



APPLICABLE LAW TO DISTRIBUTION  
CONTRACTS IN THE EUROPEAN UNION  
REGULATION 593/2008 (ROME I)\*

*LA LEY APLICABLE A LOS CONTRATOS DE  
DISTRIBUCIÓN EN EL REGLAMENTO DE  
LA UNIÓN EUROPEA 593/2008 (ROMA I)*

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*Reception date: June 21<sup>th</sup>, 2016*

*Acceptance date: July 21<sup>th</sup>, 2016*

*Availability online: July 30<sup>th</sup>, 2016*

TO CITE THIS ARTICLE / PARA CITAR ESTE ARTÍCULO  
Martínez-Luna, William Fernando, *Applicable Law to Distribution Contracts in the European Unión Regulation 593/2008 (Rome I)*, 28 *International Law, Revista Colombiana Derecho Internacional*, 247-282 (2016). <http://dx.doi.org/10.11144/Javeriana.il14-28.aldc>

[doi:10.11144/Javeriana.il14-28.aldc](http://dx.doi.org/10.11144/Javeriana.il14-28.aldc)

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\* This paper is part of the project results *El impacto de la globalización en las relaciones privadas internacionales y su repercusión en el Derecho internacional privado colombiano*, Resolución 011 de 2014, Universidad Jorge Tadeo Lozano.

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## ABSTRACT

The applicable law to the International Contract of Distribution of the European Union presented a lot of difficulties under the application of the Rome Convention of 1980, subsequently this uniform legal norm required establishing the law applicable to the international contract, to identify the characteristic performance in such legal relationship. The characteristic performance of the distribution contract could not be determined in a uniform way, because some of the courts of the Estates which made part of it understood that it was carried out by the distributor, others maintained that it was the grantor of the merchandise, while others considered that this contract could not be established under characteristic performance theory. The Rome I Regulation from the European Union has made important modifications regarding determining the applicable law to this contract, since it has established in a rigid and direct way the norm of the habitual country of residence of the distributor for this legal relationship to be applied. The present paper pretends to analyze if the rigid determination of the law applicable to the distribution contract in the Regulation of the European Union Rome I, manages to solve interpretation problems presented on the Rome Convention of 1980, bringing legal certainty through the foreseeable applicable law to the international contract.

**Keywords:** European Union; Private International Law; Rome I Regulation on applicable law to contractual obligations; distribution contract; Rome Convention

## RESUMEN

*La ley aplicable al contrato internacional de distribución en la Unión Europea presentó muchas dificultades bajo la aplicación del Convenio de Roma de 1980, pues esta norma jurídica uniforme requería, para establecer la ley aplicable al contrato internacional, identificar la prestación característica de esa relación jurídica. La prestación característica del contrato de distribución no pudo ser determinada de manera uniforme, pues unos tribunales de los Estados parte entendían que la llevaba a cabo el distribuidor; otros sostenían que era el concedente de las mercancías; mientras que otros consideraban que a este contrato no podía establecerse una prestación característica. El Reglamento Roma I de la Unión Europea ha hecho importantes modificaciones en cuanto a la determinación de la ley aplicable a este contrato, pues ha establecido de manera rígida y directa, que a esta relación jurídica le sea aplicable la ley de la residencia habitual del distribuidor. El presente artículo pretende analizar si la determinación rígida de la ley aplicable al contrato de distribución en el Reglamento de la Unión Europea Roma I logra solucionar los problemas interpretativos presentados en el Convenio de Roma de 1980, para otorgar seguridad jurídica mediante la previsibilidad de la ley aplicable al contrato internacional.*

**Palabras clave:** *Unión Europea; Derecho Internacional Privado; Reglamento Roma I sobre la ley aplicable a las obligaciones contractuales; contrato de distribución; Convenio de Roma*

## SUMMARY

INTRODUCTION.- I. THE INTERNATIONAL DISTRIBUTION CONTRACT.- *A. Introductory aspects.- B. Conceptual definition.*- II. APPLICABLE LAW TO THE DISTRIBUTION CONTRACT IN THE ABSENCE OF CHOICE BY THE PARTIES IN THE EUROPEAN UNION.- *A. The applicable law to the distribution contract in the Rome Convention of 1980.- 1. The distribution contract had a characteristic performer.- 2. The Distribution Contract did not have a defined characteristic performance.- B. The applicable law to the distribution contract in the Rome I Regulation.- 1. Introductory aspects.- 2. Qualification of the distribution contract.- 3. Juridical relations covered by Art. 4.1.f of the Rome I Regulation.- CONCLUSIONS.- BIBLIOGRAPHY.*

## INTRODUCTION

The European Union has considered it necessary to grant legal certainty to international contracts, to have uniform conflict of law rules with a high level of predictability regarding contractual obligations. For this reason, the Rome Convention was born in 1980, on the applicable law to contractual obligations,<sup>1</sup> causing great revolt with regards to the determination of the *lex contractus*, since it considerably diminished the *shopping forum*. With the passing of time it was necessary to transform the Rome Convention of 1980 into a proper norm of the European Union (in the strict sense), because keeping it as a convention produced multiple formal difficulties, and it was crucial to adjust some dispositions from the convention which presented implementation difficulties. The Rome I Regulation was born with this objective and it came into force on December 17, 2009.<sup>2</sup>

The Rome I Regulation updated several of the dispositions on the Rome Convention, however, the most radical change took place on article 4<sup>3</sup> over the applicable law to the contract

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- 1 European Union, Convention on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980. Consolidated version CF 498Y0126 (03). Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41998A0126\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41998A0126(02)&from=EN)
  - 2 European Union, Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I). Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2008:177:TOC>
  - 3 Article 4. "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. 3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated. 4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place

in the absence of party choice, and was, without a doubt, the article which presented more drawback during the twenty years that the convention was implemented. Article 4 of the Rome I Regulation paid special attention to the problems presented by the identification of the characteristic performance theory, since there was a strong doctrinal debate over which of the contractual parties would execute it, or if those contracts didn't have a specific characteristic performance. To resolve it, article 4 from the Rome I Regulation established in a rigid and inflexible way the applicable law to eight international contracts, the distribution contract among them (Art. 4.1.f).<sup>4</sup> This way, it went from being an open norm, to a disposition that establishes a direct and agile way for the applicable way to eight international contracts.

The present article intends to deepen the analysis of the applicable law to the international contract of distribution from the European Union. For the rigid norms related to Art. 4.1 of the Rome I Regulation,<sup>5</sup> the distribution contract was one of the ones which generated more debate in the implementation of the Rome Convention, producing different jurisprudence in the member Estates.<sup>6</sup> The main objective of this investigation is to determine if the establishing of a rigid conflict norm, which allows the parties in the contract to know *ex-ante* the applicable

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of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods. 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.”

European Union, Convention on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980. Consolidated version CF 498Y0126 (03). Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41998A0126\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41998A0126(02)&from=EN)

- 4 Article 4.1.f. “... a distribution contract shall be governed by the law of the country where the distributor has his habitual residence.” European Union, Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Article 4.1.f. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2008:177:TOC>
- 5 Article 4.1 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
- 6 Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I). December 15, 2005. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF>

law to the international contract of distribution, might solve in an efficient way the problems presented by the implementation of the article 4 of the Rome Convention, and grant the necessary predictability and certainty of result to reach legal certainty in the judicial space of the European Union.

Given the own characteristics of this contract, and added to the complex services by the parties, they provoked the identification of the characteristic performance to be strongly debated by the legal doctrine and interpreted heterogeneously by the different tribunals in the application of Art. 4 of the Rome Convention of 1980, and it is timely to take on its study from the conceptual point of view, to later start an analysis from a conflict of law optics. Accordingly, the study will start from a brief conceptual delimitation of the distribution contract as indispensable preamble to frame the sphere of the implementation of the Rome I Regulation, and after that it will analyze the applicable law to this figure of law under the Rome Convention of 1980, up to the important modifications included on Art. 4 of Rome I Regulation.

Lastly, the knowledge of the uniform legal norms from the European Union becomes essential for every Colombian entrepreneur who wishes to have commercial exchanges with any country from the European Union, and especially in case of a legal process under jurisdiction of any of the member Estates, the rules of the Rome I Regulation will be applicable to identify the law to this international contract. Therefore, the businessmen, as well as Colombian jurists must be aware of the risks of litigating abroad particularly because their contract might be regulated by a legal norm of the European Union, much more now that there is a Free Trade Agreement.<sup>7</sup>

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7 European Union and Colombia and Peru, Trade Agreement between the European Union and Colombia and Peru, 2012. Available at: <http://trade.ec.europa.eu/doclib/press/index.cfm?id=691>

## I. THE INTERNATIONAL DISTRIBUTION CONTRACT

### *A. Introductory aspects*

The figure of commercial distribution is an important sector of the world economy which contributes to the generation of work, business growth, but above all, favors the integration of the community by bringing closer services and goods to the consumers. The manufacturers of merchandises and creators of the services provide a substantial element of global commerce since they are the main engine which pushes economic growth in nations. However, the sector of the distribution on its different modalities plays a decisive role in this world economic gearing, through the diffusion of the goods and services in diverse markets, contributing that way to the increase of commercial interchanges. An agile and efficient commercial interchange with the capacity to get a more globalized market, hugely benefits the community, not only because it allows the population to have access to a great variety of services and goods, granting them better options to satisfy their needs, but also because it generates a wide commercial competition, which redounds in better quality products, fair prices and the inclusion of complementary services.

Commercial distribution has as main objective to establish a bridge between the production of the goods and services and the community as the final consumer of the products. Its mission is to surpass the existent barriers between these two sectors of the economy, which produces the introduction of an added value to the products and/or services, since it shortens the distances between the production process and the final consuming of it, significantly decreasing the product supplying times and allows for the adaptation of the merchandise to the needs of the clients. Commercial distribution encloses a huge multiplicity of processes done by the producer and the distributor to accomplish both main objectives: getting an economic benefit from the commercial operation and effectively satisfying their clients' needs.

The tasks of distribution of services and products can be advanced in two ways. The first one is completed directly by the producer of the goods and/or services, and the second one, via the incorporation of intermediaries. Currently, it is more common for the distribution process to be handled by third parties, independent of the production process. This situation has led to a specialization in the proving of this service until it has become a way of commercial collaboration indispensable for national and international commerce.

Distribution contracts make up an essential element of international commerce, as the ideal means to overcome the geographic and economic difficulties that are expected for accessing a foreign market.<sup>8</sup> There are a lot of problems that a businessman who intends to access an international market must face; some of them are strictly economic and others are of a legal nature. Because of this, when a producer of merchandise makes the decision to commercialize its products abroad does not have a lot of options. One of these options is to fabricate or distribute its products overseas using a filial. This is an interesting choice for the businessman, since he can maintain control of the operation through the entire process, and this way, effectively protect the performance of his brand. However, it will inevitably bring high execution prices, which is why small and medium-size companies are hardly ever able to consider it.

The second possibility is to establish a commercial distribution network using independent businesses located in the countries where they aim to introduce the products.<sup>9</sup> This commercialization modality represents significant advantages to the manufacturer, since it allows him to access markets he would have hardly accesses autonomously and considerably lowers the

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8 Manuel Antonio Domínguez-García, *Los contratos de distribución: Agencia mercantil y distribución comercial*, en *Contratos internacionales*, 1275-1384 (Alfonso Luis Calvo-Caravaca & Luis Fernández de la Gándara, dirs., Pilar Blanco-Morales Limones, coord., Tecnos, Madrid, 1997).

9 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

prices of the distributions operation since there is an enormous difficulty for the manufacturer company at the time of financing and organizing an independent net of sales abroad.<sup>10</sup> Likewise, with the independent commercial distribution, the risks of the operation are shared with the distributing companies, since they are responsible for the transportation, storage, and collection of the payment of the merchandise by the end clients. Additionally, with the use of an independent distribution network, the speed and frequency of the deliveries to the end user are improved.

The vehicle to pinpoint these type of international commercial relationships is the distribution contract. Thought it, the parties elevate to the legal world a commercial agreement which is beneficiary for both parties, looking for the legal certainty that this kind of commercial relationships needs. For a distribution contract to be considered at an international sphere, it is only necessary for it to have within it some element with a supra-national character, regardless of its class or intensity. The most common and relevant international factor presented in these types of contracts is the task of distributing the merchandise.<sup>11</sup> This is since its reason for being is that of introducing the products in the foreign market in an indirect way.<sup>12</sup> Effectively, the objective of this contract is the distribution and resale of the products in a determined territory, with an exclusively character, or without it. However, the tasks of the distribution company do not exclusive pertain to reselling the merchandise, but also to lend restoration services, selling of spare parts and other multiple activities which complement the distribution labors.<sup>13</sup>

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10 Modesto Bescós-Torres, *Contratos internacionales*, 72 (Instituto Español de Comercio Exterior, ICEX, Madrid, 1993).

11 Gaetano Iorio-Fiorelli, *Contratti internazionali di distribuzione: problemi di legge applicabile e di giurisdizione*, 43 *Rivista di diritto internazionale privato e processuale*, 3, 633-656 (2007).

12 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

13 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

Like the commercial distribution contract, a complex web of reciprocal services between the parties and from that the different contractual modalities are born, and it's necessary to define the legal figure in the study, in order to establish the implementation of the norm of Art. 4.1 of the Rome I Regulation.

### *B. Conceptual definition*

The conceptual definition of the distribution contract is not completely demarcated and currently presents a lot of difficulties, mainly because this contract does not have a complete legal tipicity.<sup>14</sup> For that reason, you may have to go to the doctrine and jurisprudence in able to build a definition on its basis of this contractual figure; however, the definitions of the contracts established on the Art. 4.1 of the Rome I Regulation must not be extracted from the internal law, but also to attend interpretative criteria from the Rome I Regulation itself.<sup>15</sup>

As Antonia Durán-Ayago says, the expression “distribution contracts” is a very wide concept that gathers different legal figures in the contractual sphere with common characteristics. Two tendencies per the wide or narrow vision of the concept prevail in today's legal doctrine. In the first place, you can find a wide concept of the distribution contract, on it are included all those contracts with which “the direct distribution by strange organs, as well as the indirect one or symbiotic is contemplated.” In this way, the contract of distribution includes the contracts of commission, agency, mediation, brand license and supply.<sup>16</sup> A second interpretation sustains a restrictive distribution contract, where only those legal relationships in which the distributor operates on an independent and autonomous way is included.

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14 Cristina Pellisé de Urquiza, *Los contratos de distribución comercial. Problemas de Derecho Internacional privado de la Comunidad Europea*, 28 (Bosch, Barcelona, 1999).

15 Luis Ignacio Alonso-Martínez, *Criterios jurisprudenciales sobre la indemnización por clientela en los contratos de agencia y distribución*, in *Treinta años de integración europea*, 553-565 (Carlos Francisco Molina del Pozo, dir., Juruá Editorial, Lisboa, 2009).

16 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

This include the contracts of mercantile concession, authorized or selective distribution and the franchise.<sup>17</sup> The restricted concept of the distribution contract perfectly frames Art. 4 Rome I Regulation, and which is followed by the jurisprudence of the Rome Convention, for which it must prevail.

To continue, it's important to highlight that the distribution contract, despite having characteristic elements of other contracts like the purchasing of merchandise or supply, at any moment can be assimilated to these contractual types.<sup>18</sup> This is because the distribution contract does not fit it with what the Vienna Convention on the International Sale of Goods 1980 (CISG) says about international purchase agreement since the obligations of the parties in that contract cannot be executed in the distribution contract. It is also not equal to the supply contract contemplated on the Art. 3 Vienna Convention<sup>19</sup> about international purchase of merchandize, or that of simple selling of goods from whole, since that distribution contract is characterized by granting the distributor a position of privilege, usually by the concession of an exclusive territory, a situation that is not the same for a businessman who only sells and repurchases products on his own account.<sup>20</sup> This allows to understand the

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17 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

18 Some judgments of the Spanish Supreme Court considered the distribution agreement as a mixed contract. Spain, Sentencia del Tribunal Supremo, STS, November 16, 2000. Spain, Sentencia del Tribunal Supremo, STS, May 17, 1999. Spain, Sentencia del Tribunal Supremo, STS, November 14, 1970. Spain, Sentencia del Tribunal Supremo, STS, October 29, 1955. Supreme Court of Spain has interpreted the distribution agreement as an exclusive supply contract: Spain, Sentencia del Tribunal Supremo, STS, October 4, 1999. Spain, Sentencia del Tribunal Supremo, STS, December 17, 1973. Manuel Broseta-Pont & Fernando Martínez-Sanz, *Manual de Derecho mercantil, II Contratos mercantiles, Derecho de los títulos-valores, Derecho concursal*, 126 (Tecnos, Madrid, 2011).

19 Article 3. (1) Contracts for the supply of goods to be manufactured or produced are to be considered sales unless the party who orders the goods undertakes to supply a substantial part of the materials necessary for such manufacture or production. (2) This Convention does not apply to contracts in which the preponderant part of the obligations of the party who furnishes the goods consists in the supply of labour or other services." United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) (CISG). Adopted 11 April 1980. Entered into force: 1 January 1988, Article 3. Available at: <http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf>

20 Gaetano Iorio-Fiorelli, *Contratti internazionali di distribuzione: problemi di legge applicabile e di giurisdizione*, 43 *Rivista di diritto internazionale privato e processuale*, 3, 633-656 (2007).

distribution contract, a contract with “self-sustainability” and for that reason it requires an independent legal treatment to those of similar figures.<sup>21</sup>

In view of the above, distribution contracts can be defined as mercantile contracts with a determined or undetermined duration, or through which a business distributor of the intermediation, is obliged in an autonomous and independent way to promote and commercialize products or services, including the distribution, sale and post-sale of a defined commercial sector, under the precise guidelines given by the grantor manufacturer with the objective of obtaining a profit from the commercialization operation performed.<sup>22</sup>

## II. APPLICABLE LAW TO THE DISTRIBUTION CONTRACT IN THE ABSENCE OF CHOICE BY THE PARTIES IN THE EUROPEAN UNION

### *A. The applicable law to the distribution contract in the Rome Convention of 1980*

Article 4 of the Rome Convention determined the applicable law to the contract in the absence of choice by the parties using the principle of the closest connection.<sup>23</sup> This principle sought the law of the country more closely connected with the contract. However, as the principle of the closest connection was difficult to pinpoint in the case, Art. 4 of the Rome Convention included a presumption which aimed to define such principle, giving a certain rigidity to the election of the applicable law. In this way, Art. 4 of the Rome Convention assumed the contract had the closest bonds with the country in which the party was to execute the

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21 Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 36 (Universidad Santiago de Compostela, Santiago de Compostela, 2000).

22 Manuel Antonio Domínguez-García, *Los contratos de distribución: Agencia mercantil y distribución comercial*, en *Contratos internacionales*, 1275-1384 (Alfonso Luis Calvo-Caravaca & Luis Fernández de la Gándara, dirs., Pilar Blanco-Morales Limones, coord., Tecnos, Madrid, 1997). Spain, Sentencia del Tribunal Supremo, STS, 990/1995, November 8, 1995.

23 Article 4 of Convention on the Law Applicable to Contractual Obligations Opened for Signature in Rome on 19 June 1980. Consolidated version CF 498Y0126 (03). Available at: [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41998A0126\(02\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:41998A0126(02)&from=EN)

characteristic performance had its habitual country of residence. Therefore, now of defining the applicable law, the judge, via the Art. 4 of the Rome Convention, should in first place identify the characteristic performance in the contract in question, and later determine the party responsible for performing such service, and finally verify the habitual residence of the characteristic feature executioner so that is law rules the contract.

The judicial application of this preconception did not present special difficulty in contracts where there was a simple exchange of goods of services for money, like in the purchasing of merchandise since it was easy to identify that the non-monetary obligation was the one which characterized the contract, in this case, the characteristic provider of the service was the seller. However, many of these international contracts do not fulfill this simple exchange of goods and/or services for money, but they perform an arbor of reciprocal services between the parties, a situation which difficulties the determining of the characteristic performance provider, as a previous step to establish the applicable law to the international contract through the Rome Convention.

The distribution contract made part of this specific group of contracts where the “heterogeneity of the services” performed by the contractual parties provided great difficulty for the court to determine which party performed the characteristic performance of the contract.<sup>24</sup> For this reason, the identification of the applicable law to the distribution contract through the Rome Convention sustained a wide and strong doctrinal debate over the implementation of the characteristic performance theory.<sup>25</sup> However, it must be highlighted that this was not an easy task. In the first place, because establishing the center of gravity of the distribution contract to determine on which of the parties the characteristic performance falls, was a gigantic chore, since

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24 Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 71 (Universidad Santiago de Compostela, Santiago de Compostela, 2000).

25 Marie-Elodie Ancel, *The Rome I Regulation and Distribution Contracts*, in *Yearbook of Private International Law*, Volume X, 221-231, 222 (Andrea Bonomi & Paul Volken, eds., Sellier, European Law Publishers & Swiss Institute of Comparative Law, ISDC, of Lausanne, München, 2008).

the parties on the contract carried a multiplicity of obligations, all of them with great importance for the contractual objective, and although there are some basic features, some are simply not clearly defined. Another motive which contributed to the difficulty of applying of the characteristic performance in this contract was the fact that some tribunals had their decisions influenced by their jurisdiction parameters. And finally, another decisive factor was the active definition of the theory of the characteristic performance, which presented special difficulty in these type of contracts.<sup>26</sup>

As indicated by the foregoing, two were the main interpretative tendencies with regards to the application of the characteristic performance theory in the distribution contract. The first one understood that a distribution contract did have the characteristic performance; however, there was no unanimity on which parts of the contract was the one executing the function which characterized the contractual relation, since a fragment considered that the characteristic executioner was the grantor, while another sector thought that the characteristic performance was executed by the distributor. The second tendency considered that the distribution contract didn't have a characteristic provider, for which Art. 4.5 of the Rome Convention as closing clause, so that the principle of the closest bonds is used, and established as the law of the contract. The study of each one of them will be undertaken.

#### 1. The distribution contract had a characteristic performer

**a. The characteristic performance executioner was the grantor.** Those who defended this thesis proposed that using Art. 4.2 of the Rome Convention it could be affirmed in the first place, that the distribution contract had a characteristic performance. The

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26 Marie-Elodie Ancel, *The Rome I Regulation and Distribution Contracts*, in *Yearbook of Private International Law*, Volume X, 221-231, 223 (Andrea Bonomi & Paul Volken, eds., Sellier, European Law Publishers & Swiss Institute of Comparative Law, ISDC, of Lausanne, München, 2008).

second term, they manifested that the characteristic performance in this contract was the one executed by the grantor.<sup>27</sup> There were many arguments which admitted that the characteristic performance in the distribution contract was done by the manufacturer or the grantor. The main ones were as follows: in first place, it was understood that the grantor was the characteristic performer addressing the objective persecuted by the contract, since the goal of the contractual relation was the distribution of goods, without the manufacturing part or the delivery of the merchandise, there could not be such distributions tasks.<sup>28</sup> For this reason, the function of the grantor constituted in the essence of the legal relationship. Likewise, the grantor was who took the initiative to organize the distribution network, and who signed the contracts to define it. Therefore, the law of habitual residence of such contractual party should be the law applicable to the contract. It was also considered that the grantor executed the most complex functions of the contractual relation, since they went further than simply handing over the merchandizes, because many of them were aimed to proportion formation regarding the handling of the merchandize, its advertising, the brand management and maybe the most important one: granting territorial protection.<sup>29</sup>

By establishing that the characteristic performance of the distribution contract fell on the grantor, the legal certainty and foreseeability of the applicable law was being advocated, since in this way all the distribution contracts concluded by the grantor were regulated by a single Estate law, that one of the habitual residence on the grantor. It would not matter then that there was a multiplicity of contracts between the same parties, or that the grantor had an extensive network of different distributors in

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27 Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

28 Jonathan Hill & Adeline Chong, *International Commercial Disputes*, 552 (4<sup>th</sup> ed., Hart Publishing, Oxford, 2010).

29 Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 81 (Universidad Santiago de Compostela, Santiago de Compostela, 2000).

diverse estates, since the law would regulate all those contracts, and if there were to be no selection by the parties, it would always be the same, the habitual country of residence of the grantor or the manufacturer of the merchandize. Ultimately, with the law of habitual residence of the grantor or manufacturer, the problem of the identification of the applicable law would be eliminated when the establishing of the distributor was “undetermined”, “unstable” or “unknown”.<sup>30</sup>

The application of the law of habitual residence of the grantor was the thesis sustained by the courts in France, Italy and in a lesser manner by England.<sup>31</sup> The legal position assumed by the British court in *Print Concept GmbH v G.E.W. (EC) Limited*, shows the main argument which backed the decision, that the characteristic lender of the distribution contract was the manufacturer-grantor.<sup>32</sup> It was a litigation about an exclusive distribution contract between an English manufacturer and a German distributing company. Such contract had been signed to introduce the British manufacturer products in all of Europe’s German speaking countries. The legal position of the German distributor admitted that the characteristic performance of the contract was the distribution of the merchandize, and therefore the German law should rule the contract. On the other hand, the British manufacturer considered that the manufacturing of the merchandize and the delivery of the merchandize constituted the characteristic performance of the distribution contract. Finally, the British tribunal granted reason to the manufacturer of the merchandizes, arguing that he was the one who executed the characteristic performance of the contract, in the following terms: “As it seems to me, the ‘real meat’ of the arrangement of that date, to adopt the phrase of Messrs Forsyth and Moser

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30 Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

31 Thomas Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar: Rom I-VO, Rom II-VO*, 217 (Sellier, European Law Publishers, München, 2011).

32 England and Wales Court of Appeal, Civil Division, *Print Concept GmbH v. G.E.W. (EC) Limited* [2001], EWCA CIV 352, 2 March 2001, 2001 WL 239668. Available at: <http://ectil.org/etl/getdoc/86e5f122-5173-45fa-bcf4-a52b9356dee2/Print-Concept-email.aspx>

in their useful article entitled *The Impact of the Applicable Law of Contract on the Law of Jurisdiction under the European Conventions* (1996) 45 *ICLQ* 190,<sup>33</sup> was the supply of the products rather than the penetration of the German market. No doubt they were both important; but the penetration of the German market could not even take place without the supply and purchase of the drying systems...<sup>34</sup>

As can be appreciated, the main argument that the tribunal exposed is that there could not be distribution without merchandise to be distributed, and for that reason, it considered that the obligation to supply the merchandise had prevalence over the distribution obligation.

In the same way, the sentence *Ammann-Yanmar v. Swaans BVA* sustained that the characteristic performance was done by the supplier of the merchandize: “concerning distribution contracts, the obligation to provide products is the characteristic obligation.” It was a French company manufacturer of construction machines which signed an exclusive distribution contract of its products with a Belgium company to distribute their products in that country. The French company decided to terminate the contract, reason why the Belgium Company sued for the payment of damages for nonfulfillment of a clause which established the obligation of informing of the termination a year prior to the event. The court established that the characteristic performance was performed by the French company, and applied that law to settle the dispute.<sup>35</sup>

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33 Christopher Forsyth & Philip Moser, *The Impact of the Applicable Law of Contract on the Law of Jurisdiction under the European Conventions*, 45 *International & Comparative Law Quarterly*, *ICLQ*, 1, 190-197 (1996).

34 England and Wales Court of Appeal, Civil Division, *Print Concept GmbH v. G.E.W. (EC) Limited* [2001], EWCA CIV 352, 2 March 2001, 2001 WL 239668. Available at: <http://ectil.org/etl/getdoc/86e5f122-5173-45fa-bcf4-a52b9356dee2/Print-Concept-email.aspx>

35 France, Cour de cassation, Chambre civile I, Cass. Civ. I, *Ammann-Yanmar v. Swaans BVA*, November 25 2003. This was also determined by the following sentences: France, Cour de cassation, Chambre civile I, Cass. Civ. I, *Ammann-Yanmar v. Swaans BVA*, November 25 2003. France, Cour d'Appel de Paris, CA Paris, *Case Orthogese v. Stratec Medical*, February 20, 2008. Italy, Corte di cassazione, September 14 1999, *Imperial Bathroom Company Plc. v. Sanitari Pozzi Spa, Optelec v. Midronics*.

**b. The distributor was responsible for the execution of the characteristic performance.** A second tendency backed by doctrine and jurisprudence affirmed that the distribution contract did have a characteristic performance, but such characteristic performance was under the responsibility of the distributor.<sup>36</sup> It considered that the distribution obligations (promotion and resale of the merchandise) constituted a “more functional and significant economic activity” within the contractual relation.<sup>37</sup> Being that the case, and per Art. 4.2 of the Rome Convention, the law of the habitual residence or central administration of the distributing Company had to regulate the contract. Several reasons supported this theory:

**- Reasons of a Functional nature:** The services done in the execution of the distribution contract are aimed to the fulfillment of the main objective: the distribution of the goods. The distributor is obliged to promote and commercialize the merchandise handed over by the grantor, functions which without a doubt would benefit both contractual parties, since the distributor obtains earnings through the resale of the products, while the grantor is benefited by a stable distribution network of its merchandise.<sup>38</sup> With this point of view, the fundamental role of the interme-

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36 With this view can be seen: “...considérer comme applicable dans les contrats de distribution commerciale la loi de l'établissement du distributeur.” Paul Lagarde, *Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980*, 80 *Revue critique de droit international privé*, 2, 287-340, 309 (1991). “Therefore it still makes sense to argue that the law of the location of the distributor should be applied.” Dieter Martiny, *The Applicable Law to Contracts in the Absence of Choice (Art. 4 Rome Convention) Old Problems and New Dilemmas*, in *Estudios sobre contratación Internacional*, 11-26 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006). “El Art. 4.2 Convenio de Roma nos lleva a la aplicación de la ley del lugar donde el distribuidor-concesionario, como elemento personal del contrato que realiza la prestación característica, tiene su establecimiento principal”. Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 99 (Universidad Santiago de Compostela, Santiago de Compostela, 2000). Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006). “La prestación característica en los contratos de distribución comercial debe considerarse constituida por la actividad que el distribuidor-colaborador desarrolla en ejecución del contrato”. Roberto Baldi, *El derecho de la distribución comercial en la Europa comunitaria*, 1194 (Editorial Revista de Derecho Privado, Padova, 1987).

37 Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 75 (Universidad Santiago de Compostela, Santiago de Compostela, 2000).

38 Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 77 (Universidad Santiago de Compostela, Santiago de Compostela, 2000).

diaries in transnational commerce was being recognized.<sup>39</sup> In sum, it was considered that the different obligations done by the distributor (maintenance of the sales network, merchandise deposit, enough product *stock*, technical sale and post-sale service, among others) granted him the qualification of active subject and responsible for the characteristic performance in the distribution contract.<sup>40</sup>

- **Reasons of a conflict of law nature:** Applying the law of the distributor represented multiple advantages of a conflictual nature, since it was a perfectible foreseeable connection by the parties of the contract, which allowed them to guide their commercial behavior towards that regulation.<sup>41</sup>

In the same way, it was considered that the headquarters of the distributor was the “center of gravity” of the contract, which was affirmed keeping in mind the economic objective of the contract.<sup>42</sup>

This interpretation was sustained in multiple sentences by judges in the member States of the Rome Convention of 1980. The sentence of the Provincial Audience of Barcelona was one of them.<sup>43</sup> It was regarding an exclusive distribution contract between a German company and a Spanish distributor where the jurisdiction of the Spanish tribunals was being argued. The judge had to establish the place of fulfillment of the obligation which served as the basis for the lawsuit, for which it used the Rome Convention. The judge analyzed Art. 4.2 of the Rome Convention to determine which of the parties was responsible for the characteristic performance of the contract. In accordance

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39 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

40 Javier Maseda-Rodríguez, *Aspectos internacionales de la concesión mercantil*, 78 (Universidad Santiago de Compostela, Santiago de Compostela, 2000).

41 Antonia Durán-Ayago, *Contratos internacionales de distribución*, in *Curso de contratación internacional*, 413-440 (Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, dirs., Editorial Colex, Madrid, 2006).

42 Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

43 Spain, Sentencia de la Audiencia Provincial, SAP, Barcelona, 28 de abril de 2000.

with this, it established that the characteristic performance was carried out by the distributor, and since the distributor had a habitual residence in Spain, the applicable law to the contract was the Spanish law. The same posture can be seen in the sentence *WS Parfums v. SAS Parfums Nina Ricci*. On a dispute over an exclusive distribution contract between a French Company (manufacturer) and an Austrian Company (distributor), the tribunal understood that the characteristic performance was carried out by the distributor of the merchandize, and for this reason, applied Austrian law to dissolve the conflict over the termination of the exclusive distribution contract.<sup>44</sup>

## 2. The Distribution Contract did not have a defined characteristic performance

This doctrinal vision understood the distribution contract did not have a defined characteristic performance. The main argument consisted that in consonance with the official report of the Rome Convention, where the characteristic obligation of the contract was non-pecuniary, it must be concluded that the distribution contract does not fit this scheme of simple interchange of services or goods for money, since it presents a structure of reciprocal obligations of a complex character, and for that reason, Art. 4.2 of the Rome Convention was “not adapted to its needs.”<sup>45</sup> On another hand, if the obligations executed by the parties are analyzed, as an indication to establish which of the parties carried out the more complex obligations and for that matter the ones who characterize the contract, that purpose must be rejected, since in the distribution contract both parties carry

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44 France, Cour d'Appel de Paris, CA Paris, *WS Parfums v. SAS Parfums Nina Ricci*, September 30 2004. Alexis Mourre & Yasmine Lahlou, *Chronicle of Private International Law Applied to Business*, 4 *International Business Law Journal*, *Revue de Droit des affaires internationales*, 509-534 (2005). In the same way, Greece, Multi-member Court of First Instance of Piraeus, *Elinga BV v. British Wool International*.

45 Cristina Pellisé de Urquiza, *Los contratos de distribución comercial. Problemas de Derecho Internacional privado de la Comunidad Europea*, 201 (Bosch, Barcelona, 1999).

out a diversity of obligations, all of them with great complexity and under an equality of conditions.<sup>46</sup>

For Javier Carrascosa-González, the problem of the characteristic performance in the distribution contract addressed the struggle between sympathizers to apply the distributor law, *versus*, those sympathizers of applying the law of the grantor, including among them the tribunals themselves. And although the parties presented reasons of value to defend one or the other interpretation, what is true is that the distribution contract in the Rome Convention lacked a characteristic performance.<sup>47</sup> This doctrinal current which recognized that the distribution contract did not have a characteristic performance, sustained two positions by the time of establishing the applicable law which would regulate the distribution contract, we will analyze this bellow.

**a. New Presumption based on Art. 4.5 of the Rome Convention.**

This first position acknowledged that most of the jurisprudence was decanted to establish the Law of the residence of the distributor, as the law that regulated the contract. In the same way, it observed that the tendency to apply the law of the place where the main activity of contract took place was also used. These two aspects allowed to reach the conclusion that there was a marked tendency to presume that the distribution contract had close bonds with the applicable law in the country where the distributor was established.

In conclusion, since it was impossible to apply the presumption in Art. 4.2 of the Rome Convention to the distribution contracts, and there was a strong tendency to apply the law of the headquarters of the distributor, they should refer to Art. 4.5 and form a new presumption which indicated the closest bonds of the distribution contract and they were had under the Law

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46 Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 700 (12<sup>a</sup> ed., Comares, Granada, 2011).

47 Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

of the Estate where the headquarters of the distributor where, and such law would rule the contract.<sup>48</sup>

**b. Determination to the Law Applicable case by case.** This doctrinal position manifested that since the presumption established on Art. 4.2 of the Rome Convention was inoperative since a specific provider of the characteristic performance could not be determined, and that there could not be presumptions built outside what was established on Art. 4 of the Rome Convention, the applicable law was to be determined by the contract through Art. 4.5 of the Rome Convention, but not as a presumption, but identifying case by case the law of the country with which the contract had “closest connections,” since the result of the application of this law would only depend on the own circumstances of each particular contract.<sup>49</sup>

In conclusion, under the juridical application of the Rome Convention, the distribution contract presented serious problems to establish the applicable law in absence of choice by the parties, and such circumstance provoked legal uncertainty in the European Union since the contractors could not foresee the law that would regulate their international distribution contract. To potentiate legal certainty through the foreseeability of the law applicable to the contract, Rome I Regulation, has incorporated this contractual type in the list of eight contracts in which it's established as the applicable law in a rigid matter.

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48 Cristina Pellisé de Urquiza, *Los contratos de distribución comercial. Problemas de Derecho Internacional privado de la Comunidad Europea*, 206 (Bosch, Barcelona, 1999). Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

49 Whit this view, Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005). Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 700 (12ª ed., Comares, Granada, 2011).

## *B. The applicable law to the distribution contract in the Rome I Regulation*

### 1. Introductory aspects

With the entry into force of the Rome I Regulation the discussion is settled about the way to establish the applicable law to the international distribution contract, it designates in a rigid manner the habitual residence law of the “distributor,” like the norm that must rule the distribution contract.

The rigid designation of the applicable law to the distribution contract, it’s a good response to the needs of certainty and foreseeability of the law applicable to this contract, and it’s a recognition that this juridical relationship must have a “different conflictual difference,” a situation that —as can be seen— was not the same under the Rome Convention.<sup>50</sup> Likewise, the introduction of this rigid norm protects the interests of the distributor without prejudice to the interests of the supplier, but the most important thing, like Hugues Kenfack highlights, is that this solution “provides legal certainty.”<sup>51</sup>

There are several reasons which motivated the legislator from the European Union to establish a rigid form of the applicable law to the distribution contract: in the first place, the legal certainty of the European Union shows up. A rigid point of connection which is previously known by the parts of the contract and by the courts, it aids in bringing more interpretative uniformity on behalf of the judges of the member Estates, and this undoubtedly potentiate the legal certainty of the European Union. Additionally, it is considered that the Law of the distributor is the closest one to the juridical relation, and for that reason, the

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50 Gaetano Iorio-Fiorelli, *Contratti internazionali di distribuzione: problemi di legge applicabile e di giurisdizione*, 43 *Rivista di diritto internazionale privato e processuale*, 3, 633-656 (2007). Hilda Aguilar-Grieder, *Los contratos internacionales de distribución comercial en el Reglamento Roma I*, 1 *Cuadernos de Derecho Transnacional*, 1, 19-35, 33 (2009). Available at: <http://e-revistas.uc3m.es/index.php/CDT/article/view/67/65>

51 Hugues Kenfack, *Le règlement (CE) n° 593/2008 du 17 juin 2008 sur la loi applicable aux obligations contractuelles ('Rome I'), navire stable aux instruments efficaces de navigation?*, 1 *Journal du droit international, JDI (Clunet)*, 1, 3-39, 23 (2009).

exclusion of that law via the exception clause could not easily prosper.<sup>52</sup> Therefore, the rigid designation of the law of the habitual residence of the distributor, strengthens the foreseeability of the applicable law to this contract, and solves the different problems presented in the application of the presumption of Art. 4 of the Rome Convention.

Another compelling reason was, without a doubt, the act of protecting the weak party in the contractual relation, the distributor.<sup>53</sup> The legislator from the European Union has understood that the distributor holds a weak negotiation position in these kind of contracts, this is acknowledged in the Rome I Regulation proposal,<sup>54</sup> for that reason, they have wanted to protect him establishing that the law in his habitual residence regulates the contract. However, and although the law of his habitual residence “is not always the one which protects the distributor the most,” if it’s the closest law, and for that matter, that which is most familiar to him.<sup>55</sup>

However, the fact of favoring the distributor with the argument that he must be protected for being the weak party in the contract does not seem very fitting. In fact, both the grantor of the merchandize, as the distributor assume the risks in the transnational operation, and a true contractual misbalance which must be compensated with the designation of the law of habitual residence of one of the parties, has not been establis-

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52 Marie-Elodie Ancel, *The Rome I Regulation and Distribution Contracts*, in *Yearbook of Private International Law*, Volume X, 221-231, 227 (Andrea Bonomi & Paul Volken, eds., Sellier, European Law Publishers & Swiss Institute of Comparative Law, ISDC, of Lausanne, München, 2008).

53 Ulrich Magnus, *Article 4 Rome I Regulation: The Applicable Law in the Absence of Choice*, in *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe*, 27-50 (Franco Ferrari & Stefan Leible, eds., Sellier, European Law Publishers, Munich, 2009).

54 Commission of the European Communities, Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I). December 15, 2005. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF>

55 Marie-Elodie Ancel, *The Rome I Regulation and Distribution Contracts*, in *Yearbook of Private International Law*, Volume X, 221-231, 226 (Andrea Bonomi & Paul Volken, eds., Sellier, European Law Publishers & Swiss Institute of Comparative Law, ISDC, of Lausanne, München, 2008).

hed.<sup>56</sup> Much less if you keep in mind “the economic powers of some of the distributors.”<sup>57</sup>

The certainty of a result is another one of the factors which motivated the rigid designation of the applicable law to the distribution contract. Taking into account consideration 17 of the Rome I Regulation admits that the distribution contract is a contract of provision of services, and in that measure, as expressed Alfonso Luis Calvo-Caravaca and Javier Carrascosa-González, if the distribution contract had not been regulated in an autonomous way, the fixed rule on provision of services, Art. 4.1.b Rome I Regulation should be followed, and in that case, legal uncertainty would prevail, since some tribunals would estimate that the provider of the service would be the grantor, while others might think it was the distributor. For that reason, and in an effort to have certainty in the result, the legislator of the European Union has established the rigid disposition for the distribution contracts.<sup>58</sup> None the less, some authors considered that the solution adopted by the legislator was “very arguable,” since in many cases the habitual residence of the distributor does not have a direct relation with the contractual agreement.<sup>59</sup>

## 2. Qualification of the distribution contract

The problem of the qualification of the contract of distribution under the Rome Convention did not represent any difficulty, mainly because the most important thing was to identify the “gravity center of the contract.” With the redaction of Art. 4.1 of the Rome I Regulation, including rigid dispositions for eight categories of contracts, it’s necessary to know which are the juri-

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56 With this opinion, Javier Carrascosa-González, *La ley aplicable a los contratos internacionales: el Reglamento Roma I*, 190 (Colex, Madrid, 2009).

57 Paul Lagarde, *Première partie - Doctrine et chroniques - Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)*, 95 *Revue critique de droit international privé*, 2, 331-349, 339 (2006).

58 Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 700 (12<sup>a</sup> ed., Comares, Granada, 2011).

59 Hélène Gaudemet-Tallon, *Le principe de proximité dans le Règlement Rome I*, 61 *Revue hellénique de droit international*, 189-203, 195 (2008).

dical relations that cover each one of these contractual types. The contractual types related on Art. 4.1 of the Rome I Regulation must be interpreted in an autonomous way, however, like Marie-Elodie Ancel says, “the juridical system of the European Union is not advanced or complex enough so it can bring answers in an anticipated manner.”<sup>60</sup> This allows to understand that the main problem that the applicable law designation to the distribution contract now faces will be its own qualification. However, it’s not a circumstance that has to worry the contracting parties very much, because the Justice Tribunal of the European Union has full competency to interpret the Rome I Regulation, and should it be required, it would establish the guidelines on the subject. However, and as its shown by the wide variety of sentences on the Rome Convention, the contracting parties prefer to frame their juridical relation in the three traditional types of the distribution contracts, which would not represent any sort of problem at the moment of grading the contract.

It’s important to remember that final part of the directive 17 of the Rome I Regulation: “...Although franchise contracts and distribution contracts are contracts of service, they are subject to specific norms.”<sup>61</sup> This directive is of vital importance because it reminds that despite the distribution contract is a contract of services, the legislator of the European Union has understood that there must be a precept that regulates the applicable law in an autonomous way, which allows to frame the juridical relations which constitute the distribution contract, to avoid coalification problems.

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60 Marie-Elodie Ancel, *The Rome I Regulation and Distribution Contracts*, in *Yearbook of Private International Law*, Volume X, 221-231, 227 (Andrea Bonomi & Paul Volken, eds., Sellier, European Law Publishers & Swiss Institute of Comparative Law, ISDC, of Lausanne, München, 2008).

61 European Union, Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), Article 17. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=OJ:L:2008:177:TOC>

### 3. Juridical relations covered by Art. 4.1.f of the Rome I Regulation

Despite the concept of the distribution contract being very extensive, in what regards to the Rome I Regulation has some very defined limits. In the first place it must be pointed out that Art. 4.1.f of the Rome I Regulation does not apply to agency, commission, brokerage and franchise contracts. The three first ones must be considered with relation to the Rome I Regulation as provision of service contracts Art. 4.1.b of the Rome I Regulation, and for the last one, although it makes part of the distribution contracts, there is a specific regulation in paragraph *e* of Art. 4.1. of the Rome I Regulation.<sup>62</sup> In keeping with the previous, the types of contracts regulated by Art. 4.1.f are the following:<sup>63</sup>

#### a. Distribution contracts or exclusive mercantile concession

The exclusivity agreement does not constitute a basic characteristic within the general contract of distribution, however, it's common that inside this contract a clause in this sense is incorporated. In that way, the distributor will be territorially and temporarily limited to develop the function of resale, and the supplier guarantees that neither him nor other distributors will operate in the place and time that has been determined.<sup>64</sup> For that reason, when the distribution contract contemplates one or two exclusivity clauses, it is denominated contract of exclusive distribution or concession. Through this contractual link, the manufacturer/grantor concedes a fractioning of its market in a designated zone, to be assigned to its distributors in a preferential way. The contract of exclusive distribution, since

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62 Thomas Rauscher, *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Kommentar: Rom I-VO, Rom II-VO*, 218 (Sellier, European Law Publishers, München, 2011).

63 Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 669 (12<sup>a</sup> ed., Comares, Granada, 2011).

64 Enrique Guardiola-Sacarrera, *Contratos de colaboración en el comercio internacional: intermediación, agencia, distribución, transferencia de tecnología, franquicia, joint-venture, agrupaciones*, 110 (Bosch, Barcelona, 1998).

it's an atypical contract (in Spanish law) does not have a legal definition, however, doctrine defines it in the following way: "a contract whereby a business man (dealer or distributor) obliges, in exchange of an offsetting, to promote on his own name and by his own account, the resale of the products of another businessman (manufacturer or grantor) in a determined territory, and the distributor is integrated in the network of the grantor."<sup>65</sup>

These agreements of exclusive distribution might violate the right to free competition, since they establish limitations in some of the contracting parties, and they avoid the participation of third parties. It is for that reason that the regulation of the European Union on *antitrust* law must be followed. Amongst the more important ones is the Regulation 2790/1999,<sup>66</sup> of Dec. 22 on the application of Art. 81.3 TCE<sup>67</sup> to specific categories according to vertical agreements and concerted practices and additionally Regulation 1400/2002<sup>68</sup> on distribution of automotive vehicles.<sup>69</sup>

#### b. Non-exclusive or selective mercantile distribution or concession contract

It's a contract through which the manufacturer, grantor obliges to sale the merchandise object of the contract, exclusively to distributors previously selected by him, without granting an exclusive and unique area of distribution. On its part, he commits to resale the merchandise whether it is to other retail sellers, or to the end consumers, following the instructions given by the

65 Manuel Broseta-Pont & Fernando Martínez-Sanz, *Manual de Derecho mercantil, II Contratos mercantiles, Derecho de los títulos-valores, Derecho concursal*, 128 (Tecnos, Madrid, 2011).

66 European Union, Regulation (EC) No 2790/1999, of 22 December 1999, on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices, *Official Journal of the European Communities*, 29 December 1999. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31999R2790&from=ES>

67 European Union, Treaty establishing the European Community, TEC, Consolidated versions of the Treaty on European Union and of the Treaty Establishing the European Community. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12002E/TXT&from=EN>

68 European Union, Regulation (EC) No 1400/2002 of 31 July 2002 on the application of Article 81(3) of the Treaty to categories of vertical agreements and concerted practices in the motor vehicle sector, 203 *Official Journal of the European Communities*, August 1 2002. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=URISERV:126098&from=EN>

69 Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 669 (12ª ed., Comares, Granada, 2011).

grantor.<sup>70</sup> The particularity of this distribution contract, lies in the fact that the manufacturer or grantor does not grant an exclusive geographical zone for the distributor to operate the market.<sup>71</sup>

c. Cinematographic license contract

Through this contract, the producer yields his exploitation rights to a “cinematographic distributor,” generally in an area limited by territory and for a temporary period. Congruent with Art. 4.1.f, the contract will be governed by the habitual residence of the cinematographic distributor.<sup>72</sup>

d. Estimate and supply contract

As stated by professors Alfonso Luis Calvo-Caravaca and Javier Carrascosa-González, if the economic objective of the contract falls on the distribution, the rigid disposition on Art. 4.1.f Rome I Regulation rules is the pertinent one.<sup>73</sup>

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70 Ricardo José Alonso-Soto, Antonio Pérez de la Cruz-Blanco & Aníbal Sánchez-Andrés, *Los contratos de colaboración*, in *Lecciones de derecho mercantil*, 707-730 (8ª ed., Aurelio Menéndez-Menéndez & Ángel José Rojo-Fernández Río, dirs., Civitas, Navarra, 2010). Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

71 Eduardo Chuliá-Vicent & Teresa Beltrán-Alandete, *Aspectos jurídicos de los contratos atípicos, I Factoring. Joint Venture. Tarjetas de crédito. Franquicia y know-how*, 975 (J. M. Bosch Editor, Barcelona, 1992). Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 669 (12ª ed., Comares, Granada, 2011). Javier Carrascosa-González, *La lucha por la prestación característica I: Los contratos internacionales de distribución*, in *Cuestiones actuales del derecho mercantil internacional*, 349-370 (Alfonso Luis Calvo-Caravaca & Santiago Areal-Ludeña, dirs., Colex, Madrid, 2005).

72 Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 669 (12ª ed., Comares, Granada, 2011).

73 Alfonso Luis Calvo-Caravaca & Javier Carrascosa-González, *Derecho internacional privado*, II, 669 (12ª ed., Comares, Granada, 2011).

## CONCLUSIONS

The rigid designation of the applicable law to the international contract of distribution on Art. 4.1.f ends the juridical uncertainty generated by the application of the Rome Convention, granting foreseeability in the designations of the applicable law to this international contract. The distribution contract was one of the contracts where the identification of the applicable law in absence of choice by the parties under the Rome Convention represented multiple problems, since it's a juridical relation that leads to a heterogeneous nature in the reciprocal services between the contracting parties. The identification of the executioner of the characteristic performance in the distribution contract presented grave difficulties due to the fact that there was no uniform jurisprudence, since one sector wanted to establish that the executioner of the characteristic performance was the grantor or manufacturer, while another sector thought that is was the distributor, and a final segment interpreted that this contract did not have a characteristic performance provider.

This debate was settled with the creation of a rigid disposition to regulate the distribution contracts in the Rome I Regulation. Art. 4.1.f establishes that the distribution contracts are ruled by the law of the habitual residence of the distributor. With this designation, the strengthening of the legal certainty is intended though the incorporation of a precept easily foreseeable by the contracting parties. Likewise, they have wanted to protect the distributor who is considered the weak part in the contractual relation, by designating his own law as the law that regulates the contract. On the other hand, with the designation of the rigid law applicable to the distribution contract, the legal certainty is increased, because if that disposition had not been established, the contract would be regulated by Art. 4.1.b, referring to the providing of services, and for that reason, there would be doubt in knowing which of both parties provides the services.

However, although with this new precept there is more foreseeability with regards to the applicable law, there are also

qualification problems in the juridical relation. Effectively, under the Rome Convention, the tribunal took care of analyzing the different services executed by the contracting parties to establish who provided the characteristic performance, meaning it analyzed the gravity center of the contract. Now, the tribunal must attend the juridical relations which cover the definition of the distribution contract, to apply in a direct way the law of the distributor.

It must be valued in a positive manner that the legislator of the European Union has established this rigid norm for the distribution contracts, since as it could be demonstrated, the jurisprudence of the Rome Convention was contradictory now of acknowledging that the part which was responsible for the characteristic performance in the contract, and seeing that is a juridical bond of great importance in transnational commerce, a regulation in that matter was necessary. The rigid designation of the law for this contractual bond, provokes that the distributor can regulate all its contract via his own law, and that the grantor of the merchandise knows beforehand that his own law will not regulate the contractual relation, which is why he will adapt to the law of the distributor, or to force to choose a law applicable to the contract by mutual concession between the parties.

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