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European Community legislation, i.e. the different kinds of legislative acts enacted by the Community institutions (mainly Directives and Regulations), are certainly not without impact on companies established outside the territory of Member States of the European Community. As for any statute, their application depends on specific provisions of private international law. These can be found either in the statutes themselves or in other acts, specifically dedicated to private international law and covering a range of related issues. The multiplicity of sources of choice of law rules is probably one of the main difficulties of private international law, but also accounts for much of the fun of it. The European Community offers a good example of this practice.

An outsider doing business in the European Union would be tempted to think that the Rome Convention on the law applicable to contractual obligations[1] would be sufficient to indicate which law would be deemed applicable by a European judge and thereby which obligations he must comply with. As this short study aims to show, one would be mistaken in this belief, almost as much as a European thinking that American conflicts are embodied in the Second Restatement.[2] Nowadays attention should be paid to secondary Community law which, because of the conflict provisions that it contains, explicitly or implicitly, modifies the impact of the Rome Convention and renders the determination of the applicable law more complex, in a way, despite the harmonization process.

Along with the ever farther reaching extent of their competencies, the European institutions have been, in the last two decades, intervening more and more in the field of private law. This is no surprise because the achievement of an internal market,[3] introduced by the Single European Act (1986), was bound to affect some notions of private law, especially contract law. Indeed, the obligations arising from the goal which the Member States assigned themselves[4] are twofold. First, obligations are imposed on Members States to refrain from hampering the free movement of goods, services, persons and capital. Second, the European institutions must play an active part through the harmonization of legal fields

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1. Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L266) 1-19, opened for signature in Rome on 19 June 1980.

2. For a Belgian example, *see* Cass., 4. Nov. 1993, *Pasicrisie*, 1993, p. 921 (also: *Journal des Tribunaux*, 1994, p. 187).

3. Art. 3.1.c and 14 EC. This study will follow the renumbering of the EC Treaty due to the entry into force of the Amsterdam Treaty on 1 May 1999.

4. The project of the European Community can hardly be reduced to a single market, even though it remains one of its main features. *See*, for instance, the other common policies and actions planned in Article 3 EC.

necessary to ensure the achievement of the four basic freedoms.[5] As divergence of national legislation and the consequential legal uncertainty can be considered obstacles to free movement, European institutions have not hesitated in enacting legislation in various fields of private law.[6] Consumer protection in particular has received a great deal of attention.[7]

Trying to give an overview of the EC intervention in private law, or even in the field of consumer protection, would be useless. Rather, our goal will be to illustrate it and to show how it can affect trade with those established outside the EU. Since a short story is better than a long theoretical explanation, we will simply follow the hypothetical adventures of Anatole and Buena Vista, contracting together on the Internet. This will lead us to analyze the interaction of the Rome Convention with some applicability provisions contained in relevant Directives. Many could be cited, but apart from certain allusions to peripheral ones, we will limit ourselves to the two main ones, the Directive on distance marketing with consumers[8] and the Directive on certain legal aspects of electronic commerce.[9]

I. WHEN ANATOLE AND BUENA VISTA MEET ON THE INTERNET

Anatole is a law student living in Brussels who is strongly involved in the actual world music trend. Having recently developed a passion for Cuban music, partially thanks to Wim Wenders, he decides to subscribe to an online database created by Buena Vista, an American corporation based in Philadelphia. The database offers the lyrics and scores of traditional Cuban jazz. Anatole broadly reads the standard terms of the contract governing access to the database and then cleverly uses his dad's credit card with which he is allowed to purchase fuel for his car. He pays little attention to the contractual clause designating the law of Pennsylvania as applicable to the contract. In fact, the clause does not actually designate the law of Pennsylvania as the law of the contract but states that the general terms of the contract are to be construed according to the law of Pennsylvania. Within the same week, however, two major events occur. First, Anatole has a lively discussion with his father concerning the gas bill. Second, he meets Nathalie who convinces him to take tango lessons. Being a law student, Anatole thinks he can maneuver his way out of his Buena Vista subscription Agreement. He believes that Belgian law provides him with the proper protection.

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5. See Title I and III of the E.C. Treaty (Articles 23-31, 39-60 EC).

6. For a good introduction to the phenomenon, *see* P.-CH. Müller-Graff, *EC Directives as a Means of Private Law Unification, in Towards a European Civil Code*, 71-89 (1998).

7. Explaining upon which bases legislation gradually arose in this field. *See* S. Weatherill & P. Beaumont, EU Law 1030 (Penguin Books Ltd., 3d ed. 1999).

8. Directive 97/7/EC of the European Parliament and the Council of 20 May 1997 on the protection of consumers in respect of distance contracts, 1997 O. J. (L144) 19-27.

9. Directive 2000/31/CE of the European Parliament and the Council on certain legal aspects of Informations Society Services, in particular electronic commerce, in the Internal market, 2000 O.J. (L178) 1-16. Earlier version can be found at 1999 O.J. (C30) 4-75 and COM (1999) 427 final for the amended version of Sept. 1999.

II. WHEN IS A CONSUMER PROTECTED BY EUROPEAN COMMUNITY LAW?

Obviously, the intent of the relevant contract is to invoke the law of Pennsylvania. However, if the question were submitted to a European judge,[10] he would: 1) examine the Rome Convention on the law applicable to contractual obligations, and 2) examine some national dispositions implementing EC Directives relevant to the subject matter with which he is confronted.

A. The Rome Convention on the Law Applicable to Contractual Obligations

The Rome Convention[11] is not a Community Act as such. It is nevertheless part of the "acquis communautaire" that new Member States must adopt and was negotiated within the framework of the Community.[12] It provides conflict rules common to all Member States in the field of contractual obligations. Its application is not restricted to situations involving Member States. Indeed, the Convention may designate the law of a third country (Article 2).

Regarding the contract Anatole entered into, Article 3 of the Convention allows parties to choose the law applicable to their contract under the sole condition that the choice should be expressed or reasonably deducible from the terms or circumstances of the contract. The fact that a specific reference is made to a legal system may amount to designation of that system as the applicable law.[13] It should also be noted that no written statement is demanded.[14] In this respect, a choice of law made on-line could be held valid with regard to the Convention. This would not mean, however, that Anatole is entirely deprived of the protection of his home state's law.

Article 5 provides a special protection for consumers which enables them to demand application of the mandatory laws of their country of habitual residence, notwithstanding the law designated in the contract. These circumstances are

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10. Our analysis will be limited to choice of law. It is not necessary to address here questions of jurisdiction (to be solved in regard of the Brussels Convention, *infra* note 12) as our purpose is to show the interaction of the various sources of choice of law rules in the EC .

11. *See supra* note 1.

12. The link with the European institutions is of course not as strong as in the case of the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, 1998 O.J. (C 27) 1-27 (consolidated version after the accession of Austria, Finland and Sweden), because, contrary to the latter, the European Court of Justice never received jurisdiction to give preliminary rulings on its interpretation.

13. M. Giulinao & P. Lagarde, Report on the Convention on the Law Applicable to Contractual Obligations, 1980 O. J. (C 282) 1-50.

14. Article 3 of the Rome Convention is less demanding than its equivalent in the Brussels Convention. Article 17 of the latter requires the agreement to be made in writing or evidenced in writing, or in a form consistent with the habits the parties have established with one another, or in a form common in international trade. The reason for this can be explained by the differing impact clauses of jurisdiction and choice of law have on a dispute. Also, as will be seen later, choice of law clauses are easier to derogate to than jurisdiction clauses. In the case of choice of law clauses, attention should nevertheless be paid to articles 8 and 9 of the Rome Convention.

specifically enumerated in Article 5.2. Only the first one is relevant to our case.[15] It is required that the consumer received a special advertisement or offer in his home country and in that country took all steps necessary for the conclusion of the contract. These cumulative conditions describe what is commonly called the passive consumer. The application of this Article to contracts concluded on the Internet is obviously debatable.[16] It can be argued that all the steps necessary for the conclusion of the contract are indeed taken in the consumer's place of habitual residence. But, unless he received a special advertisement via e-mail, the first condition is hardly met.[17] Some suggest that the Article should be applied anyway by analogy because it is the only protection offered to the consumer and should therefore be considered as covering new situations that were not thought of at the time of redaction. Moreover it could be maintained that the one organizing the sale of his products through a web site specifically intends to offer world-wide advertisement and should, therefore, expect to have to submit to the laws of different countries. To this, others reply that compliance with the laws of the entire world cannot be reasonably demanded from any corporation. All of these arguments are already well-known. They seem to arise from and control any debate on the law applicable to Internet transactions, whatever the context. In the end Anatole, who probably surfed the web in search of a specific product, appears like a rather active consumer.

Two additional points must be made about Article 5 of the Rome Convention. First, contracts for the supply of services are covered by Article 5 only when a service is not provided entirely in a country other than the country of the consumer's residence (Article 5.4.b). Regarding this provision, the status of on-line services is difficult to state. What should be considered of a service like the one provided to Anatole, one comprised solely of an online database and the posting of information on-line? Might we assume that this service is entirely accomplished at the service provider's place of establishment? A positive answer to these questions would certainly exclude the situation of Anatole from the scope of Article 5 of the Convention. Case law has yet to answer any of these questions. Second, the Article mandates a departure from the chosen law only as far as it is less favorable to the consumer. If the protection of the contract's chosen law is considered equivalent (which does not mean identical) to the one offered by the law of his habitual

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15. The other circumstances stated in Article 5.2 are the following: either the contracting party (or his agent) has received the order of the consumer in the consumer's country of residence, or the contract has been concluded on a trip specially organized by the seller.

16. *See,* e.g., the debate that took place in June 1998, at the annual meeting of the Jurist Association of the Netherlands, summarized by S. van der Hof, *De internetconsument en het internationaal privaatrecht, in* Tijdschrift voor consumentenrecht 424-30 (1998). *See also* K. Boele-Woelki & C. Kessedjian, *Internet,* Which Court Decides, Which Law Applies? (1998); M. Fallon, *La protection internationale de l'acheteur sur l'interréseau dans le contexte communautaire, in* 6 Etudes de droit de la consommation, 241-85 (1999).

17. In Belgium, an advertisement placed in an English newspaper distributed in Belgium has not been qualified as a specific offer taking place in the country of residence of the consumer: *See* Gent, Handelspraktijken, June 1990, at 70.

residence, there is no reason to derogate from the contractor's choice of law clause.[18]

Considering all the uncertainties detailed so far, it is not clear whether the situation of Anatole would fall under Article 5 of the Rome Convention. If it did, Article 5 would allow him to demand the application of the mandatory laws of the country of his habitual residence. The identification of these provisions presents another matter of uncertainty since the notion of mandatory law is itself debatable.[19] Nevertheless, internationally mandatory rules can be identified as those rules whose substantive policy requires their application whatever the law applicable to the situation normally is.[20] Their international scope is usually defined by a so-called applicability rule which is normally stated explicitly. This rule, which actually permits the identification of the internationally mandatory character of the law, may be implicit and must then be derived from the policy pursued by the law. National laws of the Member States count numerous dispositions belonging to this category,[21] some of which result from the implementation of directives.

Another article of the Convention justifies the application of mandatory laws notwithstanding the law normally applicable to the contract. Article 7.2 provides for the unconditional application of the mandatory laws of the forum, and Article 7.1 provides for the possible application of mandatory laws of any country as long as the situation presents a close connection with that country.[22] It appears at first glance that Anatole might intake Article 7.2 or 7.1 (depending on whether his action is pendant in Belgium) to ensure the applicability of Belgian law. However, the relationship between Article 5 and 7 is rather complex. As Article 5 explicitly provides a specific protection to the consumer, Article 7 should not be seen as governing situations regulated elsewhere in the Convention. Otherwise it would deprive Article 5 of its "effet utile" and offer protection to situations (such as the passive consumer) excluded from the provisions of Article 5.[23]

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18. Article 5.2 of the Rome Convention states: "[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."1980 O.J. (L 266) 3.

19. We do not wish to enter into this controversy here but only to mention that the European Court of Justice recently chose a rather classical definition of internationally mandatory rules, *see* 1999 ECJ C-369/96 and C-376/96, no. 30:

> [N]ational provisions the compliance with which has been deemed to be so crucial for the protection of the political, social and economic order in the Member State concerned as to require compliance therewith by all persons present on the national territory of that Member State and all legal relationships within that State.

<http://www.europa.eu.int/jurisp> (last visited Aug. 8, 2000).

20. Under this common definition can be gathered the notions of "lois de police," "loi d'applicabilitié immédiate"and "loi d'application nécessaire."

21. *See* M. Fallon & S. Francq, Towards Internationally Mandatory Directives for Consumer Contracts? (2000).

22. Attention should also be paid to the nature and purpose of these laws and to the consequences of their potential application.

23. The same question rises concerning the relationship between Article 6 (protection of workers) and Article 7.

We can conclude that Anatole could, at best, hope for the application of Belgian internationally mandatory laws, either on the basis of Article 5 or of Article 7 of the Rome Convention. The internationally mandatory character of these rules should, therefore, be asserted, thanks to the applicability rule defining their spatial scope. However, for the above mentioned reasons, the application of both Articles 5 and 7 remains dubious. For Buena Vista, it means that it has good chances of escaping foreign provisions.

At this stage, one should note the almost "European" nature of the Rome Convention. Indeed, in order not to deprive European Community laws of their "effet utile," the Convention itself recognizes its subordination to them. Article 20 states that the Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations 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. It insures that when European legislative acts contain either bilateral rules of conflict or rules concerning their own spatial scope, they will have precedence over the provisions of the Convention. Actually, Article 20 of the Rome Convention is not absolutely necessary. Community law, by its very nature, imposes the obligation on Member States to respect its terms and forbids them to enter into conventions that would lead to infringement of Community Law (Art. 10 and 307 EC). After becoming a member of the European Union, States cannot enter into agreements counter to community law. Therefore, the Convention cannot be seen as a way for the parties to derogate from their obligations as Member States. As a result, when a directive or a regulation lays down a rule of applicability or a conflict rule, this has precedence over the Convention solely because of its community nature. When implementation is needed, (i.e. in the case of a directive), the national implementing law will, by transfer, have precedence over the Convention but only in so far as it follows the wording of the directive and only in respect to the substantive dispositions resulting from the directive. On the one hand this principle appears, necessary for the European system to remain coherent. On the other hand, it opens the door to tremendous difficulties in the hypothesis of so-called minimal directives.[24]

Practically speaking, this means that Buena Vista may be subject to EC law even though the Rome Convention designates Pennsylvania law as the applicable law. It will all depend on the applicability rules provided for in the directives and in the way they have been implemented. In the end, whatever the implementation formula is, it should amount to the same and respect the substance of the original

24. Directives bind the States as to the result that they are due to achieve, through implementation (Article 249 EC). They are free to choose the means, *i.e.*, whether they need to change their law and how far they have to, belongs to discretionary appreciation, as long as they assure the result aimed at by the directive. In the field of consumer protection mainly, some directives, the so-called minimal directives, establish a minimal level of protection, leaving it free to the States, to go beyond it in their implementation. *See infra* note 31, the comment under Article 14 of the distance contracts directive.

text.[25] Since a systematic survey is not necessary for our purpose, we will analyze the directives themselves rather than the national laws of implementation.

B. *The Directive on the Protection of the Consumer in Respect of Distance Contracts*

As we have already stated, in contractual relationships with European consumers, Buena Vista cannot consider its standard contractual terms as exhaustively stating its obligation under these contracts. They may indeed come under scrutiny in regard to European legislation and, depending on their content, some may be set aside as, for instance, a choice of law clause.[26] Furthermore, other obligations may eventually be imposed on Buena Vista. In this respect, the directive on the protection of the consumer in distance contracts is obviously relevant. It requires the seller or service provider first to provide the consumer with various information, in particular as to his identity and location, the duration of the contract, the modality of performance, its cancellation (Article 4) and then to send confirmation, in writing or in another durable medium, to the consumer of that information (Article 5). It also offers the consumer a right of withdrawal, which must to be exercised within a week from the conclusion of the contract (Article 6.1). This period can be extended to three months if the consumer has not been informed of the geographical address of the other party. However, the consumer might be barred from exercising this right, in the example of services, if the performance has begun, with his agreement, before the end of the withdrawal period (Article 6.2).

Buena Vista will not be unconditionally subject to these obligations. The directive takes care of prescribing its own spatial scope and thereby on which conditions its provisions can be imposed on service providers established in third countries. Article 12.1 states that the consumer cannot waive the rights conferred on him by the implementation law, making the directive a mandatory law. Article 12.2 then requires the States to ensure that the consumer will not lose the protection of the 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 one or more Member States." This latter provision explicitly indicates the internationally mandatory nature of the directive.[27]

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25. In practice, however, implementations deeply diverge and raise numerous questions. *See*, *e.g.*, M. Fallon, *La loi applicable aux clauses abusives après la transposition de la directive n.93/13*, *in* Revue européenne de droit de la consommation 3-22 (1996).

26. *See* Council Directive 93/13/EEC of Apr. 5, 1993, on unfair terms in consumer contracts, 1993 O. J. (L 95) 29-35: this directive commands to disregard terms that have not been individually negotiated and cause in the contract a significant imbalance between the parties to the detriment of the consumer. In annex, the directive further provides an indicative list of clauses which can be presumed to be unfair. Arbitration clauses are mentioned in this list (point 1.q). The directive itself uses the same clause of applicability as the distance contract directive (Article 6.2).

27. At first sight, paragraphs 1 and 2 of Article 12 seem to refer to the difference between the notions of "loi impérative" and "loi de police," i.e. the difference between internal mandatory rules and internationally mandatory rules.

The exact meaning Article 12.2. should receive is nevertheless difficult to state. First, it aims to cover only contracts in which a choice of law clause has been inserted. These clauses must moreover designate the law of a third State. The reason for this lies in the approximation of laws the directive itself realizes. Indeed, from a community point of view, after implementation of the directive, Member States laws shall all provide the same level of consumer protection in distance contracts,[28] making whose law is designated absolutely neutral as long as it is a Member State's law. Accordingly, after approximation, only false conflicts could arise among Member States. It should be noted here that the absence of a choice of law clause does not ensure that a Member State's law will be held applicable to the contract. As it has been seen, the Rome Convention is not limited to the designation of contracting parties' law (Article 2 of the Rome Convention). Second, Article 12.2 of the directive requires inquiry into the content of the chosen foreign law. To be disregarded in favor of the directive provision, this law must deprive the consumer of the protection offered by the directive, meaning that a similar or further-reaching protection should be respected. But, these are the only certainties one can derive from the reading of the text.

What should be understood as "a close connection with the territory of one or more Member States" remains unclear. It can be first read as referring to the criteria of the Rome Convention, thus implying that a close connection exists when the Convention would designate the law of a Member State, notwithstanding the choice of law clause. The Convention is indeed entirely based on the "proximity principle," aiming thus, thanks to various presumptions, at selecting the law with the closest relationship to the situation.[29] It can also be seen as an open criterion to be left to the judge's discretionary construction, or eventually to be freely implemented and specified by national legislatures. Each understanding has its pros and cons. The first one renders the clause tantamount to the provisions of the Rome Convention, eventually making the special provision of the directive pointless as it would not add anything to the Convention. The second one imposes a great burden on the judge and presents the danger of leading to purely nationalistic protection which is unacceptable in an internal market as the European Community. And the last one demands a great deal of reflection and understanding of the consequences of the establishment of an internal market by the legislature. In this effort, national legislative bodies would have to make a difficult choice among the different academic positions.[30]

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28. Once again, practice denies, or at least, forces to bring nuances to this statement. Not only do implementations diverge but furthermore, they may sometimes intervene after very long delays. Large differences thus remain between the legislations of Member States.

29. *See* the wording of Article 4 of the Rome Convention: "To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, it shall be governed by the law of the country with which it is the most closely connected." 1980 O. J. (L266) 2-3.

30. *See, e.g.*, K. Thorn, *Verbraucherschutz bei Verträgen im Fernabsatz, in* Praxis des internationalen Privat- und Verfahrensrecht 1-9 (1999) and the answer of Professor Lagarde, Revue critique de droit international privé, 421-24 (1999). With Professor Fallon, we have argued ourselves for what we see as the proper implementation of provisions like Article 12 of the directive on distance contracts, namely proposing the introduction of a bilateral rule based on criteria specifying the notion

Another question parliaments will have to face derives from the minimal nature of the directive.[31] In their implementation, they are indeed allowed to choose whether they want to offer the consumer a level of protection higher than the one provided for in the directive. The extension of the protection can materialize in the substantive provisions and/or in the spatial scope given to the implementing law. However, in case a spatial scope broader than that foreseen in Article 12 of the directive is given to the implementing law, this provision will not be seen as being the kind of provision defined in Article 20 of the Rome Convention or Article 307 of the European Community Treaty. As far as it goes beyond the provision of Community law, it logically is not considered any more as implementing Community law and therefore does not enjoy the precedence sanctioned in the above mentioned articles. As a result, the national provision delimitating the spatial scope of the implementing law, if it goes beyond Article 12, will not have precedence over the Rome Convention, but only as to the situations not covered in Article 12. And since it is already difficult to state what situations are covered by Article 12 of the directive, this mechanism is extremely tricky and makes it complicated for someone to know which conflicts rule will be applied to his contract. To know that the Rome Convention will be derogated from, one has to be aware that a directive exists and provides for its own spatial scope. Therefore, national implementation laws should mention from which text they derive, because but for their origin, they would not have precedence on the Rome Convention. Second, if the original directive contains a minimal clause, the person concerned has to make sure that the spatial scope of the implementing law is not broader than the one of the directive; if it is, he has to go back to the original text, to read the applicability rule thereof and see whether his case falls in these situations. Only in this hypothesis, will a conflicts rule be applied differently from the Rome Convention.

Buena Vista surely has a good lawyer.

This good lawyer will also explain to him that according to Article 13 of the directive, provisions contained in other Community Acts may still impose other obligations on him. Following the general rule of the specific derogating from the general, Article 13 states that specific Community rules regulating certain aspects of distance contracts or the entirety of certain types of distance contracts should be applied in preference to the general directive on distance contracts. And as indeed, the material scopes of various directives

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of "close connection." *See* Fallon & Franq, *supra* note 21. The Belgian implementation of this Directive simply copied the provision of Article 12 as such, leaving it to the judge to construe what "a close connection" is. *See* Law of May 25, 1999, modifying the law of July 14, 1999, *Moniteur belge*, June 23, 1999, at 23670.

31. Article 14 states: " Member States may introduce or maintain, in the area covered by this Directive, more stringent provisions compatible with the Treaty, to ensure a higher level of consumer protection."

either overlaps[32] or derogates from one another,[33] attention should be paid to other Community Acts.

C. The Directive on Electronic Commerce

This directive had already attracted a great deal of attention even before being finalized. For our purpose, it gives a good example of the difficulty in determining which obligations one must comply with under Community law, especially being a foreigner. Indeed, the material scope of the directive is partially similar to the one on distance contracts. It also requires that certain information be given to the consumer when contracting on the Internet. For instance, all the necessary steps for the conclusion of the contract and the correction of errors eventually made in process should be clearly explained (Article 10). It also establishes certain obligations with respect to commercial communications (Articles 6 and 7) and demands that service providers clearly identify themselves, their location, geographic and e-mail addresses and eventually their trade register number to potential clients and to competent authorities. For the rest, it relates to the limitation of liability that can be imposed on intermediary service providers, to codes of conduct, out-of-court dispute settlement and so on. Few of these provisions can be of any interest to Buena Vista apart from the first one cited, concerning electronic contracts with consumers and commercial communications. Had Anatole ordered a compact disk or a book containing the lyrics and scores of his favorite musicians instead of getting a subscription to a database, Buena Vista might have wholly escaped the e-commerce directive. The question remains whether the directive covers the delivery of goods. On the one hand, the recitals declare that the information society services covered by the directive can consist of a wide range of on-line economic activities, in particular, the selling of goods (n.18). On the other hand, the definition of those services requires them to be sent, received and entirely transmitted by electronic means.[34]

In the end, knowing whether Buena Vista has to worry about the directive at all, depends first on its spatial scope. At first glance, it seems that the directive does

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32. On the difficult interconnection between the distance contracts directive, the E-commerce draft directive and the Belgian statute on unfair competition and consumer protection (Loi 14 juillet 1991 sur les pratiques du commerce et sur l'information et la protection du consommateur, *Moniteur belge*, Aug. 29, 1991); *see* J. Dumortier, *Elektronische handel en consumentenbescherming in de Europese ontwerprichtlijn en het Belgish recht*, Computerrecht 32 (1999).

33. For instance, the Directive on distance contracts does not cover financial services offered to consumers by distance marketing. These will be regulated in another Directive whose applicability rule, surprisingly enough, is not similar to the first directive on distance marketing (Proposal for a Directive of the European Parliament and of the Council concerning the distance marketing of consumer financial services amending Council Directive 90/619/EEC and Directives 97/7/EC and 98/27/EC, COM (1999) 385 final, see in particular Article 11.3).

34. See Article 2.a. of the directive on certain legal aspects of information society services, in particular electronic commerce, in the internal market. The directive refers to Article 1.2. of the directive 98/34/EC, as amended by directive 98/48/EC, in which the definition is eventually to be found.

not give any information in this respect. Recital n.23 and Article 1.4 expressly specify that the directive does not contain any special rule of private international law. Surprisingly enough, two articles further,[35] the directive states that each Member State shall apply its national law of implementation to the service providers established on its territory (Article 3.1.). It is difficult to read this provision as anything else but a rule of applicability in space, meaning that the directive is applicable to the service providers established on the territory of the European Community and that each Member State will insert in its implementation law a provision demanding that the service providers established in their own territory comply with their law. The directive even gives a definition of an "established service provider" referring to the "doing business" criterion (Article 2.c). Would that mean that rules of applicability in space are not considered by the European institutions as rules of private international law? Maybe the institutions have only perceived the substantive aspect and not the formal aspect of the provision they made. The substantive policy this provision is based on becomes clearer when reading the next paragraph of the same article. Article 3.2 forbids Member States from restricting one's freedom to provide services from another Member State, for reasons falling within the coordinated field.[36] The common reading of paragraphs one and two of Article 3 implies that within the European Community, service providers may operate freely as long as they respect the law of their country of establishment, the so-called state of origin. The substantive policy pursued here is easily recognized as the freedom to provide services laid down in Article 49 EC. But, once specified as in Article 3 of the e-commerce directive, it formally appears as a conflict rule. Who ever said that conflict rules are neutral? But even when seen as a conflicts rule, the so-called "internal market clause" can lead to different interpretations. It has, for instance, been proposed that it be assimilated with a "system conflict rule." This esoteric denomination simply means that the clause designates a system as such, including its choice of law rules, and not only the material provisions of the applicable law.[37]

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35. Article 3 (of the directive), provides:

1. Each Member State shall ensure that the Information Society services provided by a service provider established on its territory comply with the national provisions applicable in the Member State in question which fall within the coordinated field.

2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide Information Society services from another Member State.

3. Paragraph 1 and 2 shall not apply to the fields referred to the Annex.

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled: . . . .

36. The notion of "coordinated field" itself would require further clarification as the definition given in Article 2.g gives to understand that all sorts of requirements laid down by Members States concerning the taking up and pursuit of activity by service providers operating on Internet are included in the coordinated field. This could potentially go way beyond the material provisions of the directive itself!

37. G. Spindler, *Der neue Vorschlag einer E-Commerce-Richtlinie*, Zeitschrift für Urheber-und Medienrecht, 1999, at 775-95; G.A. Droz, *Regards sur le droit international privé comparé*, at 295 ff *in* 229 *Recueil des cours* (1997).

In both cases, the result is the same for Buena Vista. Indeed, either the directive is simply not applicable to service providers established outside the European Community—thus Buena Vista should stick to the Rome Convention to determine what law is applicable to its contract, or the directive contains a system conflicts rule but limited to relationships among Member States, meaning that service providers established within the EU are submitted to the conflicts provisions of their country of establishment. Buena Vista should not be concerned by this second interpretation which introduces a sort of "renvoi." But, Buena Vista should not too quickly feel relieved as the next paragraph of Article 3 of the e-commerce directive might render the situation still a little bit more complicated. It states that paragraphs one and two of Article 3 are not applicable to the fields referred to in the Annex, among which are mentioned contractual obligations concerning consumer contracts and the freedom of the parties to chose the law applicable to their contract.[38] This implies that for consumer contracts, the applicability of the directive will not be conditioned by the internal market clause (Article 3.1 and 3.2), but rather by the otherwise existing conflict rules, i.e. the Rome Convention.[39] Thus Buena Vista might be subject to the provisions of the e-commerce directive in the event that the Rome Convention designates the law of a Member State.

Buena Vista surely has a good lawyer.

III. CONCLUDING THOUGHTS

If Buena Vista needs a good lawyer, it is not so much because Community law imposes on it much heavier or very different obligations than the ones it probably already complies with. It is rather because of the piecemeal aspect of Community legislation. Different legislative acts provide for different obligations and all refer to different applicability rules. When the divergences due to implementation into national laws are added, the picture becomes totally fuzzy. It should be remembered that we mentioned only two directives, but others might come into play in a situation like the one we observed. For instance, Buena Vista might seek to determine on which conditions would its electronic signature be admissible as legal evidence before a European judge. In this respect, the directive on electronic signatures is relevant, in particular Article 7 which governs the recognition of certificates delivered by certification-service providers established in third countries.[40]

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38. The need to mention in the Annex that the freedom to choose the law applicable to their contract by the parties is not hampered by Article 3 of the draft directive is only an additional proof that Article 3 has an impact on conflict rules.

39. The applicability of consumer protection clauses inserted in the e-commerce directive and those to be found in the distance contracts directive are thus subject to different applicability rules as the first one is subject to the Rome Convention and the latter to its own applicability rule, which derogates from the Rome Convention.

40. Directive 1999/93/EC of the European Parliament and of the Council of 13 Dec. 1999 on a Community framework for electronic signatures, 2000 O. J. (L13) 12-20.

Even a complete novice can recognize that we are confronted here with a problem of legislative policy. Community institutions, acting within the limits of their competence on the one hand, and of principles of proportionality and subsidiarity on the other, enact piecemeal legislation (*see* Article 5 EC). But the multiplication of legislative acts with limited material scope and limited spatial scope inevitably damages legal certainty. The example of the two directives on distance marketing is striking. Two sister directives with a common substantive policy of consumer protection receive a different applicability rule. Almost the same rule, but not the same rule. The general directive on distance marketing mandates a departure from choice of law clauses designating the law of a third State if the contract presents a close connection with the territory of one or more Member States while the draft directive on distance marketing concerning financial services[41] departs from the Rome Convention as soon as the law of a third state is made applicable to the contract, the consumer is resident of a Member State and the contract has a close link with the Community. Why are choice of law clauses only affected, in the first case while the latter recognizes all hypotheses in which the law of a third state is applicable? Why is an additional criterion present in the latter case, i.e. the residence of the consumer, while it is not mentioned in the first case? Another difficulty, also due to the inevitable form of intervention of Community institutions, rests in the mixed nature of the provisions gathered in directives. The e-commerce directive is indicative of the problems that this tendency might lead to, once a single applicability rule is introduced in such a text. The mentioned directive contains rules on consumer protection, on legal liability for the transmission of unlawful information, and on commercial communication, in particular concerning regulated professions. Obviously these three fields, which are not the only ones regulated by the directive, employ a completely different logic as far as private international law is concerned. This has, perhaps, not been thought of, even though consumer protection has been excluded from the applicability rule of the directive.

These considerations seem to plead for the exclusion of applicability rules from directives themselves and for their collection in a separate legislative act. We do not wish to take position here on the opportunity of codification of conflict provisions within the EU,[42] but we should at least mention the feasibility of such a codification. After the Amsterdam Treaty, the Community received new explicit powers concerning private international law. The combined effect of Articles 61.c and 65 EC seems to confer on the Community extensive powers in the field of private international law. Apparently, all private international law measures necessary for the smooth functioning of the internal market could be enacted on this basis, whether they concern conflict of laws or conflict of jurisdictions.[43] The

41. *See supra* note 33.

42. It is unpersuasive considering that Professor Rigaux will address the issue in this special edition, but also it places emphasis on some sociological and cultural arguments that are worth long thinking. *See* P. Legrand, Fragments on Law-as-Culture (1999).

43. Query whether this was not already possible before the Amsterdam Treaty. A positive answer to this question would change the interpretation to be given to the new provisions. *See* Ch. Kohler,

projects considered by the Commission on this basis are indeed extremely ambitious, as it is shown by the conclusions of the European Council held in Tampere on October 15-16, 1999, and even more in the action plan of the Council adopted at the end of 1998.[44]

The latter text plans in the short term the revision of the Brussels and Rome Conventions, the achievement of a Brussels II Convention on jurisdiction and the recognition of decisions in matrimonial matters and of a Rome II Convention on non-contractual obligations. These projects cannot properly be called conventions any more as it is planned to enact them in the form of regulations.[45] On a longer term the action plan also considers, among other things, a text on the law applicable to divorce and measures for the enhancement of judicial cooperation in the field of judicial evidence.

In this context the Rome Convention will eventually be modified, hopefully taking into account the applicability rules contained in various directives. For sure, a modification of Article 5 thereof will be considered and most probably similarly inspired as the revision of the Brussels Convention. A proposal for a Council Regulation (EC) on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters[46] already exists. The new version of the article on consumer protection (Article 15) enlarges the notion of the passive consumer. It proposes to offer the consumer the possibility of availing himself of the jurisdiction of his state of residence under a new criterion, i.e. the "doing business" criterion. Accordingly, where the contract is concluded with a person pursuing commercial or professional activities in or directing them towards the Member State of the consumer's domicile and provided these activities are related to the concerned contract, the consumer could sue in his home state. The mere availability of a web site would apparently not trigger the protective jurisdiction,[47] but the fact that the other contracting party is doing business in the EU certainly will. Once again, Buena Vista might be interested.

These new projects certainly appear extremely exciting from a scientific point of view. In particular, the conception of the "European territory" they will defend might prove to be interesting and significant in the treatment of individuals established outside the EU. Such a statement would require much deeper analysis. However, it seems at first glance that the conception of the "European territory" found in EC legislation has a direct influence on the way these acts address the situation of individuals or corporations not belonging to the EU. If the two directives we have selected as examples are of any use, it is in demonstrating this potential link. The first directive on distant contracts aims at harmonizing national laws in a specific field and then at protecting the balance it achieved from external influences. Therefore, it excludes the law of third states in a specific provision

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Interrogations sur les sources de droit international privé européen après le traité d'Amsterdam, Revue critique de droit international privé at 1-30 (1999).

44. 3/12/98, 1999 O. J. (C 19/1).

45. *See* 2000 O.J. (L 160/1-52) for three new regulations on private international law.

46. COM (1999) 398 final.

47. The draft explanatory memorandum is quite obscure on this point.

tending to reinforce the substantive policy pursued in the directive (i.e. consumer protection). Along these lines, the territory of the EU is considered as a whole. In contrast, when the goal is to regulate relationships within the EU as it is in the e-commerce directive, external influences are not really taken into consideration and the territory of the EU is still grasped according to its traditional divisions, i.e. the territories of Member States. These considerations suggest the existence of a link, but the nature thereof still must be clarified.