Out-of-court dispute settlement systems for e-commerce

Report on legal issues
Part II: The Protection of the Recipient

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Contents

1 The Protection of the Recipient in Out-of-court Dispute Settlement / The Implications of the Consumer Protection Law for the Out-of-court Dispute Settlement in the Cross-border Electronic Commerce

Taking into account of the fact that many contracts concluded by Information Society services will be contracts with consumers, the rules applicable to such contracts will be of decisive importance.

1.1 Transparency of Consumer Protection Law in the Cross-border Environment

Legal uncertainties about the applicable consumer protection law in cross-border relations between Information Society services and recipients may create risks for the unfettered development of electronic commerce within the Internal Market.

1.1.1 Consumer Protection Laws

There are currently some 80 laws and by-laws concerning consumer protection in the EU[1] and possibly an equivalent number of laws and by-laws in each of the 15 Member States, unless consumer legislation would be basically contained in a single code. This would result into more than 1,000 laws and by-laws addressing consumer protection within the Internal Market. Does this mean that an Information Society service which addresses consumers in the Internal Market would have to observe the consumer protection laws and by-laws of all Member States simultaneously if its recipients are consumers domiciled in all Member States? It could be expected that such a situation might impose considerable costs on an Information Society service which extends its activities to the Internal Market. Such concerns were particularly raised during the public hearing on Electronic Commerce: Jurisdiction and Applicable Law of 04 and 05 November 1999 in the discussion papers submitted to the European Commission.[2]

The Directive on Electronic Commerce sanctions the state of origin principle in Article 3. However, obligations relating to consumer contracts are exempted from the application of this principle in application of Annex of the Convention. This mean that an Information Society service which directs its activities to recipients in all Member States would have to observe consumer protection laws establishing contractual obligations in all these fifteen States.

The limitation of the state of origin principle with regard to obligations relating to consumer contracts would also mean that, in spite of efforts directed towards the establishment of a far reaching harmonisation of regulations in the converging sectors of the economy relating to telecommunications, media and information technologies by means of the principle of the state of origin,[3] Information Society services could be bound to observe the laws in the 'state of reception' insofar as consumer protection issues are concerned. The application of the state of origin principle in the tv-broadcasting sector may be justified by the fact that the communication of the programme is made to a multitude of persons simultaneously, so that it would be very difficult to apply the state of reception principle for practical reasons. Additionally, consumer issues are of lesser concern. But it should be noted that the European Court of Justice's jurisprudence concerning television advertising may subject broadcasters to the observance of the laws of the state of reception.[4]

But in such a case it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance, public policy, public security or public health, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade. Thus taking into account of the fact that it was a high degree of harmonisation of the national laws of Member States which permitted the application of the state of origin principle for the benefit of the establishment of the Internal Market, it seems arguable that this principle could also be used with regard to obligations relating to consumer contracts. This principle would, according to the jurisprudence of the European Court of Justice, not exclude the limitation of this principle according to the legislation of Member States in application of Article 46 of the EC Treaty.

a.-) Consumer Protection in the State of Origin and the Brussels and Rome Conventions

The need to establish a unitary system of consumer protection in electronic commerce may also be based on the fact that consumer complaint boards and ombudsman who, in the interests of consumers, may work for moderate fees, cannot be expected to apply foreign laws. According to the existing legal situation, there is the dichotomy that consumers are expected to address, via the EEJ-NET (the European Extra-Judicial Network[5]) the consumer complaint or ombudsman scheme in the country of origin where the relevant body is likely to apply the laws of the state of origin. At the same time the consumer may, in application of the Brussels Convention, also resort to the jurisdiction in the Member State of his domicile where the courts, in application of the Rome Convention, are very likely to apply mandatory rules of consumer protection laws of the state of reception. Such a situation may not contribute to the transparency of legal proceedings but is likely to create instead confusion amongst consumers and in the legal profession.

Recital 23 of the Directive on Electronic Commerce states that the Directive neither aims to establish additional rules on private international law relating to conflicts of law nor does it deal with the jurisdiction of courts. The Directive thus does not modify existing rules on the international private and procedural law. In the Recitals which are directly concerned with out-of-court dispute settlement the Directive requires Member States, *where necessary, to amend any legislation which is liable to hamper the use of schemes for the out-of-court settlement of disputes through electronic channels; the result of this amendment must be to make the functioning of such schemes genuinely and effectively possible in law and in practice, even across borders*.[6]

It may be argued that Member States which permit the out-of-court dispute settlement in the country of origin according to the law of the state of origin may contravene their obligations under the Brussels and Rome Conventions. Both conventions are inapplicable only with regard to out-of-court dispute settlement constituting arbitration. Accordingly, they may be applicable to all other types of out-of-court dispute settlement. Concerning the applicable law, Recital 55 of the Directive on Electronic Commerce explains that the Directive *does not affect the law applicable to contractual obligations relating to consumer contracts; accordingly, this Directive cannot have the result of depriving the consumer of the protection afforded to him by the mandatory rules relating to contractual obligations of the law of the Member State in which he has his habitual residence*. This means that the provisions of the Rome Convention, in particular those concerning consumer contracts, are applicable.

A possible solution of the conflict should take into consideration that the Brussels and the Rome Conventions contain the principle of the precedence of Community law.[7] Accordingly, the establishment of a unitary concept of consumer protection in cross-border electronic commerce through the establishment of codes and guidelines on the basis of (secondary) EU law should be considered. This argument finds additional support in the fact that electronic commerce was unknown when the consumer protection concepts according to the Brussels and Rome Conventions were developed and that consumer protection laws of Member States were, at that time, much less harmonised than they are nowadays.

b.-) Psychological Barriers for Consumers

The difficulties deriving from the insecurity about the applicable legal system in the cross-border electronic commerce may create barriers of a psychological nature for consumers.[8] The Commission's strategy to counteract the difficulty was, inter alia:[9] *to introduce out-of-court procedures such as mediation, conciliation or arbitration. The Commission Recommendation aims to establish a series of principles applicable to out-of-court procedures in order to provide certain guarantees, such as transparency, independence and legality.* The European Parliament, concerned with the adoption of the recommendation for the second reading of the Council common position on the Directive on 10/04/00 without amendment,[10] aimed at the encouraging of the development of codes or conduct at Community level and by facilitating the setting up of effective cross-border dispute resolution systems.

1.1.2 **Consumer Protection and Private Law**

Taking into account of the fact that consumer protection is an issue which grew over the recent thirty years in many European countries, it does not surprise that the laws concerning consumer protection are often found in a variety of different laws and by-laws. The difficulty for consumers, businesses and lawyers to retain an overview concerning the existing regulatory framework led to the demand for a regulation of consumer issues within particular codes, either as an independent legal instrument (in the countries of the common law) or as an element of the laws of contract or of obligations in the civil law systems.[11]

But taking into account of the fact that consumer contracts may relate to very different contractual types (for example credits, loans, contracts of sale or leasing contracts) it may be difficult to regulate the specific aspects of consumer protection within a single comprehensive legal framework. Alternatively, it may be suggested that the contract law could develop in separate legal instruments: a legislation on commercial contracts and a legislation on consumer contracts.

1.1.3 **Consumer Protection and Procedural Law**

Concerning the consumer protection by means of the laws of civil procedure, the legal situation is fragmented, because the interests to protect consumers may relate to different circumstances in the process of the litigation. Thus the protection of the weaker party may pertain to the law of evidence (for example by limiting the possibility of the inversion or exclusion of the onus of proof to the disadvantage of the consumer) or to the law concerning arbitration (for example by limiting the possibility to resort to out-of-court dispute settlement and to regulate its rules of procedure).

a.-) Regulation of Procedural Rules in Secondary EU Law

By EU law, some procedural issues have been regulated, for example:

- the preclusion of the limitation to institute legal proceedings in the Directive on

Unfair Terms in Consumer Contracts;[12]

- the limitation concerning the disposition of particular rights in the Directive on the Sale of Consumer Goods and Associated Guarantees;[13]
- the possibility of consumer associations to institute legal proceedings in the Directive relating to the Approximation of the Laws, Regulation and Administrative Provisions of Member States concerning Misleading Advertising, and the Rules and Principles Applicable to Unfair Advertising[14] and the Directive on Injunctions for the Protection of Consumers' Interests;[15]
- the place of jurisdiction, for example in the case of contracts concluded at the home, Directive (on 'doorstep selling') to Protect the Consumer in Respect of Contracts, Negotiated Away from Business Premises;[16]
- the rules of evidence, for example in the case of financial contracts where the financial institution is charged with the onus of proof that it used the ordinary diligence, Article 18(5) of the Directive on Investment Services in the Securities Field;[17]
- the organisation of bodies responsible for out-of-court dispute settlement systems concerning consumers, Commission Recommendation on the Principles Applicable to the Bodies Responsible for such Settlement of Consumer Disputes;[18]
- schemes which facilitate cross-border complaints are being introduced, for example the EEJ-NET, the European Extra-Judicial Network.[19]

b.-) Procedural Rules of Bodies Responsible for Cross-border Out-of-court Dispute Settlement

In the case of cross-border disputes to be dealt with by bodies responsible for out-of-court dispute settlement systems, it appears to be useful if such bodies adapted their rules of procedure to those provisions of EU law which can be affected by cross-border consumer disputes. The provisions establishing the competence of consumer associations to institute legal proceedings will hardly be affected in cross-border disputes between an Information Society service and a recipient. Taking into account that such bodies assume responsibility for the consumer protection within the national market, it appears appropriate to retain those provisions in the procedural rules of the bodies responsible for out-of-court dispute settlement systems concerning consumers which constitute mandatory rules of consumer protection law with particular regard of electronic commerce.

1.1.4 Consumer Protection Law and 'Out-of-Court Dispute Settlement' According to National Laws

According to a survey[20] many national laws of EU Member States exclude the possibility to resort to arbitration by means of a contractual clause in the case of consumer contracts,[21] and others provide for special dispute resolution systems in consumer affairs,[22] others leave the issue unsettled[23] or even permit arbitration clauses in consumer contracts.[24] Whereas contractual clauses based on general terms according to which disputes should be solved by arbitration would be permissible in some countries (for example Spain), such clauses would be without effect in other countries (for example France or Finland[25]) whereas many countries envisage particular out-of-court dispute settlement schemes through particular authorities (for example Italy).

However, it seems that the exclusion or limitation of consumer arbitration on the national level does not necessarily exclude the possibility of a consumer to enter into an international arbitration agreement.[26]

1.2 Relevance of Consumer Protection Litigation and Complaint Systems in the Cross-border Environment

In practice, consumer protection litigation is not very common.[27] Accordingly, it may be expected that in the cross-border environment it would be of little importance. Differently, consumer complaint systems are much in demand.[28] Whereas cross-border consumer litigation appears to be avoided by consumers if only for the high costs, the attraction of complaint systems lies in:

- the informal nature of the proceedings;
- the low costs;
- the competence of the body organising the system;
- the efficiency of the implementation of the settlement;
- the appropriateness of the legal framework on which decisions are based.

The few existing systems of out-of-court dispute settlement which expressly deal with cross-border complaints are often based on initiatives of certain branches of the industry thus providing mechanisms of self-regulation.[29]

1.2.1 Cross-border Legal Redress

The provision of legal redress for consumers is a concern of the EU since 1984.[30] The system of protection which EU law ensures enables the consumer to take action against certain unlawful practices occurring in any Member State.[31] With regard to the problems resulting from cross-border consumer litigation it has been stated[32] that *one also has to count with the possible psychological self-restraint of the consumer to resort to jurisdiction, in particular in the case of cross-border litigation, simply, because he would have to move to a territory which is not his own, facing a legal system which he does not know and possibly using a language of procedure which he does not necessarily master. With this regard, the absence of the augmentation of litigation before the courts … creates concern. It renders in particular questionable the effectiveness of the Community action, and it seems that one may ask whether the activity of the Community in the matter of the legal protection of the consumer has brought to the latter a level of higher protection*.

1.2.2 Redress for E-consumers

Concerning traditional commerce it has been observed that for consumers, legal rights stop or at least change at the frontier, sometimes in a substantive sense and almost always in a procedural sense:[33] *The supply side has developed methods for dealing with such problems but consumers have not the means, individually or collectively, to do so. In terms of consumer rights, we do not have a single market. One of the factors which deters consumers from shopping cross border is uncertainty about their legal rights. Harmonisation or agreement on a certain common minimum set of rights may help to reduce that uncertainty, but it may not do much more than that. This is not a question of uneven implementation ... but rather of a more fundamental and complicated question which might be posed as follows: Assuming a given directive is implemented in a consistent way within the national legal systems of all fifteen Member States, do we then have a single market as far as the provisions of that directive are concerned? Unfortunately, the answer is no, partly because legal mechanisms for redress and access to justice (and even substantive rights) tend to operate only within national legal systems and not between national legal systems.*

1.2.3 Recognition and Enforcement of Foreign Consumer Settlements

In the case of decisions and settlements made by national systems for mediation or conciliation and consumer complaint boards or ombudsmen, the national law may provide that such results should be final, binding and enforceable. Within the Internal Market such a system of the recognition and enforcement of settlements is particularly needed. There is no international instrument according to which foreign out-of-court settlements would be enforceable unless they were achieved by voluntary arbitration. Whereas the recognition of foreign arbitral awards is established by the New York Convention, such a system does not exist for other types of settlements achieved by out-of-court dispute settlement procedures.

A possible solution may lie in the mutual recognition and enforceability of settlements issued by bodies responsible for out-of-court dispute settlement in Member States. In the case of settlements achieved within arbitration, the New York Convention provides already an effective legal tool, but there is no international instrument which would provide for the recognition and enforceability of settlements achieved by other types of out-of-court dispute settlement. The recognition and enforceability of such settlements do not so much need to be based on the control of the settlement. Different from arbitral awards there is no decision by a third person imposed on both parties. In the case of mediation and conciliation or consumer complaint and ombudsman proceedings the settlement is generally achieved with the support and consent of both parties. Accordingly, it appears sufficient to safeguard the public interest in the maintenance of the legal order if Member States accredited the bodies responsible for out-of-court dispute settlement. EU secondary law could thus provide for the recognition and enforceability of settlements achieved with the support of bodies responsible for out-of-court dispute settlement other than arbitration if such bodies were accredited with a Member State.

2 Out-of-court Dispute Settlement on the Basis of Terms of Contracts

Whether and under which circumstances an Information Society service and a consumer may effectively enter into an agreement on out-of-court dispute settlement depends on the rules of the private and international private, respectively procedural law. Essential rules are contained in the Brussels Convention. However, if the parties agree on arbitration as the type of dispute settlement, the Brussels Convention is not applicable.[34] The possibility to agree on out-of-court dispute settlement by terms of contract is dealt with in the relevant parts of the study dealing with the individual types of dispute settlement, the following explanations give only an overview.

2.1 The Brussels Convention and Prorogation

Article 2 of the Brussels Convention establishes the basic principle that a person domiciled in a Contracting State may be sued in the courts of that State. Article 5 of the Brussels Convention establishes a special jurisdiction. In matters relating to a contract, a person may be sued in the courts for the place of performance of the obligation in question[35] and in tort in the courts for the place where the harmful event occurred.[36]

If the parties wanted to exclude the jurisdiction according to the Brussels Convention, for example by resort to another type of out-of-court dispute settlement than arbitration, they are bound by Article 17 of the Brussels Convention.[37] According to this provision the parties may select a court to settle the dispute, but the provision

does not concern the exclusion of the jurisdiction for the benefit of non-arbitration types of out-of-court dispute settlement systems. A prorogation of jurisdiction is permissible only if the parties agree that another court in a Contracting State shall have exclusive jurisdiction. Other stipulations are without effect.[38]

2.2 Online Terms and Agreements

In electronic commerce the use of online general terms and conditions, for example available via a link on the Website, may facilitate the conclusion of a contract online. provided that the Information Society service does not have to provide the relevant communication of such terms and conditions on paper. But since the Directive on Electronic Commerce provides in Article 9 to 11 for the conclusion of contracts by electronic means, it may be assumed that also the information about general terms of contract may be given electronically. With this respect, Article 10 of the Directive establishes the duty for the Information Society service that information on contract terms must be given so that the recipient can store and reproduce the Information. Concerning the use of digital data messaging it appears to be accepted that the requirement of 'writing' in the sense of Article 17 of the Brussels Convention can be satisfied by electronic data messages.[39]

2.3 The Business-to-Business Sector

In the business-to-business sector of the electronic commerce, the use of general terms of contract is widespread. Particularly in the case of EDI contracts arbitration clauses may be used.[40] In cross-border contracts the validity of such clauses will depend on the international private law. The same principles are applicable which govern the validity of such terms in the traditional commerce. If both parties use general terms which are contradictory, the relevant rules of the international private law will be applicable. For example, if the Information Society service uses a term according to which disputes shall be referred to arbitration but to mediation according to the recipient's general terms, it depends on the contractual relation between the parties which solution was chosen. However, the relevant problem is not particular to electronic commerce, but dealt with according to traditional legal concepts.

In many cases the reference to out-of-court dispute settlement is exclusive, that is to say that the dispute may no longer be brought before the courts. The validity of such clauses is subject to the national law. Taking into account of the fact that the use of international commercial arbitration is based on established commercial practices, such clauses will generally be considered as effective.

2.4 The Business-to-Consumer Sector

Contractual clauses between Information Society services and recipients providing for out-of-court dispute settlement in the case of business-to-consumer relations are facing limitations in the interest of the consumer as the weaker party to the contract.

2.4.1 Consumer Protection According to the Brussels Convention

According to Article 13 of the Brussels Convention the provisions on consumer protection will be applicable in the case of:

- (1) contracts for the sale of goods on instalment credit terms; or
- (2) contracts for a loan repayable by instalments, or for any other form of credit, made to finance the sale of goods; or

- (3) any other contract for the supply of goods or a contract for the supply of services if:
  - in the state of the consumer's domicile the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising; and
  - the consumer took in that state the steps necessary for the conclusion of the contract.

The protection according to the third alternative is given the so called 'passive' consumer. The 'active' consumer who travels abroad and acquires goods and services abroad is not considered in need of protection.

According to Article 15 of the Brussels Convention the provisions on consumer protection contained in Articles 13 and 14 may only be departed from by an agreement:

- which is entered into after the dispute has arisen; or
- which allows the consumer to bring proceedings in courts other than those indicated in Articles 13 and 14; or
- which is entered into by the consumer and the other party to the contract, both of whom are at the time of conclusion of the contract domiciled or habitually resident in the same Contracting State, and which confers jurisdiction on the courts of that State, provided that such an agreement is not contrary to the law of that State.

The Information Society service may on its website offer a general term for contracts providing for other types of out-of-court dispute settlement than arbitration. Such a clause may, in particular, relate to the out-of-court dispute settlement which a service may offer on the basis of national consumer protection legislation. The validity of such clauses in cross-border contracts may be controversial, in particular if they contradicted principles on consumer protection established by the Brussels Convention, Articles 13 to 15. With this regard, different considerations have to be used than in arbitration, taking into account that in non-arbitration types of out-of-court dispute settlement the Brussels Convention is applicable. Accordingly, a general contract term should not deprive the recipient who is a (passive) consumer of the right to institute legal proceedings in the Contracting States where he is domiciled.

2.4.2 The Unfairness of Out-of-court Dispute Settlement Clauses

According to Article 3(1) of the Directive on Unfair Terms in Consumer Contracts[41] a contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer. The Directive obliges Member States in Article 6(1) to lay down that unfair terms used in a contract concluded with a consumer by a seller or supplier shall, as provided for under their national law, not be binding on the consumer and that the contract shall continue to bind the parties upon those terms if it is capable of continuing in existence without the unfair terms.

According to subsection (2) of Article 6 Member States shall take the necessary measures to ensure that the consumer does not lose the protection granted by this Directive by virtue of the choice of the law of a non-Member country as the law applicable to the contract if the latter has a close connection with the territory of the Member States. Thus the consumer may not be deprived of the protection granted by the Directive through the choice of a law of a non-Member State if the contract has a

close relation with a Member State. The choice of law will be permissible insofar as the protection afforded by the Directive is guaranteed.[42] This allows the conclusion, that terms providing for the choice of the law of a Member State may be effective. This appears reasonable, taking into account that Member States have to satisfy the minimum requirements established by secondary EU consumer protection law.

The purpose of the Directive was to re-establish the balance of power between consumers and those businesses who drafted the general terms, since the consumer has no possibility to influence the content of the terms.[43] The Directive thus creates harmonised conditions within a sector of consumer protection law. However, it does not even regulate all types of general terms in consumer contracts. Not covered are, for example, clauses which concern the subject of the contract or the relation between the price and the performance. However, with reference to the Directive it should be possible to draft clauses which may be agreed upon by the parties on the basis of the consumer's limited freedom of contract within the whole Internal Market.

The Directive on Unfair Terms in Consumer Contracts does not address the issue of general terms and conditions relating to out-of-court settlement systems. However, in the Annex the Directive gives examples of unfair terms, including, in letter (q) the term: *excluding or hindering the consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions, unduly restricting the evidence available to him or imposing on him a burden of proof which, according to the applicable law, should lie with another party to the contract.*

General terms which would require the consumer to exclusively resort to a system of out-of-court dispute settlement in electronic commerce thus must be drafted carefully in order to observe the standard of protection. However, it seems that a clause by means of which the consumer agrees to confer any disputes to out-of-court settlement would be acceptable according to EU law, if such a scheme is:

- non-exclusive (permitting the consumer the resort to court litigation) or
- exclusive (not permitting the consumer the resort to court litigation) if:
  - the out-of-court dispute settlement system is not covered by legal provisions, and if the consumer's evidence is unduly restricted, or
  - imposing a burden of proof on him which lies with the other party to the contract.

The mere exclusivity of an arbitration clause may be considered as unfair. The English Schedule 3 to the Unfair Terms in Consumer Contracts Regulation of 1994 reproduces in Paragraph 1(q) the text of letter (q) of the Directive's Annex. The UK Office of Fair Trading held[44] that a clause by means of which the company attempted to restrict the legal remedies of consumers by referring all disputes to arbitration was potentially unfair according to this provision. However, this interpretation of the clause is not unanimous, and, for example, Italian jurisprudence did not consider that the inclusion of an exclusive arbitration clause in a consumer contract concerning certain claims in the case of the purchase of a pre-fabricated house was unfair.[45]

2.4.3 Two Types of Out-of-court Dispute Settlement Clauses on the Information Society Service's Website?

Within contractual relations arbitration clauses are often used, in particular in certain branches of the trade and in international contracts. But in the case of consumer contracts such clauses may have to meet stricter legal standards, in particular the

standards of the Directive on Unfair Terms in Consumer Contracts. Yet it would be cumbersome for an Information Society service should it be expected to offer on its Website two different sets of out-of-court dispute settlement clauses – one for business-to-business electronic commerce and another one for business-to-consumer electronic commerce.

a.-) Different Cost Prices for Goods and Services

Taking into account of the fact that recipients who are not in a long-standing contractual relation with the Information Society service may opt for the 'consumer' version of the forms, provided that their address permits such a possibility, Information Society services may suffer from additional disadvantages through the increase of consumer contracts. Since the cost price of products or services rendered to recipients who are consumers is likely to be higher than the cost price in the case of business contracts, Information Society services which are established in the Internal Market may have to calculate higher prices for their products and services than services which direct their offers to third countries where the degree of consumer protection is lower.

Whether society is prepared to pay for the benefits of consumer protection is a political issue, however, there is no doubt that the application of the consumer protection system which is based on the Brussels Convention and on the exclusion of contractual obligations concerning consumer contracts from the application of the 'state of origin' principle according to the Annex of the Directive on Electronic Commerce may lead to a higher cost price than for identical goods and services which are offered in the business sector.[46] This may be due to the reserves which have to be made for consumer litigation abroad and for the obtaining of legal advice.

b.-) The Balancing of the Disadvantages through an Effective Dispute Settlement System

In order to balance these disadvantages, a system for out-of-court dispute settlement has to be established. However, the effectiveness of such a system must be ensured which means that general terms envisaging the use of such out-of-court dispute settlement systems should be admissible in law. But the legal situation concerning the validity of arbitration clauses in consumer contracts may vary from Member State to Member State. In particular, concerning the validity of click-wrap clauses may be doubtful. In some sectors of the economy also consumers may effectively agree to arbitration clauses, for example in the case of the acquisition of shares.[47]

There may also be a conflict between the admissibility of arbitration clauses and provisions according to the Brussels Convention. Do Member States violate their obligations under the Brussels Convention if they permit that consumers may derogate from protection by resorting to arbitration? Certainly, according to Article 1 No. 4 of the Brussels Convention the instrument is not applicable to arbitration – however, does the term 'arbitration' include international consumer arbitration? The validity of general terms in consumer contracts relating to arbitration has to be assessed on the basis of the national laws of Member States.[48] Thus the laws of Member States are far from relying on a common standard which might have been seen in the term contained in Annex q of the Directive on Unfair Terms in Consumer Contracts.

3 Choice of Law and the Rome Convention

It has been observed that *in many cases, contracts concluded over the Internet will contain a choice-of-law clause in its standard terms. Such terms may be stored on a Web-page accessible to the customer before or when concluding the contract*.[49] The validity of such choice of law clauses is not clear. Generally, choice of law clauses are based on the principle of the freedom of contract. However, in the case of consumers this principle is qualified in the interest of the weaker party according to the laws of many states. The state of origin principle in the sense of Article 3 of the Directive on Electronic Commerce is not applicable to the choice of law between an Information Society service and a recipient according to the Annex of the Directive.

There are two basic approaches according to which such a choice of law clause based on general terms may be without effect. First, the law may render such clauses invalid so that the law applicable to the contract would be determined by the relevant rules of conflict of laws; second, even if the choice of law clause would be considered valid, one might apply mandatory provisions of the consumer protection law applicable on the basis of the international private law.[50]

In a survey on Consumers@shopping[51] relating to international business websites it was found that only 10% of sites visited mentioned the applicable law: *Reference to applicable law was usually in small print, buried with lengthy legal text on terms and conditions. In no case did we found that applicable law was highlighted or that the implications of this condition were spelt out to the consumer. Consumers were probably unaware that by clicking their agreement to the terms and conditions they were also clicking agreement to be governed by the law of another country. In all cases, the applicable law referred to was that of the retailer's country of origin.*

3.1 The Applicable Law in the Absence of a Choice of Law Clause

According to Article 4 of the Rome Convention[52] concerns the applicable law in the absence of choice. According to subsection (1) of this provision the contract shall be governed by the law of the country with which it is most closely connected if there was no choice of law in the sense of Article 3 of the Convention. According to Article 4(2) of the Convention it is assumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of the conclusion of the contract, his habitual residence. If the party is a business that place may be the location where it has its central administration. But if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3.2 Choice of Law Clauses According to the Rome Convention

According to Article 1(1) of the Rome Convention *the rules of the Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries*. Arbitration agreements are excluded from the scope of the Convention, Article 1(2)(d).[53] Since other types of out-of-court dispute settlement systems are not excluded, it appears that the Convention would, in principle, be applicable in the case of mediation and conciliation or consumer complaint and ombudsman systems relating to out-of-court dispute settlement, if the relevant cross-border contracts contained a choice of law clause. Member States which permitted

such systems to operate in contravention of the Convention might violate their obligations under the Rome Convention.

Choice of law clauses are, according to the Rome Convention, based on the freedom of contract.[54]

However, according to Article 20 of the Convention[55] the Convention does not affect the application of provisions contained in acts of the institutions of the European Communities or in national laws which implement such acts which, in relation to particular matters, lay down choice of law rules relating to contractual obligations. Accordingly, choice of law rules which differ from those contained in the Rome Convention may be applied by Member States in the case of types of non-arbitration out-of-court dispute settlement, provided that such rules are contained in an act of the institutions of the European Communities.

According to Article 3(4)[56] and 8(1)[57] of the Rome Convention a court will, at its discretion, apply the chosen law when considering the material validity of a choice-of-law clause. A party which invokes the objection that he did not consent to the choice-of-law clause, may attempt to rely on the law of the Member State of which he is a habitual resident, if in the circumstances it is not reasonable to determine the issue of consent according to the clause under the chosen law, Articles 3(4) and 8(2)[58] of the Rome Convention. This may possibly be the case if the party is a 'passive' consumer in the sense of Article 5(2) and (3) of the Convention.

3.3 The Applicable Law and Choice of Law in Consumer Contracts

According to Article 5 of the Rome Convention[59] a consumer contract is, in the absence of a choice of law, governed by the law of the country where the consumer has his habitual residence.[60] This means that the law of the Member State where the recipient is domiciled will be applicable to the contract with an Information Society service established in another Member State if no choice of law was made, provided that Article 5 of the Convention is applicable. If there is no consumer transaction in the sense of Article 5 of the Convention, the law of the Member State will be applicable where the Information Society service has its place of business according to Article ... of the Convention.

For example, according to English law, *choice-of-law clauses in consumer contracts have not been rendered invalid, but have been subject to the mandatory rule approach. This was, in principle, not changed by the Rome Convention*.[61]

Also in the US law the freedom of choice of law is qualified. There are to basic limitations: First, there must be a substantial relationship between the chosen law and the parties or the transaction or there must be another reasonable support for the choice. Accordingly, in the case of a contract of sale the chosen law would have to be the law of the state where a significant part of the performance of the contract takes place. In consumer contracts it is likely that US courts will consider that a choice-of-law clause is void according to which a law would be applicable which has no relation at all with the contract. Second, *the law chosen by the parties will not be applied if that would be contrary to a fundamental policy of the forum's law or the law which would apply in the absence of the choice-of-law clause, provided that the respective state has a materially greater interest than the chosen state in the determination of the particular issue*.[62]

3.4 Validity of the Contract

The validity of the contract concluded between the Information Society service and a recipient is subject to the national law if both parties are domiciled or established in a Member State. In cross-border contracts the Rome Convention will be applicable.[63] The Rome Convention does not regulate the conditions relating to the formation of the choice of law. Thus the validity of choice of law clauses, in particular clauses based on general business terms, is not regulated. The validity of such clauses has to be decided on the basis of the law applicable according to the Rome Convention. Concerning the protection of the recipient consumer protection laws may establish particular hurdles for the online choice of law.

3.4.1 Material Validity

According to the Rome Convention the material validity of a contract may be decided on the basis of the law which would govern the contract if the contract was valid.[64]

3.4.2 Formal Validity

According to the Rome Convention the formal validity of a contract which is concluded between parties which are in different countries, may be decided on the basis of the law of one of the states – if the contract satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.[65] However, in the case of the 'passive' consumer the formal validity of the contract is governed by the law of the state where the consumer is domiciled.[66]

3.4.3 Mandatory Rules

Mandatory rules of law of a certain national legal system may be applicable to the contract in spite of a choice of law or, in the absence of such a choice, in spite of the application of a certain national law.[67] The application of mandatory rules of law will be examined in connection with the particular systems for out-of-court dispute settlement.

3.5 The 'State of Origin' Principle Is not Applicable to Contractual Obligations Concerning Consumer Contracts

According to the Annex of the Directive on Electronic Commerce the provision on 'Internal Market' which implements the state of origin principle, does not apply to *contractual obligations concerning consumer contracts*. By means of this regulation it is avoided that a conflict arises with Member States' obligations deriving from the adherence to the Rome Convention which, by reason of its Article 20 recognises the principle of the precedence of Community law. Thus the principles of international private law remain applicable in the case of cross-border contracts, and the principle of the state of origin does not affect obligations which Information Society services assume with regard to consumer contracts.[68]

The exception from the 'state of origin' principle does not concern general laws concerning consumer protection – the exception is limited to obligations deriving from consumer contracts. This means that, in the absence of the conclusion of a contract, the 'state of origin' principle established in Article 3 of the Directive remains applicable. The law applicable to contractual obligations concerning consumer contracts thus may not be determined by reference to the principle of the 'state of origin' but in application of the principles of the international private law. Accordingly, a differentiation has to be made between contractual obligations deriving from a

contract between an Information Society service and a recipient and the non-contractual obligations which likewise protect the consumer.

Contractual obligations are, for example:

- provisions which regulate the content of obligations, for example concerning general terms and conditions of contracts;
- the scope of obligations concerning data protection, insofar as such obligations are based on contract;
- contractual obligations concerning warranties against defects and the undisturbed enjoyment of the contractual subject-matter;
- contractual obligations concerning distance contracts such as rights in information and of withdrawal;
- obligations implied by reason of statutes, such as those regulating the scope of warranties which concern defects of the contractual subject-matter.

Non-contractual obligations may derive, for example, from:

- provisions regulating the direct marketing;
- provisions regulating advertising;
- provisions concerning data protection.

It may be controversial up to which extent pre-contractual obligations will be included in the scope of 'contractual obligations concerning consumer contracts' in the sense of the Annex. According to Recital 56 of the Directive those obligations *should be interpreted as including information on the essential elements of the content of the contract, including consumer rights, which have a determining influence on the decision to contract*. Therefore, pre-contractual obligations such as a possible obligation of information may well be included within the contractual obligations, because such information is generally of essential importance for the recipient's decision to conclude the contract.

In the absence of a contractual relation the principle of the 'state of origin' according to Article 3 of the Directive remains applicable. Accordingly, the lawfulness of direct marketing activities or advertising strategies of Information Society services within the Internal Market may have to be assessed on the basis of the law applicable in the state of origin.

3.6 State of Origin Principle and the Contractual Obligations of the Information Society Service

The Directive envisages the application of the state of origin principle in Article 3. However, obligations deriving from consumer contracts are exempted from the application of the state of origin principle in Application of the Annex of the Directive. It may be difficult for the Information Society service to establish a coherent policy for pre-contractual direct marketing and advertising if such activities lead to contracts which then would create contractual obligations with regard to the consumer which had to be evaluated on the basis of the law applicable in Member State where the consumer is domiciled, whereas the service's marketing strategy took into account only the law of the Member State where it was established.

If, for example, the Information Society communicates information which it is due to provide according to the Directive on Distance Contracts, it may do so according to the law applicable at the place where it is established (state of origin principle),

however, if, subsequently, a contract is concluded with a consumer who is domiciled in another Member State, the contractual duties concerning the obligation of information may, in application of Article 5 of the Rome Convention, have to be assessed on the basis of the law applicable at the place where the consumer is domiciled.

The implications of the state of origin principle and the conflict of laws has already been stressed with regard to Directives concerning financial services – it has been observed that the relevant directives do not provide a unitary scheme concerning the conflict of laws, however, based on the Community's public policy which is constituted by the provisions establishing a minimum protection, the parties are, generally, free to choose the law of a Member State as the law applicable to the contract.[69] But due to the fact that the directives provide additionally conflict of laws rules, the situation may become complicated, for example in the case of the Directive on Deposit Guarantee Schemes[70] where the freedom of contract of the parties to choose the law applicable to the contract is replaced by complicated criteria which establish a minimum protection, a "clause of non-exportation" is designed to prevent the exportation of a higher degree of protection from the state of origin to the state of the consumer whereas the exportation of a higher degree of protection from the state of the consumer to the state of origin remains possible.[71]

3.7 Unfair Terms in Consumer Contracts

According to Article 6(2) of the Directive on Unfair Terms in Consumer Contracts Member States are obliged to prevent that a consumer will be deprived of the protection according to the Directive by means of the choice of law of a non-Member State as the law applicable to the contract. Thus the Directive does not generally consider such a term as unfair which stipulated the law of a non-Member State as the law applicable to the contract. Such a clause, however, would be without effect insofar as it deprived the consumer of the protection under the Directive.

Concerning the minimum standard of protection (the EU "public order" consumer protection) the Directive does not focus on the law of Member States, but on the standards established by the Directive. But such a minimum standard of protection will only be available, if the contract has a "close connection with the territory of Member States".

The Directive does not define the facts which constitute such a close connection. In the online environment the subsistence of such a connection may be controversial, in particular, since the application of the principle of territoriality appears questionable at all in cyberspace. According to the traditional concepts such a close connection with the territory of Member States may be established, if the place of the conclusion of the contract was in a Member State. However, this concept is hardly of use in distance contracts.

The national laws of Member States concerning unfair terms in consumer contracts employ different methods when defining the scope of unlawful terms. Some national laws retain a general prohibition of unfair terms without giving a list of examples, others contain non exhaustive lists of unlawful terms, possibly complemented by a 'grey' list of clauses which are considered unlawful until their 'fairness' has been proven or which may be considered unlawful by a court.[72]

3.7.1 Online Negotiation of Terms in Consumer Contracts

The Directive on Unfair Terms in Consumer Contracts affects clauses which are not individually negotiated, Article 3(1) of the Directive. This means, that its scope relates to terms which are pre-established without that the consumer had the possibility to influence the content of the terms. The content of the online-clauses may be difficult to prove, for example if the dispute arises with a delay after the conclusion of the contract during which the terms have been modified. According to the rules of evidence established in Article 3(2) of the Directive, the business has to prove that a term was individually negotiated if it wants to rely on such an assertion. However, concerning all other terms the consumer who relies on the protection by the Directive will have to prove that the term was not individually negotiated.[73]

3.7.2 The Possibility to Take Notice of the Online-Terms in Consumer Contracts

According to the Directive on Unfair Terms in Consumer Contracts, Recital 20, the Information Society service has to give the consumer the possibility to take notice of all terms. In the Annex to the Directive, (i), it is stated that a clause according to which the consumer is deemed to have accepted the terms is unfair if the consumer did not have the possibility to actually take notice of the terms before the conclusion of the contract.

It may be questionable whether the link on a website through which access to the terms of contract is offered may suffice to satisfy the criteria of the providing of a possibility to take notice of the terms. However, in the evaluation of the sufficiency of such an offer also considerations based on the Information Service's duty to be of good faith should be included. Accordingly, taking into account of the ordinary online consumer's expectations, it should be considered as satisfactory, if he may obtain notice of the terms via a link on the website which is clearly identifiable as leading to the terms of contract. It would be recommendable, if such a link was contained on the homepage, however, it may also be sufficient, if the link was placed on the front page of the relevant websites containing the Information Society's offer.

The terms should be downloadable and printable, also with regard to the possibility of providing evidence about their content. The mere granting of an access to view the terms will not be sufficient to constitute the possibility to take notice. In order to permit the consumer a clear impression about the content of the terms, it is recommendable to separate between clauses for business-to-business and business-to-consumer contracts.

3.8 Lack of Neutrality by Facilitating Out-of-court Dispute Settlement for Electronic Commerce?

It should be observed that Information Society services present in itself only a sector of the Internal Market's industry, in particular involved in the marketing of goods and services. Accordingly, the establishment of an out-of-court dispute settlement system for this sector of the economy could affect/disturb the free working of competition between this sector of the trade and industry which uses electronic means for distribution and the sector which employs traditional means.

With regard to issues of taxation and electronic commerce it should be borne in mind that in the past the Commission insisted on the 'neutrality' of taxation. This means that particular taxes on electronic commerce such as the 'bit tax' should be avoided

insofar as they were introduced with the aim to take off the advantages in competition which the use of the new means of distribution offered. Inversely, it might possibly be argued that the offering by the Commission and Member States of an out-of-court dispute settlement system for electronic commerce at no or low costs could negatively affect the competitive position of those parts of industry and trade which do not rely on electronic means for distribution. However, taking into account of the fact that the implementation of out-of-court dispute settlement systems for electronic commerce is directed towards the establishment of the Internal Market for Information Society services, these initiatives can fully be based on the relevant provisions of the EC Treaty, particularly on Article 3(1) lit.s (c), (g) and (h).

3.9 Clauses on Choice of Law in the Business-to-Business Sector

The scope of the Directive on Unfair Terms in Consumer Contracts is not applicable in the case where the Information Society service and the recipients are businesses. The EU law does not provide a basis for the assessment of the unfairness of such clauses. Accordingly, a careful approach is needed when drafting business clauses for contracts between Information Society services and recipients which are not consumers. However, taking into account of the need to establish an Internal Market for electronic commerce, it would appear to be necessary to provide Information Society services with guidance on business terms which they may use for cross-border contracts. Such terms may probably be established on the basis of existing schemes used in the traditional economy, taking into account of international instruments regulating the law of contract. It may be argued that a particular Directive would be needed to protect SMEs against the use of clauses established by powerful Information Society services, however, the discussion about the enlargement of the scope of the existing Directive so as to include SMEs showed, that the inclusion of SMEs in the scope of protection of consumers would require a particular political initiative.[74]

The express exclusion of obligations deriving from consumer contracts from the scope of applicability of the state of origin principle according to the Annex of the Directive on Electronic Commerce permits the inference that in the case of business-to-business relations the principle would be applicable. But does this mean that an Information Society service could rely on the law of the Member State where it is established for the purpose of the drafting of general terms for cross-border contracts in the business-to-business sector? Since the Directive on Electronic Commerce does not contain a particular rule on the choice of law concerning cross-border contracts, it appears that the rules of the Rome Convention are applicable, since there is no other rule on the choice of law relating to contractual obligations in relation to particular matters established by an institution of the Communities in the sense of Article 20 of the Rome Convention.[75] Accordingly, it would appear that in business-to-business relations the provisions of the Rome Convention are applicable unless the issue has to be decided by arbitration.

According to Article 3 of the Rome Convention,[76] a choice of law clause is governed by the freedom of contract. Article 3(3) of the Convention establishes the principle that even if the parties have chosen a foreign law, the mandatory rules of the law of that state will be applicable if all the other elements relevant to the situation at the time of the choice are connected with one country only. The possible choice of law according to the Rome Convention thus gives thus two initial problems: First, it is questionable whether the parties may choose a non-national law. Second, by the choice of law of a foreign jurisdiction the parties may not avoid the application of the rules of the mandatory law of the Member State where, at the time of the conclusion

of the contract, both parties are established and where the characteristic contractual obligation in the sense of Article 4(2) of the Convention is performed.[77]

A court (or the decision maker of a body responsible for out-of-court dispute settlement other than arbitration) which, according to the Rome Convention, applies the law of a state, shall apply the rules of the mandatory law of another state if the 'situation' has a close connection with the law of that state, no matter whatever the law applicable to the contract, Article 7 of the Rome Convention.[78]

4 Measures of Self-protection for the Recipient

Measures of self-protection of recipients have not attracted much attention in out-of-court dispute settlement, because they are based on a unilateral activity. For this reason it may suffice to limit the following observations to essential issues.

4.1 Types of Measures

The concept of the traditional consumer self-protection comprises several measures open to consumers in order to defend their own interests with regard to the business sector. Such measures may be:[79]

- self-defence, for example boycott or consumer strikes, which can be organised by consumer associations;
- termination of contractual relations, also 'cooling-off' periods;
- toleration, combined, however, with protests, for example to the business, the distributor or internally, with regard to the family and friends;
- participation in traditional concepts of dispute settlement, either within the concept of negotiation (without a third party decision maker) or by dispute settlement with the help of a third party.

In electronic commerce consumers avail of additional measures for self-defence. They may publish negative experiences on their own websites and organise the distribution of information in listservs. Exchange of information on goods and services supplied by Information Society services may also be provided online within professional listservs.

Statements about goods and services respectively the Information Society service which are published online have to observe the legal rules applicable to electronic publishing. It has to be differed whether they are contained in an electronic publication or in a privately entertained website. In the first case regulations concerning electronic publishing or electronic media services may be applicable, in the second case the basic rules will concern libel or slander.

4.2 Measures and Unfair Competition

If recipients are businesses, such measures have to be assessed with particular regard of their unfairness in competition. The relevant laws of Member States vary considerable. Whether a certain measure constitutes an act of unfair competition can only be verified with regard to the law of a particular Member State.

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[1] See http://www.europa.eu.int/comm/dg24/library/legislation/leg01_en.pdf
[2] See http://europa.eu.int/comm/justice_home/events/index_en.htm
[3] For example in the tv sector or in the sector of services on conditional access.

[4] According to the jurisprudence of the European Court of Justice a Member State is not precluded from taking, on the basis of provisions of its domestic legislation, measures against an advertiser in relation to television advertising. But in such a case it is for the national court to determine whether those provisions are necessary for meeting overriding requirements of general public importance or one of the aims mentioned in Article 46 (ex Art. 56) of the EC Treaty, whether they are proportionate for that purpose and whether those aims or overriding requirements could be met by measures less restrictive of intra-Community trade, Joined Cases C-34/95 and 36/95 De Agostini (1997) ECR I-3843, § 54.

[5] European Extra-Judicial Network (EEJ-NET), see http://europe.eu.int/comm/dg24/policy/developments/acce_just/index_en.html

[6] Recital 51 of the Directive on Electronic Commerce.

[7] Article 57(3) of the Brussels Convention and Article 20 of the Rome Convention.

[8] Communication from the Commission of 30/03/98 on the Out-of-court Settlement of Consumer Disputes, No. 1, see http://www.europa.eu.int/scadplus/leg/en/lvb/132031.htm

[9] Communication from the Commission of 30/03/98 on the Out-of-court Settlement of Consumer Disputes, No. 4, see http://www.europa.eu.int/scadplus/leg/en/lvb/132031.htm

[10] European Parliament, see the Legislative Observatory http://wwwdb.europarl.eu.int/oeil/oeil_viewdnl.ProcedureView?lang=2&procid=3012 at 1 and 6.

[11] Concerning Italy see, for example, Fabio PADOVINI: "Konsumentenschutz und Zivilprozeß in Italien nach dem Gesetz 281 vom 30/07/98 (Gesetz zum Schutz der Rechte der Konsumenten)", Zeitschrift für Rechtsvergleichung (ZfR) 1999/9-13 at 9.

[12] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93, Annex letter (q).

[13] EU Directive 99/44/EC of 25/05/99 on the Sale of Consumer Goods and Associated Guarantees, O.J. L 171 of 07/07/99.

[14] EU Directive 84/450 of 10/09/84 relating to the Approximation of the Laws, Regulation and Administrative Provisions of Member States concerning Misleading Advertising, and the Rules and Principles Applicable to Unfair Advertising, O.J. L 250/17 of 19/09/84 as amended by Directive 97/55/EC of 06/10/97, O.J. L 280/18 of 23/10/97.

[15] EU Directive 98/27/EC of the European Parliament and of the Council of 19 May 1998 on Injunctions for the Protection of Consumers' Interests, O. J. L 166/51 of 11/06/1998.

[16] EU Directive 85/577/EEC of 20/12/85 'doorstep selling', to Protect the Consumer in Respect of Contracts, Negotiated Away from Business Premises, O.J. L 372/31 of 31/12/85.

[17] EU Directive 93/22/EEC of 10/05/93 on Investment Services in the Securities Field, O.J. L 141/27 of 11/06/93.

[18] Commission Recommendation 98/257/EC of 30 March 1998 on the Principles Applicable to the Bodies Responsible for such Settlement of Consumer Disputes, O.J. 115/31 of 17/04/98.

[19] European Extra-Judicial Network (EEJ-NET), see http://europe.eu.int/comm/dg24/policy/developments/acce_just/index_en.html

[20] Report by UNIONCAMERE, written by Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999.

[21] See Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: France, at 25, in Germany such a clause would very likely contravene the Act concerning Unfair Terms of Contracts, Luxembourg, at 60.

[22] See Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: Belgium, at 11, Denmark, at 15, Finland, at 19, Great Britain, at 36, Greece, at 38, Ireland, at 42, Italy, at 56, Portugal, at 69, Netherlands, at 66, Sweden, at 83.

[23] Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: Austria, at 5.

[24] Valeria FEDERICI, ed., and Veronica MANFREDI, coordination: "Chambers of Commerce in the European Union and Alternative Resolution of Commercial Disputes", Unioncamere, Rome 1999: Spain, at 78.

[25] In Finland Art. 1d of Chapter 11 of the Finnish Consumer Protection Act of 1978 disallows arbitration of disputes arising out of consumer transactions.

[26] This issue will be dealt with in more detail in the Parts relating to the particular types of out-of-court dispute settlement.
[27] EUROPEAN CONSUMER LAW GROUP: "Jurisdiction and Applicable Law in Cross-Border Consumer Complaints", Journal of Consumer Policy, Kluwer Academic Publ., 1998/315-337 at 317.
[28] See for example: EASA (European Advertising Standards Alliance): "Cross-border Complaints Report" (http://www.easa-alliance.org/xborder.html).
[29] See for example: EASA (European Advertising Standards Alliance): "Cross-border Complaints Report" (http://www.easa-alliance.org/xborder.html).
[30] EU document COM(84) 692 final.
[31] Bernadette LE BAUT-FERRARESE: "L'Emergence d'un Droit Communautaire de la Protection Juridictionnelle du Consommateur", in "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998, 287-304 at 288.
[32] Bernadette LE BAUT-FERRARESE: "L'Emergence d'un Droit Communautaire de la Protection Juridictionnelle du Consommateur", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998, 287-304 at 303, 304.
[33] Jim MURRAY: "Consumer Protection in the EC and Contract Law - Some Reflections from the Perspective of Consumer Organisations", in: Neues europäisches Vertragsrecht und Verbraucherschutz, Bundesanzeiger, Cologne 1999, 57-59 at 57.
[34] Article 1 No. 4 of the Brussels Convention.
[35] Article 5(1) of the Brussels Convention.
[36] Article 5(3) of the Brussels Convention.
[37] Article 17 of the Brussels Convention states:
"(1) If the parties, one or more of whom is domiciled in a Contracting State, have agreed that a court or the courts of a Contracting State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have exclusive jurisdiction. Such an agreement conferring jurisdiction shall be either:
(a) in writing or evidenced in writing; or
(b) in a form which accords with practices which the parties have established between themselves; or
(c) in international trade or commerce, in a form which accords with a usage of which the parties are or ought to have been aware and which in such trade or commerce is widely known to, and regularly observed by, parties to contracts of the type uninvolved in the particular trade or commerce concerned.
(2) Where such an agreement is concluded by parties, none of whom is domiciled in a contracting State, the courts of other Contracting States shall have no jurisdiction over their disputes unless the court or courts chosen have declined jurisdiction.
(3) The court or courts of a Contracting State on which a trust instrument has conferred jurisdiction shall have exclusive jurisdiction in any proceedings brought against a settler, trustee or beneficiary if relations between these persons or their rights or obligations under the trust are involved.
(4) Agreements or provisions of a trust instrument conferring jurisdiction shall have no legal force if they are contrary to the provisions of Articles 12 or 15, or if the courts whose jurisdiction they purport to exclude have exclusive jurisdiction by virtue of Article 16.
(5) If an agreement conferring jurisdiction was concluded for the benefit of only one of the parties that party shall retain the right to bring proceedings in any other court which has jurisdiction by virtue of this Convention." ...
[38] Jan KROPHOLLER: "Europäisches Zivilprozeßrecht", Kommentar zu EuGVU und Lugano-Übereinkommen, Recht und Wirtschaft, 6th ed., Heidelberg 1998 at 258.
[39] Luigi MARI: "Il Diritto Processuale Civile della Convenzione di Bruxelles", CEDAM, Milan 1999 at 620.
[40] Michael E. SCHNEIDER and Christopher KUNER: "Dispute Resolution in International Electronic Commerce", Journal of International Arbitration, vol. 14, No. 3, Sept. 1997, 5-37 at 18-21.
[41] EU Directive 93/13/EEC of 05/04/93 on Unfair Terms in Consumer Contracts, O.J. L 95/29 of 21/04/93.
[42] Norbert REICH: "EG-Richtlinien und Internationales Privatrecht", in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 109-126 at 121.
[43] Communication of the Commission of 14/02/84 on Unfair Terms in Consumer Contracts, document COM (84)55 final.
[44] See http://europa.eu.int/clab/tmp/tmp/PdoA7b.htm

[45] See http://europa.eu.int/clab/tmp/tmp-klEPMb.htm, it has to be observed, however, that the decisions indicated in the Commission's database are not dated, so that it is not possible to indicate with security, whether it relates to the relevant law after the implementation of the Directive.
[46] See in particular the Position Papers submitted to the EU Commission for the Hearing on "Electronic Commerce: Jurisdiction and Applicable Law", on 04 and 05/11/99, http://europa.eu.int/comm/justice_home/events/index_en.htm
[47] Concerning Italian law Giovanni IUDICA: "Brevissimi Appunti sulla Tutela dell'Acquirente di Pacchetti Azionari", in: La Tutela del Consumatore tra Liberismo e Solidarismo", ed. by Pasquale Stanzione, Ed. Scientifiche Italiane, Napoli 1999, 187-193 at 193.
[48] On Italian law see, for example, Daniela GIACOBBE and Elena d'ALESSANDRO, eds.: "L'Arbitrato", IPSOA, Milano 1999 at 252 with further references: According to Article 822 of the Italian Code of Civil Procedure the arbitration clause which is contained in the general terms of contract or in models or forms is not subject to the particular approval envisaged by Articles 1341 and 1342 of the Italian Civil Code. In the absence of a special provision of the national law, such a conclusion will also be valid with regard to clauses on arbitration abroad, even if subject to Italian law according to the New York Convention. However, Article 1469-bis of the Italian Civil Code is applicable in the case of an arbitration clause relating to the an international consumer dispute, from which follows that such a clause will be considered as unfair until the contrary is proved and unless the clause corresponds with the conditions establishing the fairness of a clause according to Article 1469-ter of the Italian Civil Code. According to Articles 1469-quater and 1469-quinquies the arbitration clause must be written in a clear and comprehensible manner to be effective. However, the non-effectiveness of the arbitration clause does not automatically follow from a deficiency of transparency: this will follow only, if the unclear drafted clause causes a contractual imbalance at the disadvantage of the consumer.
[49] Reinhard SCHU: "The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?", International Journal of Law and Information Technology, vol. 5., no. 2, 192-229 at 200.
[50] Reinhard SCHU: "The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?", International Journal of Law and Information Technology, vol. 5., no. 2, 192-229 at 200.
[51] Consumers International: "Consumers@shopping", an international, comparative study of electronic commerce, September 1999, http://www.europa.eu.int/comm/dg24/library/surveys/sur12_en.pdf at 28.
[52] Article 4 of the Rome Convention states: Applicable law in the absence of choice
(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.
(2) Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated. (…)
(5) Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.
[53] According to Article 1(2)(d) of the Rome Convention the rules of the Convention shall not apply to arbitration agreements and agreements on the choice of court.
[54] Article 3 of the Rome Convention states: "Freedom of choice
1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`.
4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11."

[55] Article 20 of the Rome Convention states: "Precedence of Community law. This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."

[56] Article 4(3) of the Rome Convention states: "The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11."

[57] Article 8(1) of the Rome Convention states: "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid."

[58] Article 8(2) of the Rome Convention states: "Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."

[59] Article 5(3) of the Rome Convention states: "Nothwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the ocnsumer has his habitual residence if it is entered into in the circumstances desrcibed in paragraph (2) of this Article." Subsection (2) states: "Nothwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the ocnsumer of the protection afforded to him by the mandatory rules of the law of the ocuntry in which he has his habitual residence: - if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that counry all the steps necessary on his part for the conclusion of the contract, or – if the other party or his agent received the consumer's order in that country, or – if the contract is for the sale of goods and the consumer travelled from that country to another ocuntry and there gave hius order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy."

[60] Article 5 of the Rome Convention states: "Certain consumer contracts
(1) This Article applies to a contract the object of which is the supply of goods or services to a person ('the consumer`) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.
(2) Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:
- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.
(3) Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.
(4) This Article shall not apply to:
(a) a contract of carriage;
(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.
(5) Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation."

[61] Reinhard SCHU: "The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?", International Journal of Law and Information Technology, vol. 5., no. 2, 192-229 at 202, 203.

[62] Reinhard SCHU: "The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection Through Private International Law?", International Journal of Law and Information Technology, vol. 5., no. 2, 192-229 at 203 to 205.
[63] Article 1(1) of the Rome Convention states: "The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries."
[64] Article 8 of the Rome Convention states: "Material validity
(1) The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.
(2) Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph."
[65] Article 9 of the Rome Convention states: "Formal validity.
(1) A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
(2) A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
(3) Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
(4) An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.
(5) The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.
(6) Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract."
[66] Article 9(5) of the Rome Convention.
[67] Article 7 of the Rome Convention states: "Mandatory rules
(1) When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
(2) Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."
[68] Bernd SCHAUER: "E-commerce in der Europäischen Union", Manz, Vienna 1999 at 186, 187.
[69] Norbert REICH: "EG-Richtlinien und Internationales Privatrecht", in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 109-126 at 122.
[70] Directive 94/14/EC on Deposit Guarantee Schemes of 30/05/94, O.J. L 135/5 of 31/05/94.
[71] Norbert REICH: "EG-Richtlinien und Internationales Privatrecht", in: L'Européanisation du Droit International Privé, ed. by Paul Lagarde, Bundesanzeiger, Cologne 1996, 109-126 at 124.
[72] Gilles PLAISANT: "La Lutte Contre les Clauses Abusives des Contrats dans l'Union Européenne", in: "Vers un Code Européen de la Consommation", proceedings of a workshop of the University of Lyon, 12 and 13 December 1997, Bruylant, Brussels 1998, 165-177 at 175.
[73] Elissavet N. KAPONOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 94.
[74] Elissavet N. KAPONOPOULOU: "Das Recht der missbräuchlichen Klauseln in der Europäischen Union", Mohr, Tübingen 1997 at 83.
[75] Article 20 of the Rome Convention states: "This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts".
[76] Article 3 of the Rome Convention states: "Freedom of choice. 1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by

the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract. 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.
3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules`. 4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11."

[77] Article 4(2) of the Rome Convention states: "Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated."

[78] Article 7 of the Rome Convention states: "Mandatory rules 1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.
2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract."

[79] Oreste CALLIANO: "Tecniche Alternative di Tutela di Consomatore", in: La Tutela del Consumatore tra Libreralismo e Solidarismo, ed. by Pasquale Stanzione, Ed. Scientifiche Italiane, Napoli 1999/289-298 at 291.