of autonomy of the parties and in order to strengthen legal certainty, the parties should be able to choose the law applicable to a non-contractual obligation. This choice should be expressed or be unequivocal in the circumstances of the case.

With specific regard to the safeguard clause, EC identifies the aims in introducing a certain flexibility in the conflict norm, allowing the judge to apply the law that corresponds to the center of gravity of the situation in the further recitals n. 18 and 20 of the Regulation identifies the safeguard clause in relation to the general rule of the lex loci damni and refers to the possibility of applying a manifestly closer connection with another country in the event of liability for product damage[67].

It is observed in recital n. 15 that the principle of the lex loci delicti commissi while representing the basic solution in the matter of non-contractual obligations in almost all member states is in practice applied in a differentiated way in case of dispersion of the elements between various countries. There is a need to improve the predictability of the applicable law by observing how uniform rules should benefit predictability between the interests of the alleged perpetrator and those of the party by pointing out that the connection with the country on whose territory the direct damage has occurred (lex loci damni) determines the right balance between the interests of the alleged perpetrator and those of the injured party to correspond to the modern conception of the right of civil responsibility and to the evolution of the systems of objective responsibility.

The general connection criterion indicated in art. 4 of Regulation Rome II is that of the lex loci damni: the law applicable to non-contractual obligations deriving from an unlawful event is identified in that of the country in which the damage occurs, regardless of the country in which the fact that gave rise occurred to damage and regardless of the country or countries in which the indirect consequences of this event occur[68]. In this regard it is known that CJEU has given a broad interpretation to the notion of lex loci delicti. This in particular in the context of the definition of jurisdiction criteria in civil and commercial matters. As it is known, it has also considered with regard to the Brussels Convention of 1968 that if the place where the fact involving a possible crime or quasi-crime takes place does not coincide with the place in which this fact caused damage to the expression place in which it is a harmful event and it must be understood in the sense that it refers both to the place where the damage arose and to the new where the generator event of the damage occurred and this with the consequence that the defendant can be sued, at the choice of the

[67]About the extension of the exception clause referred to in the Rome II Regulation also in the special hypotheses of the offense referred to in art. 5 of the same, it was observed that the judge should apply it also according to the predictability of the law applicable to the illicit fact, where it is highlighted: "(...) to the approach pursued by the EC draft proposal the Hamburg group concludes that judges should also be able to invoke the escape clause in cases involving special torts regulate in arts 5-8 DP such as product liability and defamation (...) to cases where the injured person buys the defective goods and the reduction of conflicts between the law governing the contractual obligation of a party on the one hand and the law governing this party's delictual obligations on the other are objectives of primacy importance (...)".

[68]A correction of the general criterion is provided for in paragraph 2 of art. 4 of the Rome II Regulation that if the alleged perpetrator and the injured party habitually reside in the same country at the time the damage occurs, the law of that country is applied.

plaintiff both before the judge of the place where the damage occurred and before that of the place where the harmful event occurred[69]. This perspective is overcome by the Rome II Regulation where the alternative between the theory of conduct and the event is solved in favor of the latter. To justify this choice in the recital n. 16 of Regulation Rome II shows that the connection with the country on whose territory the direct damage occurred (lex loci damni) determines a fair balance between the interests of the alleged perpetrator and those of the injured party, in addition to correspond to the modern conception of civil liability law and the evolution of strict liability systems. In this perspective, therefore, the place where the indirect consequences of the unlawful event occur[70], is not relevant, nor does it take place in the light of an orientation already expressed by CJEU on the subject of jurisdiction criteria in the place where financial damage is suffered as a result of initial damage suffered in another state[71].

However, if from all the circumstances of the case it is clear that the illicit fact has manifestly closer links with a country other than the one referred to in paragraphs 1 or 2 above, the law of this other country applies (article 4, lett. 3)[72]. A manifestly closer connection with another country could be based on a pre-existing relationship between the parties, such as a contract that has a link with the illicit fact. It is observed in recital n. 18 of Regulation Rome II that the general rule should be that of the lex loci

[69]CJEU, C-21/76, Hnadelskwekerij g.j. Bier b.v. v. Mines de Potasse de'Alsace sa of 30 November 1976. C-45/123 of 16 January 2014where it is reiterated that: "(...) by constant jurisprudence if the place where the fact involving a possible liability ex delictu or quasi-delictu takes place does not coincide with the place and in which this fact caused the damage, the expression place where the harmful event occurred as per article 5, paragraph 3 Regulation No. 44/2001 must be understood in the sense that it refers both to the place where the damage occurred and to the place where the damage occurred. event generating it so that the defendant can be sued at the choice of the plaintiff before the judge of one or the other of these two places.

[70]Art. 4, lett. 1 of Regulation Rome II.

[71]CJEU, C-364/93, Marinari v. Lloyd's Bank of 19 September 1995, ECLI:EU:C:1995:289, I-2719, it is observed that the notion: "(...) of place in which the event of damage occurred in accordance with article 5, letter 3 of the Convention of 27 September 1968 concerning jurisdiction and the execution of decisions in civil and commercial matters must be interpreted in the sense that it does not refer to the place where the injured party claims to have suffered a financial loss in contracting party. In this regard CJEU if it is admitted that such notion can refer so much to the place where it is when the damage arose as the place where the generator event of the damage occurred, it cannot however be extensively interpreted up to include any place where the harmful consequences of an event that has already caused damage actually occurred in another may be affected place (...)".

[72]S.C. SYMEONIDES, "Rome II and tort conflicts: a missed opportunity", in *American Journal of Comparative Law*, 56, 2008, pp. 198ss, which is stated that: "(...) despite serious reservations about the scope and wording of this particular escape, this author applauds the drafters for including an escape in the final version of Rome II. Indeed, escape clauses are necessary in any less than perfect statutory scheme. Because perfection is not for this world and more modern legislatures have begun to recognize their fallibility, escapes have become a common feature of almost all recent codifications (...)".

damni referred to in art. 4, par. 1, so that on one side, art. 4, par. 2 should be an exception to this general rule as it creates a special connection if the parties are habitually resident in the same country and the other art. 4, par. 3 should be understood as a "safeguard clause" with respect to art. 4, parr. 1 and 2 if it is clear from all the circumstances of the case that the offense manifestly has a closer connection with another country.

As articulated between first and second lett. of art. 4 the general provision concerning the law applicable to offenses appears to constitute a general conflict rule[73]. This articulation starts from the prevalence of the criterion of common habitual residence of the presumed person responsible for the damage and the injured party. From here some considerations can be drawn regarding the scope of application of the exception clause of which at lett. 3, art. 4 the general rule excludes both the criterion of conduct and of place where the indirect consequences of the unlawful event occur. For the purposes of reconstructing the complex circumstances of the case, these criteria can be used to highlight a connection that is manifestly narrower than the place of the common habitual residence and of unlawful conduct. The fact that they are excluded from the general rule also does not allow to exclude their relevance for the purpose of applying the exception clause that the provision referred to in letter. 3 of art. 4 stands as a substitute for the general rule in its two articulations pursuant to sub-paragraphs 1 and 2 of art. 4.

It should be noted that in the proposed regulation presented by EC in special offense reports (article 5) it is noted that the clause is difficult to apply or "(...) not adapted to this matter in general (...)"[74]. With regard to the clause pursuant to art. 3 Regulation Rome II, EC also notes that "(...)

[73]P. STONE, *EU Private international law,* Edward Elgar Publishers, Cheltenahm, 2017, pp. 378ss. It should be noted that the general rule as well as the exception clause are applied subject to the fact that a choice of the applicable law has not occurred as provided by art. 14 of Regulation Rome II and within the limits of what is included in this forecast. In particular, the choice can intervene or by agreement after the occurrence of the event that caused the damage, or through a freely negotiated agreement before the occurrence of the fact that caused the damage on condition that all the parties carry out a commercial activity. It is clarified in recital n. 31 of the Regulation itself which, in compliance with the principle of autonomy of the parties and with the aim of strengthening legal certainty, the parties should be able to choose the law applicable to a non-contractual obligation. It is also clarified that this choice should be expressed or be unequivocal in the circumstances of the case.

[74]Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (Rome II), Bruxelles of 22 July 2003 COM(2003) 427 final, 2003/0168 (COD), p. 16 which is observed that: "(...) the need for a special rule here is sometimes disputed on the ground that it would lead to the same solution as the general rule in art. 3 the damage for which compensation is sough being assimilated to the anti-competitive effect on which the application of competition law depends. While the two very often coincide in territorial terms they will not automatically do so: for instance, the question of the place where the damage is sustained is tricky where two firms form State A both operate on market B. Moreover, the rules of secondary connection of the common residence and the exception clause are not adapted to this matter in general (...)".

since this clause generates a degree of unforesseability as to the law that will be applicable it must remain exceptional (...)".
On the reconstructive and interpretative level two further profiles deserve to be examined. The first relates to the provision of lett. 3 and 4, last part of Regulation according to which the connection that is manifested most closely may be based on a pre-existing relationship between the parties. The second concerns the relevance of the clause in the event that the main damage is produced in a plurality of different states. With regard to the first profile, the provision under letter 3 of art. 4, clarifies that the pre-existing relationship could be constituted by a contract that has a close connection with the unlawful act. This hypothesis can materialize if the existence and the performance of a pre-existing relationship has constituted an occasion for the realization of a conduct having the characteristic elements of the illicit fact. It is necessary in light of the literal tenor of letter 3, last part of art. 4 of Regulation that there is identity between the parts of the pre-existing relationship and the figure of the presumed responsible and of the injured party[75].
This connection between the illegal and other pre-existing relationship in effect determines a clear simplification in the application of the clause to the point that it was doubted whether lett. 3 of art. 4 of Regulation Rome II may have effective application "where there is no pre-existing relationship between the parties (...)"[76].
The scope of the aforementioned revision is not clear, where it establishes that a manifestly closer connection "could be based" on a pre-existing relationship[77]. It does not appear to be a presumption, but a simplifying indication that extends the scope of circumstances that can be assessed for the purpose of determining the prevalent connection. The preceptive value of the forecast, the only one that seems reasonable to envisage, under penalty of emptying of meaning, is that for which the connection profiles that can be obtained from the pre-existing service between the parties can by themselves alone, if sufficiently meaningful, allow to base

[75]Proposal for a Regulation of the European Parliament and the council on the law applicable to non-contractual obligations, op. cit., which is affirmed that: "(...) experience with the Rome Convention, which begins by setting out presumptions, has shown that the courts in some member states tend to begin in act with th exception clause and seek the law that best meets the proximity criterion, rather than starting from these presumptions. That is why the rules in art. 3 (1) and (2) of the proposal Regulation are drafted in the form of rules and not of mere presumptions. To make clear that the exception clause really must be exceptional, par. 3 requires the obligation to be "manifestly more closely connected" with another country (...)".
[76]P. STONE, EU Private international law, op. cit., which is affirmed that: "(...) perhaps the clearest case for such application is where the parties reside in different countries whose laws are in relevant respects identical to each other but different form the law of the place of injury. In that situation the application under art. 4 common to the parties residences will rectify a drafting defect in art. 4 (2). It also seems arguable that art. 4(3) may properly be used to make the law of the place of injury prevail over the law o the common residence where there would otherwise be an unacceptable discrimination between plaintiffs who are resident in different countries but are injured in the same incident (...)".
[77]In english version: "might be based" and in french version: "pourrait se fonder".

the use of the clause safeguard and the non-application of the general rule.

On the interpretative level, the reference to a pre-existing relationship between the parties seems to be understood not only in strictly legal but also in factual terms. Not only therefore a contractual relationship, but also a relationship not founded on a legal relationship, which involves a continuity of activity that has involved the parties. Consider the hypothesis in which the parties both linked to a contractual relationship with the same third party, have jointly operated in circumstances of common time and place, for the purposes of such parallel obligations. The report could also be based on a juridical link ex lege, or on a relationship (family relationship) from which mutual rights and obligations are derived.

As for the second profile mentioned above concerning the plurality of relevant places, it is observed by EC, in the report to the Regulation proposal that the general rule concerning the place of the damaging event can be applied also in the case of an offense that produces damage in different states, recalling the principle of Mosaikbetractung[78]. The safeguard clause pursuant to lett. 3 of art. 4 of Regulation Rome II does not seem to be linked to the mere fact of the presence of difficulties in the application of the general rule, or of interpretative or reconstructive problems that may arise from the application of more laws with respect to the same unlawful conduct of damage in different states. It should be connected to the acknowledged assumption of lett. 3, art. 4 of Regulation Rome I, or in the presence of a manifestly closer connection with a country other than that identified on the basis of the general rule referred to in sub-paragraphs 1 and 2 of the same article[79].

10. LAW APPLICABLE TO PRODUCT DAMAGE LIABILITY: ART. 5, LETT. 1 OF REGULATION ROME II

In relation to product damage, the conflict rule pursuant to art. 5, lett. 1 of Regulation Regulation Rome II, which also finds application subject to the choice of the parties and the application of the general rule that identifies the connection criterion in the place of habitual residence of the alleged perpetrator and of the injured party, is divided up into various plans linked to the place of marketing of the product[80]. If the place of

[78]Which is affirmed that: "(...) the rule entails, where damage is sustained in several countries, that he laws of all the countries concerned will have to be applied on a distributive basis, applying what is known as Mosaikbetractung in german law". See also in argument: M. DANOV, *Jurisdictions and judgments in relation to EU competition claims,* Hart Publishing, Oxford & Oregon, Portland, 2010, pp. 166ss.

[79]It must also be considered that the hypothesis of an offense with damage of a widespread size appears more frequently to be proposed in relation to those hypotheses of illicit, such as that connected to acts of unfair competition, to environmental damage, which receive specific Regulation.

[80]C. MARENGI, "The law applicable to product liability in context: article 5 of the Rome II Regulation and its interaction with other EU instruments", in *Yearbook of Private International Law*, 16, 2014/2015, pp. 512ss. A. DICKINSON, *The Rome II Regulation. The law applicable to non-contractual obligations,* Oxford University Press, Oxford, 2008. For similarity with the solution accepted by the Regulation Rome II see the provisions of

marketing is that of the country where the person who suffered the damage resided habitually when the damage occurred, the law of that country applies. If the place of marketing is the one in which the product was purchased, the law of that country applies while the law of the country in which the damage occurred occurs if the product was marketed in that country. If the place of marketing is the one in which the product was purchased, the law of that country applies while the law of the country in which the damage occurred occurs if the product was marketed in that country[81]. The regulation is applied both with respect to the hypotheses of damage already manifested and with regard to the hypotheses of damage likely to occur[82].

With regard to the foregoing, it must be remembered that habitual residence is defined by art. 23 of Regulation in question as the place where the central administration is located in relation to companies, associations and legal persons[83], while for a natural person it is

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the convention of the Hague of 2 October 1973. "(...) on the law applicable to products liability" entry into force internationally the 1st October 1997. Articles 4, 5 and 6 of the Convention provide for a series of consecutive criteria starting from the place of damage up to the habitual residence of the injured with a further closure provision.

[81]See recital n. 20 of Regulation Rome I where the rationale of the cascading criterion and the connection with the place of marketing of the product is clarified, specifying that in the matter of responsibility for defective products the conflict of laws rule should respond to the objectives of equitably sharing the risks inherent in a modern high-tech company, to protect health and consumers, to stimulate innovation, to ensure undistorted competition and to facilitate trade. If he also observes that the reaction of a cascading system of connection criteria together with a predictability clause constitutes a balanced solution in the light of these objectives. Thus the first element to be taken into consideration is the law of the country in which the injured party habitually resided at the time when the damage occurred on condition that the product was marketed in that country. The other elements of the cascade system come into play if the product has not been marketed in that country without prejudice to art. 4, par. 2 and the possibility of a manifestly closer connection with another country.

[82]See art. 2.2. e 2.3. of the Rome II Regulation by virtue of which it also applies to non-contractual obligations that may arise and any reference therein agreed upon to a fact giving rise to the damage includes, in fact, that may occur that give rise to damage while damage includes damage that may occur .

[83]With the clarification referred to in the same art. 23, lett. 1 second paragraph that if the fact that caused the damage occurs or the damage arises during the activity of the activity of a branch, an agency or any other place of business, the place where the branch is located, the agency or the other place of business is considered habitual residence. See, G. HOHLOCH, "Place of injury, habitual residency. Closer connections and substantive scope. The basic principles", in *The Yearbook of Private International Law,* 7, 2007, pp. 3ss. In fact relates to the notion of branch, however, with regard to the parallel profile of the jurisdiction see from the CJEU the case C-33/78, Somafer of 22 November 1978, ECLI:EU:C:1978:205, I-02183, according to which the notion of branch, agency or any other branch implies an operations center that is manifested in a lasting way outwards as an extension of the house provided with management and materially equipped so as to be able to deal with third parties, so that these, even knowing that a possible legal relationship will be established with the parent company whose headquarters are located abroad are exempted from applying directly to this, and can do business in the operations center that constitutes the extension. More generally, the notion of a permanent establishment should be mentioned, which exists in the presence of a fixed business location in which the necessary human and technical resources are

understood to be its main place of business if it is a subject acting in the exercise of its professional activity.

The expectation of the alleged perpetrator of the unlawful act is enhanced by sub-paragraph 2 of art. 5, noting the precedents, the connection criterion of his place of habitual residence on the assumption that he could not reasonably foresee the marketing of the product or a product of the same type in the country whose law is applicable under the three criteria of cascade connection provided by sub-paragraph 1 of art. 5[84].

The exception clause envisaged by sub-paragraph 3 of art. 5 is modeled in the same terms adopted by sub-paragraph 3, of art. 4 relating to the general rule regarding the law applicable to illicit facts. It appears to have a limited application space as it must be assumed that n is the place of habitual residence of the person who suffered the damage at the time when this occurred neither the place of purchase of the product nor the place where the damage occurred verified (if coinciding with the country of marketing)[85] are able to express a close connection between applicable law and product liability (and without prejudice to the hypothesis of the common habitual residence of the presumed responsible and the injured party)[86]. This can be hypothesized, in particular in the case in which, in the presence of the condition referred to in the second part of sub-paragraph 1 of art. 5 of Regulation or if the alleged person in charge cannot reasonably foresee the marketing of the product or product of the same type in the country indicated according to the aforementioned rules, the place of habitual residence of the presumed person responsible for the violation does not express in the light of an overall assessment of the circumstances of the case an effective connection, so that the illicit present a manifestly narrower connection with a different scale.

The tenor of the aforementioned provision is equivalent to that of the exception clause concerning the law applicable to non-contractual obligations arising out of an unlawful event. Thus it reiterates the exceptional nature of the clause that operates only if it is clear that the unlawful act has manifestly closer links with a different country than the one identified on the basis of the general rule; on the other hand, it is accepted that the closest connection may derive from a pre-existing relationship between the parties such as a contract[87]. All this must be

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permanently present and through which the customs operations of a person.

[84]The relevance of the predictability of the commercialization of the product in another state is established by the art. 7 of convention of Hague of 2 October 1973 concerning the law applicable to liability for product damage.

[85]CJEU, C-127/04, O'Byrne, of 9 February 2006, ECLI:EU:C:2006:93, I-01313.

[86]S.C. SYMEONIDES, *Rome II and tort conflicts: a missed opportunity,* op. cit., pp. 196, "(...) in contrast to the preliminary draft, which limited the scope of the escape to cases covered by the general rule, the final text repeats the escape in the articles dealing with products liability (art. 5(2)) unfair competition cases in which the competition affects "exclusively" the interests of a specific competitor (art. 6 (2) and choice of law agreements (art. 14 (2)).

[87]See Report of the Committee of 22 July 2003 (COM (2003) 427 final) it is specified that the accessory connection is a factor that can be taken into consideration in order to determine whether there is a manifestly closer connection with another country than that

compared with the objectives outlined by recital n. 20 of Regulation Rome II, that is to fairly share the risks inherent in a modern high-tech project, protect the health of the consumer, incentivize innovation, guarantee undistorted competition and facilitate trade. The discipline that is characterized by a cascade system of connection criteria and a predictability clause is based on the place of habitual residence by the injured party at the time the damage occurred and on condition that the product was marketed in that country. This leads us to believe that there is not actually any relevant actual space for the exception clause, however it has been observed how it can be applicable in cases where the victim of the offense is a third party who is exposed to the risk without having purchased or used the product (innocent bystander).
The inapplicability of the rule referred to in sub-paragraph 1, first and second paragraph of art. 5 of Regulation, where the three criteria provided for by lett. a), b) and c) of sub-paragraph 1 do not appear to be operating due to the lack of coincidence between the place indicated therein and place of sale of the criterion referred to in the second paragraph of the same art. 1 cannot be applied as the alleged person could reasonably foresee the marketing of the product or of a product of the same type in the country indicated by the aforementioned letters a), b) and c). In this case, the exception clause which presupposes the abstract applicability of sub-paragraph 1 of art. 5 does not appear to apply and the possibility of recognizing a closer connection with a different country but should refer to the general rule set forth in art. 4, as well as the relevant exception clause.

11. ENRICHMENT WITHOUT CAUSE, NEGOTIORUM GESTIO AND CULPA IN CONTRAENDO AND EXCEPTION CLAUSE

Among exception clauses modeled in substantially the same terms are provided for by articles 10, 11 and 12 of Regulation Rome II in relation to enrichment without cause negotiorum gestio and culpa in contrahendo respectively. With regard to the first hypothesis[88], the relevant connection criterion is the one that applies to the relationship existing between the parties (in particular the contract, illicit fact) to which the non-contractual obligation deriving from an enrichment without cause, including the addition of the undue payment, is linked. Failing this, it detects the common habitual residence of the women at the moment in

designated by the strict criteria. On the other hand, the law applicable to this pre-existing relationship does not apply automatically and the judge has a margin of maneuver to assess whether a significant connection exists between the non-contractual obligation and the law applicable to the pre-existing relationship. It should also be noted that the solution consisting in the act that the pre-existing relationship may consist of a contract that has a close connection with the offense assumes a particular interest in the Member States whose legal system allows the accumulation of contact and extra-contractual liability for the same parties.

[88]T.W. BENNETT, "Choice of law rules in claims of unjust enrichment", in *International and Comparative Law Quarterly,* 39 (1), 1990, pp. 136ss. P. HAY, "Unjust enrichment in the conflicts of law. A comparative view of german law and the american restatement", in *American Journal of Comparative Law,* 1978, pp. 2ss.

which the fact that led to enrichment without cause or, subordinately, the place where unjust enrichment was produced occurred. The applicative space of the clause that operates according to the well-known model adopted by the Regulation, that is to say if all the circumstances of the case show that the non-contractual obligation that derives from an enrichment without cause presents closer links with a different country, appears limited beyond its literal wording in terms of strict exception to the rule. It must be assumed that in the absence of a pre-existing relationship between the parties or their habitual residence in the same country, the place where the enrichment was produced does not express an actual connection. This can be assumed concerning that the enrichment deriving from the same action has been determined in different states, so that one of these prevails in light of the overall examination of the circumstances and of the convergence with other relevant connection elements (eg habitual residence of the party that having benefited from enrichment, it is burdened with the non-contractual obligation).

For the negotiorum gestio, the same considerations made with regard to enrichment without cause, concerning the sequence of the connection criteria or with an existing relationship between the parties, the common residence and the place where the management of the business. Also in this regard, the applicability of the clause appears to be limited: however, it can be assumed that in the absence of an existing relationship between the parties and their common habitual residence, the place where the business is managed does not appear to be expressing an actual connection and this in particular if the management was carried out in different states.

As for the culpa in contrendo[89] the application of the exception clause referred to in sub-paragraph 2, lett. c) of art. 12 Regulation is subject to the inapplicability of the criterion envisaged by sub-paragraph 1 of the same article which makes use of the law applicable to the contract or which would have been applicable if the contract had been concluded. The clause operates in the alternative to the other criteria set forth in sub-paragraph 2 of art. 12 consisting of the place where the damage occurred and the common habitual residence of the parties when the fact that it produces the damage occurs[90]. Therefore, if the general rule pursuant to

[89]It should be noted that it appears from the recital n. 30 of Regulation that art. 12 includes only non-contractual obligations that have a direct link with the pre-general negotiations. This means that if a person suffers personal injury during the pre-contractual negotiations, art. 4 or other relevant provisions of the Regulation.

[90]Note the editorial technique of art. 12 paragraph 2 of Regulation Rome II: when the applicable law cannot be determined on the basis of paragraph I, the following applies: a) the law of the country in which the damage occurs regardless of the country in which the fact occurred that determined ah the damage and regardless of the country or countries in which the indirect consequences of the event occurred; or b) if the parties have their habitual residence in the same country when the fact that determines the damage occurs, the law of other countries; or c) if it is clear from all the circumstances of the case that the non-contractual obligation deriving from pre-contractual negotiations has manifestly closer links with a country other than that referred to in letters a) and b)

sub-paragraph 1 of art. 12 there seems to be no room for the clause referred to in sub-paragraph 2, lett. c) of the same article, of course the significance of the exception clause contemplated on the basis of the conflict rules relating to the contractual situation in the relevant case. The operational space of the clause therefore appears to be decidedly circumscribed to the hypothesis in which the law applicable to the contract concluded or that had been concluded cannot be determined, since the common habitual residence of the parties is missing[91], the location of the damage is not able to express a connection effective between case and applicable law.

12. ART. 21, LETT. 2 OF REGULATION (EU) 650/2012 IN MATTERS OF SUCCESSION

In force of art. 21 Regulation (EU) 650/2012, 1st lett., and except as otherwise provided by the Regulation itself, the law applicable to the entire succession is that of the state in which the deceased had his habitual residence at the time of his death. If, by way of exception, from the set of circumstances of the concrete case it is clear that at the time of death the deceased had manifestly closer connections with a state other than that whose law would be applicable under the aforementioned rule the law applicable to the succession is the law of this other state[92].

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the law of that other country.

[91]P. STONE, The Rome II Regulation on choice of law in tort, in Ankara Law Review, 4, 2007, pp. 105ss, which is affirmed that: "(...) as regards a company or other body, corporate or unincorporated, art. 23 (1) specifies that its place of central administration must be treated as its habitual residence, but that where the event giving rise to the damage occurs, or the damage arises, in the course of operation of a branch, agency or other establishment the location of that establishment must be treated as its habitual residence. Probably the place of central administration of a company is the place at which its principal managerial organ usually meets, rather than the office form which its main trading activities are conducted (...)".

[92]The text takes up the provisions of art. 3, lett. 2 of convention of Hague of 1989 on the law applicable to succession due to death. Consider also how assessments related to the applicable law may be relevant for the purpose of declaring incompetence. Art. 6 of Regulation 650/2012 provides that when the law chosen by the deceased to regulate his succession is the law of a member state the requested juridical body may, at the request of one of the parties to the proceedings, declare its incompetence if it considers that the jurisdictional bodies of the member state of the chosen law are better able to decide on the succession in view of the latter's practical circumstances such as the habitual residence of the parties and the place where the assets are located. On the subject of habitual residence the perplexities expressed by the European Parliament in the preparatory work of the Rome I Regulation must be remembered. See the position of the European Parliament of 29 November 2007 finalized in first reading on 29 November 2007 with a view to the adoption of the Regulation (EC) of European Parliament and of Council on the law applicable to contractual obligations (Rome I), (EP-PE_TC1-COD (2005) 0261) where it was specified in par. 39: "legal certainty would require a clear definition of habitual residence, in particular with regard to companies, associations and legal persons. Contrary to Article 60, paragraph 1 Regulation (EC) No. 44/2001 which proposes three criteria , the rule of conflict of laws should be limited to a single criterion, since otherwise the parties would remain unable to predict what would be the law applicable to their situation (...)". For further details see: A. DUTTA, W. WURMNEST, *European private international law and member state treaties with third states. The case*

Recourse to the exception clause in matters of succession is presented in recitals of Regulation 650/2012 in the hypothesis of transferring the habitual residence of the deceased at a time prior to death[93]. In particular, the hypothesis emerges in which the deceased moved into the state of habitual residence at a time relatively close to his death and all the circumstances from the case indicate that he had manifestly closer connections with another state[94]. Therefore, the hypothesis of a habitual residence not actually representative of connection relevant to succession is outlined. It is clear that habitual residence is also connected to the chronological element[95]: its actual effectiveness, at a time just before death, may not be in accordance with Regulation 650/2012 which underlies, in identifying the connecting criterion in general terms the habitual residence of the search for an effective and prevalent connection in the perspective of the relationship of succession[96].

It is true that recourse to the aforementioned clause may not benefit succession planning, but feed the dispute, unless provision is made for the choice of the applicable law in the terms provided for by Regulation[97].

Furthermore, recourse to the exception clause in succession matters is not compatible with the reference regulation. This aspect seems to correspond to a more general logic that rereads the incompatibility between connecting criteria that are inspired by the principle of proximity and forms of reference. This is confirmed in Regulation 650/2012, whose art. 34 while admitting in its sub-paragraph 1 the postponement phenomenon[98], it excludes its operations, inter alia with reference to the provision in its art. 21, par. 2.

On the exegetical level, the comparison between the formula of the clause in art. 21, sub-paragraph 2 of Regulation on succession and art. 4, lett. 3 of Regulation Rome I, shows greater prudence in the non-application of

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of the European succession regulation, ed. Intersentia, Antwerp, Oxford, 2019.

[93]Recital n. 25 Regulation 650/2012. See, G. PALAO MORENO, G., ALONSO LANDETA, I., BUÍGUES, (dirs.), S*ucesiones internacionales. Comentarios al Reglamento (UE) 650/2012,* op. cit.

[94]Without prejudice to the fact that manifestly closer links should not be invoked as a subsidiary linking criterion whenever the determination of the habitual residence of the deceased at the time of death is complex.

[95]In relation to this profile, see the specific indication in art. 3, par. 2 of the convention of Hague of 1st August 1989 on the law applicable to inheritance not in effect, according to which: "(...) succession is also governed by the law of the state in which the deceased at the time of his death was habitually resident if he had been resident there for a period of no less than five years immediately preceding his death. In exceptional circumstances if at the time of his death he was manifestly more closely connected with the states of which he was then a national the law of that state applies (...)".

[96]A relationship that is declined in terms of continuity between the deceased and his successors, according to the principle of unity of the succession.

[97]Art. 22 of Regulation 650/2012.

[98]By virtue of this provision, when the Regulation prescribes the application of the law of a third state, it refers to the application of the juridical norms in force in that state, including the names of private international law, to the extent that these norms refer a) the law of a member state; or b) the law of another upright state that would apply its own law

the general rule in favor of the different state with respect to which the closest connection is manifested. This profile is evidenced by the exception that does not appear in the corresponding provision of the safeguard clause contemplated by Regulation Rome I regarding contractual obligations. This reflects the need to avoid the unfavorable impact of this clause on the predictability of the applicable law.

13. ART. 26, LETT. 2 OF REGULATION (EU) 2016/1104 ON ENHANCED COOPERATION OF REGISTERED PARTNERSHIPS

Within the scope of Regulation (EU) 2016/1104 of Council of 24 June 2016 which implements enhanced cooperation in the area of application of the applicable law, the recognition and enforcement of decisions regarding the property effects of registered partnerships[99], a peculiar hypothesis of exception clause. This regulation based on art. 81 (3) TFEU[100] and implementation of enhanced cooperation authorized by Decision (EU) 2016/954[101] provides in its art. 26, in the event of failure to choose the applicable law by the parties, a general rule to which an exception clause is attached. In this regard, in its recital n. 50, it should be noted that in relation to the determination of the law applicable to the property consequences of registered partnerships in the absence of a choice of law and an agreement between partners, the jurisdictional authority of a member state, at the request of one of the partners, should be able to conclude in exceptional cases, for the application of the law of the state in which we have had habitual residence for a long period of time, if the partners themselves have relied on it. Within the scope of this Regulation, which takes on universal significance and concerns the patrimonial effects

[99]Note that under its article 70, lett. 2, second part it will be applied in an unequal manner starting from 29 January 2019. It is envisaged that "it will apply from 29 January 2019, except for the articles 64 and 64 which apply from 29 April 2018 and the arts. 65, 66 and 67 which apply from 29 July 2016. For those member states participating in enhanced cooperation by virtue of a decision adopted pursuant to article 331, paragraph 1, second or third paragraph TFEU, the present Regulation applies from the date indicated in the decision in question (...). On the other hand, in terms of the temporary right, the Regulation will apply only to the proceedings initiated, to the formal deeds drawn up or registered and to the judicial transactions approved or concluded at date or later than January 29, 2019. However, and the proceeding in the home member state was started before January 29, 2019, the decisions taken after this date are recognized and executed sector I lay down the provisions of the Regulation itself if the rules on jurisdiction applied comply with those established by the provisions contained therein in Chapter II. Furthermore, the provisions of its Chapter III are applicable only to partners who have registered their union or who have designated the law applicable to the property consequences of their union registered after 29 January 2019.

[100]Based on this provision as an exception to par. 2, the related measures resolution decree a transnational procedure are established by the council, which deliberates according to a special legislative procedure. The council deliberates unanimously after consulting the European parliament.

[101]This is the decision of 9 June 2016, in OJ o 16 June 2016, L, 159, p. 16ss. According to art. 1 "(...) are authorized to establish among themselves an enhanced cooperation in the field of the competence of the applicable law of recognition and enforcement of decisions concerning property regimes of property pairs of registered partnerships, applying the relevant provisions of the Treaties.

of a registered partnership[102], the totality of the assets subject to these effects, regardless of where they are[103], is used as a general connecting criterion for the purposes of determination of the applicable law in the absence of choice of partners or future partners, the place where the registered union was established[104].

Notwithstanding the aforementioned rule the exception clause pursuant to art. 26.2. of Regulation 2016/1104 is linked to the request of one of the partners addressed to the competent judicial authority, although it does not entail forms of automatism in its application, establishing that the judge "can" decide the use of a law different from that identified by the general rule.

The extreme caution of resorting the exception of general rule as well as consistent with the aforementioned right attributed to the national judge is strengthened by the incipit art. 26.2. therefore the use of the clause in question is intended to operate by way of exception[105]. The acceptance of the request for the application of the clause is subject to the demonstration by the applicant of a double condition, one linked to the presence of a prevalent connection with respect to that indicated by the general rule, the other relating to the expectation of the parties. Under

[102]See ar. 3.1. of Regulation.

[103]Art. 21 of Regulation.

[104]In reality, in the provision of art. 25.2. of Regulation in question the "may" comes to emphasize the margin of discretionary assessment of the national judge in the verification of the conditions for the non-application of the general rule for the benefit of the provision of the exception clause.

[105]Similarly, only in the presence of exceptional circumstances does the Regulation admit to its recital n. 52 the use of necessary application standards. It is specified that. "(...) under exceptional circumstances, for reasons of public interest, such as safeguarding the political, social or economic organization of a member state, the courts and other competent authorities of the member states should be able to apply exceptions based on necessary rules of application The concept of rules of necessary application should include rules of an imperative nature such as those relating to the protection of the family home. This exception to the application of the law applicable to the property effects of the registered partnership must be strictly interpreted to be compatible with the general objective of this Regulation (...)". The same must be said for the use of public order. See recital n. 53 of the same Regulation according to which "in the presence of exceptional circumstances for reasons of public interest the judicial authorities and other authorities of the member states competent in matters of the patrimonial effects of registered partnerships should also be able to disregard the determining provisions of a foreign law if in a specific case , the application of these provisions is manifestly incompatible with the public order of the member state concerned, and courts or other competent authorities should not be allowed to use the public order exception to disregard the law of another state or to refuse to recognize-or where appropriate, accept- or execute-a decision, public deed or court settlement issued in another member state if this were in violation of the Charter of Fundamental Rights on European Union (CFREU), in particular its Article 21 on the principle d non-discrimination (...)". For further details see: X. GROUSSOT, G.T. PETURSSON, "The EU Charter of the Fundamental Rights five years on. The emergence of a new constitutional framework?", in S. DE VRIES, U. BERNITS, S. WEATHERILL, *The EU Charter of Fundamental Rights as a binding instrument. Five years old and growing*, Oxford University Press, Oxford, 2015. S. PEERS et al. (eds.), *The EU Charter of Fundamental Rights, A Commentary*, Hart Publishing, Oxford & Oregon, Portland, 2014.

the first profile, is provided for by lett. a) of lett. 2 of art. 26 of Regulation in question that the partners must have had the last common habitual residence in this state for a significantly long period, under the second profile, lett. b) of the same sub-paragraph establishes that both partners must have relied on the law of such other state in the organization or planning of their patrimonial relationships. The clause operates on the assumption that union's prior rooting in another member state is prevalent with respect to the place of registration both from the objective point of view, in terms of real connection as expressed by the habitual residence and under the subjective profile in terms of expectation of the parties and in temporal terms for the significant duration of the pre-existing link with another state.

14. ART. 26, LETT. 2 OF REGULATION (EU) 2016/1103 ON ENHANCED COOPERATION IN MATTERS OF MATRIMONIAL PROPERTY REGIMES

Considerations partly analogous to those carried out in the previous paragraph also apply to Regulation (EU) 2016/1103 of Council of 24 June 2016 which implements the strengthened cooperation in the area of competence, of the applicable law of recognition and enforcement of decisions in the matter of matrimonial property regimes.

With regard to the identification of the scope of material application of the Regulation in question as highlighted in its recital n. 18, it "includes not only the property regime specifically and exclusively contemplated by certain national legislations in the case of marriage but also all the patrimonial relations between the spouses and with respect to third parties, which derive directly from the conjugal bond or from the dissolution of this[106].

In art. 3 of Regulation includes material and the set of rules governing the property relations of the spouses with each other and with respect to third parties as a result of the marriage or its dissolution[107].

[106]In the same recital the extent of the material application field is justified by pointing out that it is appropriate that the scope of application of the Regulation includes all aspects of civil law of property regimes between spouses, concerning both the daily management of the property of the spouses and the liquidation of the property regime, in particular following personal separation or death of a spouse. It should be noted that "the term" matrimonial property regime "must be interpreted independently and should include not only the rules that the spouses cannot derogate from but also the optional rules eventually agreed by the spouses in accordance with the applicable law as well as any provisions of the applicable law".

[107]For the rest, in order to limit the scope of application ratione materiae of Regulation under consideration, the exclusions referred to in its art. 1.2. according to which the following are excluded from its scope: "a) the legal capacity of the spouses, b) the existence, validity and recognition of a marriage, c) maintenance obligations, d) the succession due to the death of the spouse, e) social security, f) the right of transfer or adjustment between spouses, in the event of divorce, personal separation or annulment of the marriage of retirement or disability pension rights accrued during marriage and which did not generate pension income in the course of the same, g) the nature of the real rights, h) any registration in a register of rights on movable or immovable property, including the legal requirements relating to such registration and the effects of the

Article 3 of Regulation also provides for the application to the dissolution of the marriage specularly, the Regulation 1259/2010 of 20 December 2010 applicable to divorce and personal separation, pursuant to art. 1.2. e) does not find the application even if they are presented simply as a preliminary issue to the patrimonial effects of the marriage.
The provision of art. 267 of Regulation in question, which is also relevant for the purpose of identifying jurisdiction[108]
and is applied to the assumption that there is no agreement on the choice of applicable law[109], identifies three criteria for cascade connection for the purposes of determining the applicable law. The first criterion is that of the common habitual residence and in particular of the first common habitual residence after the conclusion of the marriage. It may coincide with the common habitual residence of the couple possibly already established prior to the conclusion of the marriage, not manifesting in such a case a solution of continuity between the settlement of the copy before and after the marriage. In different hypotheses, the common habitual residence could be identified with that of new institution with respect to the situation existing before the conclusion of the marriage provided that it is characterized by stability or destined to last over time (in potential, but reasonably certain terms). In the event that the couple, after the conclusion of the marriage, changed their residence in a reasonably short period of time, a stable, potentially durable settlement should be realized, so that in this perspective the first common habitual residence may come to exist at a much later time than that of marriage.
In the absence of the foregoing, in the discipline under examination, the common citizenship of the spouses is noted at the time of the conclusion of the marriage, without prejudice to the fact that in force of lett. 2 of art. 26 mentioned above if the spouses have more than one common citizenship at the time of the conclusion of the marriage the criteria other than citizenship apply. Moreover, it should be noted that the convergence of citizenship at the time of conclusion plus an effective connection between applicable law and family life. In the further alternative, it will assist the law of the state with which the spouses jointly present the closest connection at the time of the conclusion of the marriage, taking into account all the circumstances. In this regard, having to disregard the common habitual residence, the place of fulfillment of the obligations inherent in the marriage relationship may be relevant, taking into consideration the overall family unit considered and the implementation of the common life direction. It will also be possible to detect the location of minor and adult children, the location of family assets with respect to whose management the spouses will cooperate. More generally, the place of prevailing fulfillment of the duty to cooperate and govern the family,

registration or non-registration of such rights in a log (...)".
[108]See art. 7 of Regulation.
[109]Please note that the choice of applicable law subject to specific requirements must be expressed. See also art. 23.1. of Regulation in question, which concerns the formal validity of the agreement on the choice of applicable law.

including the duty to provide assistance, as well as the work that may be provided for the good performance of the family business and of the contribution to the needs of the family, can be taken into account.
As an exception the provision of art. 26.3. which also operates subject to the request of one of the spouses[110], establishes that the jurisdictional authority competent to decide on matters relating to the matrimonial property regime can establish that the law of a state other than that whose law is applicable according to the general rule of referred to at 26, 1, lett. a) (first common habitual residence after the conclusion of the marriage) regulates the matrimonial property regime. The recourse to this provision, besides being optional, is subordinated to the demonstration of a different and more effective connection and this in relation to the double circumstance that the spouses have had the last common habitual residence in this different state for another significantly longer period of that of common habitual residence after the conclusion of the marriage on the other, that both spouses have relied on the law of that other state in the organization or planning of their patrimonial relationships.

15. CONCLUDING REMARKS

The exception clause appears as a unitary institution, in light of the fact that its various declinations, even the most sui generis which link its functioning to extrinsic profiles with respect to the case in point, do not change the core of its structure, which is articulated in the access of the clause to the general rule which is articulated in accessing the clause to the general rule in basing the latter on a localization criterion inspired by the principle of proximity, in the subordination of the first to the second even with presuppositions that otherwise are connoted on the level of positive law. The clause is thus an expression of consistency in the reference system: a provision of private international law that identifies a flexible and non-univocal connection criterion could not be entirely consistent with its ratio if, when combined with presumptions or rules suitable for predetermining the connection narrower did not foresee corrections to bring the rule back into its specific function by giving priority to what is the most significant link.
Without prejudice to the above, it is necessary to check whether the exceptional clauses that are linked to a rule characterized by a relative presumption of formality can be considered different in terms of structure and foundation. The distinction thus proposed is highlighted in the passage between Rome Convention and the Rome I Regulation on the subject of the law applicable to contractual obligations: in the first case in particular the habitual residence of the characteristic lender is presumed

[110]See art. 51 of Regulation in question, according to which, as regards the determination of the law applicable to the matrimonial property regime, it concerns the determination of the law applicable to the matrimonial property regime in the absence of a choice of law and a marriage agreement, the judicial authority of a member state at the request of one of the spouses, should be able to conclude in exceptional cases where the spouses had moved into the state of habitual residence for a long period of time, that the law of that state is applicable if the spouses have relied on it.

to be the narrowest link while in the second case the habitual residence of the seller or service provider is the connecting criterion tout court. The answer to the question posed lies in the multi-point textual analysis carried out in this paper and in the consideration that from this analysis it follows from the role of relative presumption, as proposed in the example considered by art. 4, lett. Convenion of Rome of 1980.

It seems except what immediately specified that the structure of the clause in its relations with the general rule does not change in either case. The articulation of the provision remains unchanged, its function and the relationship between rule and exception: two non-coinciding connection criteria (the lender's habitual residence, on the one hand, and the closer connection on the other, which access the same case and function) in the relationship of subordination. What varies, if anything, but is graded not by structure is the resistance of the rule with respect to the exception where the rule is originally assisted by relative presumption it is already born with a greater level of penetrability than the exception, while in the case where the rule sets the criterion (the habitual residence of the lender) in categorical terms, said penetrability is reduced and the exception clause takes shape and manifests itself is reduced and the exception clause takes shape and is manifested is reduced and the exception clause takes shape and is manifested in truly "exceptional" terms, which then needs to be reflected in the to motivate the judge, required to support the reasons for the abandonment of the rule due to the presumption of other criteria. Moreover, it is precisely in the context of the formulation adopted by the Convention of Rome of 1980 assorted by a form of relative presumption that the discussion about the "weak" or "strong" nature of the presumption referred to in its art. 4, lett. 2 and whose jurisprudential orientations have also been taken into account in the present work.

The examination of the normative data and the practice conducted in the present work has also highlighted how the study of the exception clause involves in addition to exegetical profiles linked to its different attitude in EU, conventional and internal discipline, general theoretical questions of international law private. The first important aspect on which the analysis carried out allows us to give feedback is if the exception clause in the various forms and areas in which it is expressly regulated, represents a forecast whose relevance is limited to the areas of reference, or constitutes expression of a general principle proper to the system of private international law. In this regard, it should be recalled that an attempt to reconstruct the exception clause in terms of the general principle of private international law appears to have not been shared by the doctrine[111]. This attempt was based on the consideration that the conflict rules, like other juridical norms, are formulated assuming what usually happens in reality, so that they would miss their objective if they even operate when there is a closer connection with another order. In

[111]G.S. MARIDAKIS, *Le renoiv en droit international privè,* ed. Brill, The Hague, 105, 1957, pp. 55ss.

light of the considerations already made in this work, the doctrinal position was expressed that the exception clause underlies a fundamental principle in the field of private international law[112]. It is to be shared that the interpretation of the conflict rules must take place in accordance with the general precepts of certainty and predictability so that where the connecting criterion has flexibility margins, the actual connection between the cases is sought. However, it does not seem to be able to go further or to claim that the exception clause constitutes a general principle inherent in the system of private international law. Moreover, the thesis that considers the subjection of the conflict rules to the interests underlying them does not seem to be able to be understood in such terms as to go beyond the normative data and assume the presence of a general principle that allows the non-application of the connection criterion according to the search for an effective connection that is justified in light of these interests.

It emerges that the exception clause functions in correlation with a more general rule to represent an alternative, albeit an exceptional one, or a completion. The result of the operation of the exception clause consists in the identification of an applicable law different from that which would be applicable on the basis of the general rule which the clause enters. This may be the consequence of the non-application of forms of presumption destined to disappear when all the circumstances indicate that the contract has a closer connection with another country. Beyond a rule characterized by forms of presumption and therefore on the assumption of a different basic approach if the set of circumstances clearly shows that the relationship has manifestly closer links with a country other than that indicated on the basis of the criteria identified by type contractual law the law of this different country applies. The effect of the foregoing is that the right invoked on the basis of the criteria provided by the general rule is by exception inapplicable if from the set of circumstances it is manifest that the case is only slightly connected but more closely connected with another.

It appears that the exception clause is a flexible clause. It introduces an element of evaluation suitable to overcome the rigidity of the more general criterion to which it accesses. On the other hand, the international harmony of the solutions, that is, uniformity of the discipline of the relationship regardless of the legal order from which it arises, may appear more protected by a rigid or generally predictable rule of private international law, while the clause exceptional in its characterizing for flexibility and discretion attributed to the judge, it appears to move in a different direction. Through the exception clause, however, the role of the judge is enhanced, which is responsible for determining and motivating, through appropriate assessments, which closer connection is relevant for

[112]F. VISCHÉR, "Das Problem der Kodifikation des schweizerischen internationalen Privatrechts", in *Zeitschrift für Schweizerische Recht*, 90, 1971, pp. 76ss. S. ROSENTRITT, *Die Gefahrtragung im europäischen und internationalen Kaufrecht*, Mohr Siebeck, Tübingen, 2019.

the purpose of identifying the applicable law in the absence of choice of the parties. For this flexibility, the exception clause restricts its scope of application to the extent that the rule it accesses is conceived in terms that reduce the interpreter's space which is the characterizing element in the passage from the Rome Convention to the Rome Regulation I. It emerged that the use of the exception clause cannot be directly based on considerations of material law. The purpose of the clause is to enable the contractual relationship to be located in a given order, resulting in aspects that are external to the position of the contractual parties or to the effects that the law thus identified as applicable can produce on the relationship itself.

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