

Internationales Privat- und Verfahrensrecht

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Challenges of navigating the Rome I Regulation in respect of the Rome Convention, Brexit, and Consumer Protection

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Comments on CJEU, judgment of 14.9.2023 – C-632/21 – Diamond Resorts Europe

I. Introduction

- 1 In the preliminary ruling procedure *Diamond Resorts Europe*, the Court of Justice of the European Union (CJEU) was asked to clarify several issues about the Rome I Regulation:¹ not only the Regulation's applicability in relation to the preceding Rome Convention² and after Brexit, but also, and most importantly, about the Regulation's consumer protection. The following analysis will submit the CJEU's responses to closer scrutiny, starting with the applicability issues of the Regulation. The focus will then be placed on the consumer protection issue because the CJEU decision in *Diamond Resorts Europe* could – but in fact should not – be understood as suggesting a strict limitation of consumer protection.
- 2 The facts of the underlying case before a Spanish court of first instance can be simplified as follows:³ a consumer and a professional party entered into timeshare contracts in 2008 and 2010, which entitled the consumer to stay at properties in Spain and other European countries. The parties were from England (although the professional party acted through its Spanish branch), and they agreed on the choice of English law for their contracts.⁴ The consumer brought the case before the court in Spain in order to have the contracts declared invalid. The consumer claimed that the contracts were invalid for not meeting the requirements of the Spanish Timeshare Acts 42/1998 and 4/2012, which are the transpositions of the Timeshare Directives 94/47/EC⁵ and 2008/122/EC,⁶ respectively.
- 3 The following discussion will not engage with the criticisms by the Spanish government⁷ and the CJEU⁸ about the alleged incompleteness of the Spanish reference because the criticisms seem largely unfounded, nor with the basic question of what constitutes a foreign element for the purposes of a conflict of laws analysis because the foreign element was undoubtedly present in this case.⁹

II. Delineation of the Rome I Regulation from the Rome Convention

- 4 The Rome I Regulation succeeded the Rome Convention,¹⁰ and it only applies *ratione temporis* to contracts concluded on 17 December 2009 or later.¹¹ In *Diamond Resorts Europe*, the contract concluded in 2010 is thus governed by the Rome I

Regulation, whereas the previous contract, which was concluded in 2008, falls under the Rome Convention.

While the substantive differences between the Convention and Regulation are not huge,¹² the present case brings to light an interesting deviation in respect of the CJEU's ability to interpret the Rome rules. By virtue of Article 267 of the Treaty on the Functioning of the European Union (TFEU), the CJEU is tasked with interpreting the Regulation upon request by "any court or tribunal of a Member State". With regard to the Convention, the CJEU was tasked with the interpretation by the First Protocol to the Convention.¹³ However, the First Protocol stipulates that the national courts listed "may request" the CJEU's interpretation; the Tribunal Supremo is listed for Spain, and generally the courts of the Contracting States when acting as appeal courts.¹⁴

- 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) [2008] OJ L177/6.
- 2 Convention on the law applicable to contractual obligations (consolidated version) [1998] OJ C27/34.
- 3 CJEU, judgment of 14 September 2023, C-632/21 *Diamond Resorts Europe* ECLI:EU:C:2023:671, para 25 ff. At the time of writing, the CJEU had only published the provisional text in English.
- 4 *Diamond Resorts Europe* (n. 3), para 70.
- 5 Directive 94/47/EC of the European Parliament and the Council of 26 October 1994 on the protection of purchasers in respect of certain aspects of contracts relating to the purchase of the right to use immovable properties on a timeshare basis [1994] OJ L280/83.
- 6 Directive 2008/122/EC of the European Parliament and of the Council of 14 January 2009 on the protection of consumers in respect of certain aspects of timeshare, long-term holiday product, resale and exchange contracts [2009] OJ L33/10.
- 7 *Diamond Resorts Europe* (n. 3), para 43 ff.
- 8 *Diamond Resorts Europe* (n. 3), para 81–82.
- 9 *Diamond Resorts Europe* (n. 3), para 49–53.
- 10 Art. 24 Rome I Regulation.
- 11 Art. 28 Rome I Regulation in conjunction with the Corrigendum [2009] OJ L309/87; *Diamond Resorts Europe* (n. 3), para 61–63.
- 12 Mankowski, 'Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge', IHR 2008, 133.
- 13 Art. 1 First Protocol on the Interpretation by the Court of Justice of the European Communities of the Convention on the Law Applicable to Contractual Obligations [1989] OJ L48/1.
- 14 Art. 2 First Protocol.

- 6 The CJEU held in *Diamond Resorts Europe* that the referring first instance court is not on the list of the First Protocol, nor acting as an appeal court.¹⁵ Accordingly, the request to interpret the Rome Convention, which is applicable to the contract concluded in 2008, was found to be inadmissible. This prevented the CJEU from saying anything more about the law applicable to the 2008 contract (and the CJEU subsequently limited itself to the 2010 contract, which falls under the Regulation).
- 7 It seems, albeit not debated or stated expressly, that the CJEU considered the list of eligible national courts in the First Protocol to be exhaustive. This is regrettable because it creates an unnecessary risk of legal uncertainty and procedural inefficiency. It essentially requires national courts of first instance to speculate about the Convention's interpretation (which can then only be resolved upon appeal), while first instance courts would undoubtedly be able to make a request to the CJEU if it concerned the Regulation's interpretation under Article 267 TFEU. Apart from the historical fact that first instance courts were not included in the list,¹⁶ there is no compelling reason for disregarding the equal importance of certainty for contracts concluded prior to 17 December 2009, which are and will for the foreseeable future be governed by the Convention. In particular, it is not convincing that the CJEU had to be protected from being overwhelmed by too many requests about the Convention, which is a concern that had originally been expressed in relation to the parallel Protocol concerning the interpretation of the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters.¹⁷ This concern has never been compelling because, since 1957, all national courts have been permitted to request a preliminary ruling from the CJEU on instruments of European law (as opposed to on international law treaties, such as the Convention) on the basis of Article 177 of the Treaty establishing the European Economic Community, which is nowadays Article 267 TFEU.
- 8 The view of the CJEU on the exhaustive nature of the list in the First Protocol was also not the only one imaginable. It would have been possible to alternatively argue as follows: the First Protocol could be understood to only stipulate that the listed national courts "may request" as opposed to being obliged. This was also highlighted by Advocate General Trstenjak in an earlier case, where she submitted in her Opinion that, "in the context of the First Protocol on the interpretation of the Rome Convention, the national courts have only a right, but not an obligation, to refer a question to the Court for a preliminary ruling".¹⁸ The underlying reason is that the Contracting States did not oblige their courts to make requests to the CJEU but only enabled them to do so. In light of this, it could be argued in turn that other national courts, namely courts of first instance, would not – and should not – be prevented from making a request to the CJEU.
- 9 Moreover, the decisions of the CJEU in *Diamond Resorts Europe* completely ignored the parallel to its earlier decision in the case *DFDS Torline* where it had dealt with a very similar issue in respect of the Protocol concerning the interpretation of the 1968 Brussels Convention.¹⁹ There, the CJEU had held that a national court of first (and last) instance which was not listed was permitted to make a request for interpretation of the Convention.²⁰ This conclusion had been reached on a teleological

basis by appreciating the purposes of the Convention, despite the fact that first instance courts had not been included in the list of that Protocol either.²¹ Similar considerations should have been taken into account by analogy in *Diamond Resorts Europe*, and should have led to the admissibility of the request in respect of the Rome Convention.

III. Continuity of the Rome I Regulation after Brexit

In light of Brexit, the CJEU was asked to clarify the applicability of the Rome I Regulation to a case before a Member State court where the parties are British, such as in *Diamond Resorts Europe*.²² The CJEU held that the Rome I Regulation continues to apply.

While this result is certainly correct for pre-existing contracts, which were concluded before the end of the Brexit transition period, i.e. 31 December 2020, the CJEU did not provide any reasons for it. The CJEU referenced Article 66(a) of the Withdrawal Agreement,²³ but it observed correctly that this provision was "drawn up with regard to the cases pending before the courts and institutions of the United Kingdom" and as such does not have any bearing on cases before courts in Spain or other remaining Member States.²⁴ Nonetheless, without giving any other reasons, the CJEU concluded that "the provisions of the Rome I Regulation are applicable, in the context of a dispute before a court of a Member State, to contracts the two parties of which are United Kingdom nationals".²⁵

What, then, is the reasoning which supports the CJEU's result? For pre-existing contracts, it seems sensible and permissible to apply Article 66 Withdrawal Agreement by analogy to cases before courts in the remaining Member States.²⁶ Although there

15 *Diamond Resorts Europe* (n. 3), para 40.

16 *Tizzano*, 'Reports on the Protocols on the Interpretation by the Court of Justice of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations' [OJ] 1990 C219/1, 12–14.

17 *P. Jenard*, 'Report on the Protocols on the Interpretation by the Court of Justice of the Convention of 29 February 1968 on the Mutual Recognition of Companies and Legal Persons and of the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters' [OJ] 1979 C59/66 para 11, which was expressly referenced in *Tizzano* (n. 16) fn. 16. For criticism of this, see for instance *Rasmussen*, 'A New Generation of Community Law?' (1978) 15 Common Market Law Review 249, 253 ff.

18 CJEU, Opinion of Advocate General Trstenjak of 16 December 2010, C-29/10 *Heiko Koelzsch v Grand Duchy of Luxembourg* ECLI:EU:C:2010:789, para 42. This issue was not discussed in detail in the subsequent judgment of 15 March 2011 in *Koelzsch*, ECLI:EU:C:2011:151.

19 Protocol concerning the interpretation by the Court of Justice of the convention of 27 September 1968 on jurisdiction and the enforcement of judgments in civil and commercial matters, signed at Luxembourg on 3 June 1971 (consolidated version) [1998] OJ C27/28.

20 CJEU, judgment of 5 February 2004, C-18/02 *DFDS Torline v SEKO Sjöfolk Facket för Service och Kommunikation* ECLI:EU:C:2004:74, para 14–18.

21 *Jenard* (n. 17).

22 *Diamond Resorts Europe* (n. 3), para 49ff, in particular 54 ff.

23 Agreement on the withdrawal of the United Kingdom of Great Britain and Northern Ireland from the European Union and the European Atomic Energy Community [2019] OJ 3841/1.

24 *Diamond Resorts Europe* (n. 3), para 55.

25 *Diamond Resorts Europe* (n. 3), para 56.

26 *Ungerer*, 'Article 24' in Franzina (ed), *Rome I Regulation* (Elgar, forthcoming), para 24.09.

is no reciprocity in Article 66, unlike in Article 67 for matters of international jurisdiction etc, the spirit of the Withdrawal Agreement suggests that the Rome I Regulation should equally continue to apply in the remaining Member States. This is supported by Article 127(1) and (3) of the Withdrawal Agreement, which stipulate that “[u]nless otherwise provided in this Agreement, Union law shall be *applicable to* and in the United Kingdom during the transition period” and that Union law “shall produce *in respect of* and in the United Kingdom the same legal effects as those which it produces within the Union and its Member States” (emphasis added).

- 13 This seems the better line of argument than drawing on Article 2 Rome I Regulation, which stipulates the “universal application” of the Regulation. Although the Regulation indeed applies regardless of whether the Regulation’s connecting factors designate the law of a Member State or a Third State, such as the UK, this universality only pertains to the law, not the parties and their nationality. Thus, Article 2 Rome I Regulation is an insufficient basis for explaining in all cases – especially in cases where, unlike in *Diamond Resorts Europe*, English law is not the designated law – why the Regulation still is the correct instrument for determining the applicable law for pre-existing contracts which are litigated before Member State courts and involve British parties.
- 14 What the CJEU did not have to address in *Diamond Resorts Europe* but what is the much more interesting and controversial question is whether the Rome I Regulation or the Rome Convention ought to apply to new contracts which have been concluded on 1 January 2021 or later. These contracts are not covered by any rules of the EU-UK Trade and Cooperation Agreement,²⁷ due to the hard Brexit in the area of private international law. It has been argued that, based on Article 2 Rome I Regulation, the Regulation continues to apply even for these new contracts before Member State courts;²⁸ this view is popular because it is the most pragmatic solution. The other and more convincing view takes seriously the binding nature of the Convention, which is a public international law treaty between the Member States (apart from Croatia) and the UK;²⁹ accordingly, in line with Article 25 Rome I Regulation, these Member States are still bound by the Convention vis-à-vis the UK post-Brexit. Thus, Member States courts ought to follow the Convention instead of the Regulation in cases involving British parties for contracts concluded post-Brexit. Ultimately, the courts will have to decide the matter of reviving the Convention if and when a difference becomes decisive in an actual dispute. This is imaginable particularly in the context of consumer contracts where Article 5 Rome Convention differs to some extent from the wording in Article 6 Rome I Regulation (e.g. in respect of the substantive scope and exclusions as well as the situational requirements).³⁰ Insofar as the Convention is to be revived, it becomes even more important to let Member State courts of first instance make references to the CJEU about the interpretation of the Convention and not just the Regulation.

IV. Breadth of Consumer Protection under the Rome I Regulation

- 15 The main issue in *Diamond Resorts Europe* concerned the breadth of consumer protection in respect of the 2010 contract under Article 6 Rome I Regulation.

Before exploring this in detail, it should be acknowledged as a preliminary matter, although it was not discussed at all in the CJEU decision, why it was possible to consider Article 6 Rome I Regulation for a contract relating to property. Article 6 Rome I Regulation could not be engaged if it was an excluded contract “relating to a right in rem in immovable property or a tenancy of immovable property”, but it offers protection for consumer contracts “relating to the right to use immovable property on a timeshare basis”.³¹ Since the contract in *Diamond Resorts Europe* seems to have been such a timeshare contract,³² Article 6 Rome I Regulation was not excluded, at least not by virtue of its paragraph 4(c).

Whether Article 6 Rome I Regulation could then have been excluded on the basis of paragraph 4(a) is not worth exploring additionally since the facts are not sufficiently clear (it is only stated that the contract enabled the consumer to use “accommodation in various countries in Europe, in particular in Spain” without specifying whether or not the colloquial term “Europe” includes the UK, where the consumer was habitually resident).³³ Also, it is generally argued that paragraph 4(a) should be interpreted narrowly so that timeshare contracts, even “where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence”, ought not to be excluded from Article 6 Rome I Regulation.³⁴ Thus, Article 6 Rome I Regulation was applicable in principle.

Article 6 Rome I Regulation stipulates that, if the contract fulfils all the personal, substantive, and situational requirements of a consumer contract in Article 6(1), which is for the Member State court to decide,³⁵ then the preferential law mechanism of

27 Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part [2021] OJ L149/10.

28 Dickinson, ‘Realignment of the Planets – Brexit and European Private International Law’ (2021), *Praxis des Internationalen Privat- und Verfahrensrechts* 213, 220; Rühl, ‘Judicial Cooperation in Civil and Commercial Matters after Brexit: Which Way Forward?’ (2018) 67 *International and Comparative Law Quarterly* 99, 108.

29 Lehmann/Zetzsche, ‘Brexit and the Consequences for Commercial and Financial Relations between the EU and the UK’ (2016) 27 *European Business Law Review* 999, 1003–1005; Lein, ‘Uncharted Territory? A Few Thoughts on Private International Law Post Brexit’ (2015) 17 *Yearbook of Private International Law* 42; Ungerer, ‘Consequences of Brexit for European Private International Law’ (2019) 4 *European Papers* 395, 403; Abdel Wahab, ‘Brexit’s Chilling Effect on Choice of Law and Arbitration in the United Kingdom’ (2016) 33 *Journal of international arbitration* 463, 465. This view was also indicated previously by Dickinson, ‘Back to the Future: The UK’s EU Exit and the Conflict of Laws’ (2016) 12 *Journal of Private International Law* 195, 202–204.

30 For a summary of the differences, see Mankowski (n. 12), 140 ff.

31 Art. 6(4)(c) Rome I Regulation. The reference to Directive 94/47/EC should be read as a reference to Directive 2008/122/EC, see Art. 18 Directive 2008/122/EC.

32 Whether or not it was a timeshare arrangement in the sense of Directive 2008/122/EC (or the preceding Directive 94/47/EC) was not made very clear, see *Diamond Resorts Europe* (n. 3), para 26, although the Directives were quoted by the CJEU at para 13–14.

33 *Diamond Resorts Europe* (n. 3), para 26.

34 Zhen Chen, ‘The Tango between the Brussels Ia Regulation and Rome I Regulation under the Beat of Directive 2008/122/EC on Timeshare Contracts towards Consumer Protection’ (2022) 18 *Journal of Private International Law* 493, 506–507; Rühl, ‘Art. 6 Rom I-VO’ in Budzikiewicz/Weller/Wurmnest (eds), *Beck-Online Großkommentar* (1.2.2023, C.H. Beck 2023) para 148.

Article 6(2) protects the consumer against a detrimental choice of law. This mechanism ensures that a consumer benefits from the most preferential provisions contained in either the chosen law or the mandatory provisions in the law of the country of the consumer's habitual residence. It requires an issue-by-issue analysis to identify the respectively most preferential provision,³⁶ and it usually achieves the highest standard of consumer protection by turning a complex international situation into a 'home game' for the consumer.

19 However, *Diamond Resorts Europe* is an interesting case because all parties were from England and had chosen English law,³⁷ so there was neither any doubt about the applicability of English law, nor any risk of depriving the consumer of the protection afforded by mandatory provisions of English law. Yet the consumer sought to invoke better protection which would have been afforded by mandatory provisions in the law of the place where the timeshare property was located, namely invalidity of the contract under mandatory rules in the Spanish Timeshare Act over property in Spain.³⁸ However, invoking the Spanish statute was not possible by virtue of Article 6 Rome I Regulation.³⁹ Article 6(2) Rome I Regulation does not permit the consumer to benefit from mandatory provisions which are available in another jurisdiction to which the case is connected but which is neither the jurisdiction chosen by the parties nor the home jurisdiction of the consumer.

20 This narrow design of the mechanism for consumer protection has been criticised since the times of the Rome Convention.⁴⁰ Even the CJEU had to acknowledge in another Spanish case, *Club La Costa*,⁴¹ which was decided on the same day and by the same judges as *Diamond Resorts Europe*, that Article 6(2) Rome I Regulation as it stands does "not necessarily lead to the application, in all cases, of the law most favourable to the consumer".⁴² Yet the CJEU explicitly held that Article 6 Rome I Regulation "is not only specific, but also exhaustive" in the sense that "the conflict-of-law rules laid down in [Article 6] cannot be amended or supplemented by other conflict-of-law rules laid down in [the Rome I Regulation], unless they are expressly referred to in that article".⁴³ In *Diamond Resorts Europe*, the CJEU did not offer any reasoning for this apodictic statement about Article 6 Rome I Regulation being exhaustive, apart from a not very instructive reference by analogy to its decision on the jurisdictional rules for employment under Article 21 Brussels Ia Regulation.⁴⁴ However, in *Club La Costa*, the CJEU came to the same conclusion about Article 6 Rome I Regulation as in *Diamond Resorts Europe* arguing as follows: the Court found, drawing by analogy on its decision a decade earlier in *Schlecker*,⁴⁵ that broadening Article 6(2) Rome I Regulation "would necessarily seriously undermine the general requirement of predictability of the applicable law and, therefore, the principle of legal certainty in contractual relationships involving consumers".⁴⁶

21 Uncertainty and unpredictability have, no doubt, to be avoided. But would it not be possible and justifiable in the interest of consumer protection to interpret or even rephrase Article 6 Rome I Regulation more broadly so as to take into account mandatory provisions of another jurisdiction which has a sufficiently certain and predictable connection with the case? Broadening the protection could indeed be imaginable and justified if it only concerned another jurisdiction where the professional party pursued its activities or has directed its activities

to. These criteria of pursuing or directing activities would be borrowed from the very situational requirements in Article 6 (1) Rome I Regulation. These criteria seem to suffice for the current mechanism in Article 6(2) in terms of certainty and predictability. Broadening Article 6(2) Rome I Regulation by re-using these certain and predictable criteria would allow a consumer to rely on mandatory protection offered by another connected jurisdiction, in addition to the jurisdiction chosen by the parties and the home jurisdiction of the consumer. For instance, in *Diamond Resorts Europe*, the English consumer concluded the contract with the English professional party through a branch in Spain, where the property was situated and where the law contains mandatory provisions. Hence, if Article 6(2) Rome I Regulation were to be understood or phrased more broadly, it would be imaginable to take account of the Spanish mandatory provisions since the professional party pursued its activities not only in England but also in Spain.

Interpreting or even reforming Article 6(2) Rome I Regulation 22 in this way would, without creating significant uncertainty or unpredictability, remedy the problem of artificially leaving aside mandatory protection which is only available in another

35 This was not made clear in this case, *Diamond Resorts Europe* (n. 3), para 73.

36 Calliess, 'Article 6 Rome I' in Calliess/Renner (eds), *Rome Regulations: Commentary* (3rd edn, Wolters Kluwer 2020) para 76ff; Rühl, 'Consumer Protection in Choice of Law' (2011) 44 *Cornell International Law Journal* 569, 591.

37 Regarding the choice, the requirements of Art. 3(1), 3(5) and 10 Rome I Regulation have to be met, which seems to have been questioned in *Diamond Resorts Europe* (n. 3), para 32, but not been discussed further in the judgment.

38 Although this is not perfectly clear in the CJEU report in *Diamond Resorts Europe* (n. 3), it can be deduced from para 27 and 30 that, in respect of the contract concluded in 2010, the consumer sought to rely on mandatory provisions in the Spanish Timeshare Act 42/1998, which transposed Directive 94/47/EC, instead of relying on the subsequent Spanish Timeshare Act 4/2012, which transposed Directive 2008/122/EC and which is understood not to apply to contracts concluded previously (see the first rule about *disposición transitoria única: contratos preexistentes* in the Spanish Timeshare Act 4/2012). This is important because Directive 2008/122/EC was transposed into both Spanish law and English law (when the UK was a Member State, see below n. 52–53) and, unlike the minimum harmonisation of Directive 94/47/EC, Directive 2008/122/EC aims for full harmonisation, see its Recital 3. Thus, Spanish and English law can only differ and lead to a conflict of laws situation if the temporally relevant law is the respective national law prior to the transpositions of Directive 2008/122/EC. In the absence of further information on the matter in the report, this has to be assumed; else, the international conflict of laws would not arise and would not be an issue for the Rome I Regulation, cf Calliess (n. 36), para 87.

39 *Diamond Resorts Europe* (n. 3), para 74.

40 Ragno, 'Article 6' in Ferrari (ed), *Concise commentary on the Rome I Regulation* (2nd edn, CUP 2020) para 48 with further references.

41 CJEU, judgment of 14 September 2023, C-821/21 *Club La Costa* ECLI:EU:C:2023:672.

42 *Club La Costa* (n. 41), para 87.

43 *Diamond Resorts Europe* (n. 3), para 76.

44 *Diamond Resorts Europe* (n. 3), para 76, referencing CJEU, judgment of 20 October 2022, C-604/20 *ROI Land Investments* ECLI:EU:C:2022:807, para 40 and 41.

45 CJEU, judgment of 12 September 2013, C-64/12 *Schlecker v Boedeker* ECLI:EU:C:2013:551, para 35. The analogy is very strained though because, when referring to predictability and legal certainty in *Schlecker* at para 35, the CJEU solely confirmed the cascade of connecting factors in Art. 6(2) Rome Convention (now Art. 8(2)–(4) Rome I Regulation).

46 *Club La Costa* (n. 41), para 86.

jurisdiction to which the case is connected but which is neither the jurisdiction chosen by the parties nor the home jurisdiction of the consumer. Despite the attractiveness of this remedial solution, its implementation cannot be expected in the near future. Hence, for now, it might be helpful to seek an understanding of how the consumer in *Diamond Resorts Europe* would have, in line with the law as it stands, been able to enjoy the protection of Spanish law by other means.⁴⁷ Pursuing this investigation is particularly important in order to qualify the CJEU's apodictic statement that, under the law as it stands, "Article 6 is exhaustive". This statement could be – if taken too literally – mean that no other provision within the Rome I Regulation can be employed to let the consumer benefit from mandatory provisions in a jurisdiction not designated by Article 6 Rome I Regulation. However, it will be shown that this understanding would not be in line with how the Regulation is designed.

23 Firstly, would Spanish law have applied if the parties had not agreed on a choice of English or any other law in their contract? No, English law would still have been the applicable law because it was a consumer contract about a timeshare arrangement to which, in the absence of deviating choice, the law of the consumer's home jurisdiction applies.⁴⁸ This was England, and thus English law would still have applied. However, the answer would have been different, and Spanish law would have been applicable, if it was not a consumer contract or if it was a consumer contract "relating to a right in rem in immovable property or a tenancy of immovable property" but without "relating to the right to use immovable property on a timeshare basis". Then, and only then, the contract would have been excluded from Article 6 Rome I Regulation either by virtue of Article 6(1) or 6(4)(c), which would have meant that the applicable law is to be determined by Article 4 in the absence of a choice of law.⁴⁹ Consequently, Spanish law could have applied in line with Article 4(1)(c) Rome I Regulation if it was "a contract relating to a right in rem in immovable property or to a tenancy of immovable property", unless it was "a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months", which would, according to Article 4(1)(d) Rome I Regulation, have been governed again by English law as "the law of the country where the landlord has his habitual residence" and given "that the tenant is a natural person and has his habitual residence in the same country".⁵⁰

24 Secondly, could the mandatory provisions of Spanish law have applied by virtue of the limitation imposed on the choice of (English) law by Article 3(3) Rome I Regulation? No, since Article 3(3) Rome I Regulation only protects against the evasion of a country's mandatory provisions in cases where, apart from the choice of foreign law, all other elements of the case are located in the country.⁵¹ While the parties were all from England in *Diamond Resorts Europe* (and, in fact, they had even chosen English law), the property was located in Spain; thus, it was a truly international case and Article 3(3) Rome I Regulation would not have been engaged. Interestingly, with regard to the UK, one might nowadays additionally consider the limitation of Article 3(4) Rome I Regulation which seeks to protect consumers from the evasion of mandatory EU provisions. A Spanish or other Member State court would have to assess whether the UK as a Third State would not offer the protection which is

offered by EU law in the Member States. However, the UK had transposed the Timeshare Directives into its national law during its EU membership,⁵² and did not repeal it after Brexit.⁵³ Therefore, even if all elements of the timeshare case were located in the EU apart from the choice of English law, a Member State court would be unlikely to find that Article 3(4) Rome I Regulation would have been engaged.

25 Thirdly, and interestingly this point is touched upon in *Diamond Resorts Europe*,⁵⁴ could the provisions of Spanish law have applied by virtue of Article 9 Rome I Regulation, despite English law being generally applicable based on either Articles 3(1), 4(1), or 6(1) Rome I Regulation? This depends on whether the Spanish provisions are to be characterised not only as (simple) mandatory provisions but as overriding mandatory provisions in the sense of Article 9(1) Rome I Regulation. Mandatory provisions are overriding if they ought to apply regardless of the Regulation's determination of the otherwise applicable law; in other words, they must be of such great importance to warrant superimposition upon any applicable law.⁵⁵ The CJEU observes that the Spanish court, whose task it would be to assess the overriding character of its national law, submitted that the relevant Spanish Timeshare Act⁵⁶ seeks to apply to "all timeshare contracts concerning rights relating to the use of a timeshare property situated in Spain".⁵⁷ This very much suggests that it is an overriding mandatory provision, although it is often argued that consumer protection provisions are simple mandatory provisions (in the sense of Article 3(3) or 6(2) Rome I Regulation) but not overriding mandatory provisions (in the sense of Article 9(1) Rome I Regulation).⁵⁸ Affirming

47 What will not be discussed though is the obvious solution: had the parties chosen Spanish law, it (and its mandatory rules) would have applied.

48 Art. 6(1) Rome I Regulation.

49 Art. 6(3) Rome I Regulation. However, if there was a choice of law, the contractual rights would be fully governed by the chosen law since there is no 'exclusive applicability' of the *lex situs* for contracts over property, unlike in the realm of international jurisdiction under Art. 24(1) Brussels Ia Regulation; *Calliess* (n. 36), para 64.

50 There are other ways imaginable to characterise timeshare contracts, see *Leible/Leitner*, 'Das Kollisionsrecht des Timesharing nach der Richtlinie 2008/122/EG', (2013) *Praxis des Internationalen Privat- und Verfahrensrechts* 37, 41–42.

51 Whether Art. 3(3) Rome I Regulation can be relied upon at all in the context of Art. 6 Rome I Regulation is debatable, see *Magnus*, 'Art. 6 Rom I-Verordnung', *Staudinger* (Neubearb., Otto Schmidt/de Gruyter 2021) para 25; *Rühl* (n. 34), 'Art. 6 Rom I-VO', para 30 ff.

52 Transposition of Directive 94/47/EC by virtue of the Timeshare Regulations 1997 (SI 1997 No 1081), and Directive 2008/122/EC by virtue of the Timeshare, Holiday Products, Resale and Exchange Contracts Regulations 2010 (SI 2010 No 2960).

53 Some amendments were made to reflect the departure from the EU in the Timeshare, Holiday Products, Resale and Exchange Contracts (Amendment etc) (EU Exit) Regulations 2018 (SI 2018 No 1397).

54 *Diamond Resorts Europe* (n. 3), para 78 ff.

55 *Diamond Resorts Europe* (n. 3), para 78–79.

56 This must be, in line with the analysis in n. 38, the Spanish Timeshare Act 42/1998. At *Diamond Resorts Europe* (n. 3), para 80–81, the CJEU expresses discontent that the Spanish court did not submit information on the subsequent Spanish Timeshare Act 4/2012, but this information seems unnecessary if the above analysis is correct. In any event, the subsequent Act 4/2012 contains somewhat similar overriding aspirations in its Art. 17 (although less clear, it seeks overriding applicability if Spanish properties are concerned and a foreign law would otherwise be applicable).

57 *Diamond Resorts Europe* (n. 3), para 80, which is a simplified version of the Act's translation given earlier in para 22.

the overriding mandatory character of this Spanish Timeshare Act is also supported on the ground that the underlying Timeshare Directive 94/47/EC requires “that, whatever the law applicable may be, the purchaser is not deprived of the protection afforded by this Directive, if the immovable property concerned is situated within the territory of a Member State.”⁵⁹ If the characterisation as overriding mandatory provisions is affirmed by the Spanish court which is adjudicating the case, then the Spanish court is able to superimpose these Spanish provisions of its *lex fori* onto the governing English law by virtue of Article 9(2) Rome I Regulation. Therefore, depending on the characterisation of the particular mandatory provision in question, it should be possible, under the law as it stands, to at least apply overriding mandatory provisions of the court’s own jurisdiction even if this is neither the jurisdiction chosen by the parties nor the home jurisdiction of the consumer.⁶⁰

- 26 When the CJEU made its apodictic statement, mentioned above, that Article 6 Rome I Regulation “cannot be [...] supplemented by other conflict-of-law rules laid down in [the Rome Regulation], unless they are expressly referred to in that article,”⁶¹ then this has to be understood as not banning Article 9 Rome I Regulation from superimposing overriding mandatory provisions. Although some scholars have argued that Article 6 Rome I Regulation provides for a balance of interests which is exhaustive and cannot be interfered with by Article 9 Rome I Regulation,⁶² it seems like a logical necessity that simple mandatory provisions (by Article 6) must not be more strongly enforced than overriding mandatory provisions (by Article 9), which is a view shared by other scholars.⁶³ In addition to this logic, the wording of Article 9(1) Rome I Regulation itself supports the argument that the CJEU’s statement about the allegedly exhaustive nature of Article 6 Rome I Regulation must be qualified: according to Article 9(1) Rome I Regulation, overriding mandatory provisions “are applicable [...] irrespective of the law otherwise applicable to the contract under this Regulation”, which means, for instance, irrespective of the law applicable to the contract under Article 6 Rome I Regulation. Moreover, the wording of Article 9(2) Rome I Regulation stipulates that “[n]othing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum” (emphasis added), which makes it nearly impossible to suggest that Article 6 Rome I Regulation could restrict the application of the overriding mandatory provisions of the law of the forum.

V. Conclusion

- 27 *Diamond Resorts Europe* is an interesting case for three reasons: it showed first of all that the Rome Convention is still relevant for contracts concluded in 2009 or earlier, which makes it even more regrettable that the CJEU held, without good reason, that a court of first instance may not make a preliminary reference request to the CJEU for clarification on the Convention’s interpretation. First instance courts should be equally permitted to make such requests in order to ensure legal certainty and procedural efficiency, as it is possible to make requests in respect of EU law, such as the Rome I Regulation, under Article 267 TFEU.
- 28 Secondly, *Diamond Resorts Europe* gave the CJEU the opportunity to confirm that, despite Brexit, the Rome I Regulation con-

tinues to apply before Member State courts for contracts which involve British parties and which were concluded before 2021. This is helpful because it was unclear under the Withdrawal Agreement. However, *Diamond Resorts Europe* did not yet present the CJEU with an opportunity to resolve the controversy about whether or not the Rome Convention ought to be revived for new contracts involving the UK, which was left open in the EU-UK Trade and Cooperation Agreement. The Convention should indeed be applied again because it is an international treaty binding the remaining Member States (apart from Croatia) and the UK.

Thirdly, *Diamond Resorts Europe* brought to light the shortcomings of Article 6 Rome I Regulation for effective consumer protection in cases where the sought protection is only available in another jurisdiction to which the case is connected but which is neither the jurisdiction chosen by the parties nor the home jurisdiction of the consumer. While a broader interpretation or re-phrasing of Article 6 Rome I Regulation would be desirable to grant consumers this protection from another jurisdiction where the professional party pursued its activities or has directed its activities to, this is currently not possible and national courts can thus only use what the Regulation has to offer. In this regard, the CJEU made an apodictic statement in *Diamond Resorts Europe* that Article 6 Rome I Regulation is exhaustive to the extent that, despite its insufficient breadth of protection, Article 6 Rome I Regulation must not be amended or supplemented by other conflict of laws rules of the Regula-

58 Consumer protection provisions are considered to be simple mandatory provisions only, for instance, by: German Federal Court of Justice (BGH), judgment of 9 July 2009, case v. 9.7.2009 – Xa ZR 19/08, published in BGHZ 182, 24, para 32; Maultzsch, ‘Art. 9’ in Budzikiewicz/Weller/Wurmnest (eds), *Beck-Online Großkommentar* (1.2.2023, C.H. Beck 2023) para 281; Thorn, ‘Art. 9 Rom I-VO’ in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht: Rom I-VO, Rom II-VO*, vol. 3 (5th edn, Otto Schmidt 2023) para 57. In support of consumer protection provisions as overriding mandatory provisions: Bonomi, ‘Article 9’ in Magnus/Mankowski (eds), *European Commentaries on Private International Law: Rome I*, vol. 2 (Otto Schmidt 2017) para 80. The latter view seems to be shared by the CJEU, see for instance C-168/05 *Mostaza Claro v Centro Móvil Milenium* ECLI:EU:C:2006:675, para 38; C-40/08 *Asturcom Telecomunicaciones v Rodríguez Nogueira* ECLI:EU:C:2009:615, para 52. Cf. Plender/Wilderspin, *The European Private International Law of Obligations* (6th edn, Sweet & Maxwell 2023) para 12-026 ff.

59 Art. 9 Directive 94/47/EC. See also Plender/Wilderspin (n. 58) para 9-038.

60 It would moreover be imaginable to give effect under Art. 9(3) Rome I Regulation to overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful, and to take account of overriding mandatory provisions from yet another jurisdiction in line with the CJEU’s decision in C-135/15 – *Nikiforidis*; see Lehmann/Ungerer, ‘Applying or Taking Account of Foreign Overriding Mandatory Provisions – Sophism Under the Rome I Regulation’ (2017) XIX Yearbook of Private International Law, 53.

61 *Diamond Resorts Europe* (n. 3), para 76.

62 Heiderhoff, ‘Art. 6 Rom I-Verordnung’ in Rauscher (ed), *Europäisches Zivilprozess- und Kollisionsrecht* (5th edn, Otto Schmidt 2023), para 30; Thorn (n. 58), para 8.

63 Bonomi (n. 58) para 29; Magnus (n. 51) para 34; Maultzsch (n. 58) para 193; Schmidt-Kessel, ‘Article 9’ in Ferrari (ed), *Rome I Regulation: Pocket Commentary* (Sellier 2015) para 24ff; Stürner, ‘Art. 6 EGV 593/2008’ in Westermann/Grunewald/Maier-Reimer (eds), Erman, BGB (17th edn, Otto Schmidt 2023) para 6. Plender/Wilderspin (n. 58) para 12-068 suggest that overriding mandatory provisions may be superimposed on the law designated by Art. 6 Rome I Regulation even in a situation where the overriding mandatory provisions of the *lex fori* are less favourable to the consumer.

tion. This is unwarranted because it should at least be possible for a national court to apply overriding mandatory provisions of their national law in line with Article 9(2) Rome I Regulation. Superimposing protective provisions through this mechanism solely depends on the characterisation of the provisions in question (in *Diamond Resorts Europe*, the national provisions looked like overriding mandatory provisions), and Article 6 Rome I Regulation should not be understood to prohibit it.

Zusammenfassung

- 30 Der EuGH befasste sich in der Rs. *Diamond Resorts Europe* erstmals mit dem Europäischen Schuldvertragsübereinkommen von 1980 und seiner Kompetenz zur Auslegung desselben, die er bei Vorlagen von erstinstanzlichen Gerichten verneinte, aber hätte bejahen sollen. Zweitens bestätigte der EuGH – begrüßenswerterweise – die Fortgeltung der Rom I-Verordnung vor mitgliedstaatlichen Gerichten für Verträge mit britischem Bezug während der Brexit-Übergangsphase, jedoch bleibt weiterhin offen, ob für Neuverträge das Europäische Schuldvertragsübereinkommen im Verhältnis zum Vereinigten Königreich wiederauflebt. Drittens entschied der EuGH in Bezug auf den Verbraucherschutz gem. Art. 6 Rom I-Verordnung, dass diese Vorschrift abschließend und eine ergänzende Heranziehung anderer Kollisionsnormen der Verordnung ausgeschlossen sei. Im konkreten Fall versagte der EuGH dem Verbraucher damit den Schutz der Belegenheitsrechtsordnung der streitgegenständlichen Teilzeitnutzung-Immobilie; der Verbraucher sollte aber von diesem Schutz, sofern es sich dabei um eine Eingriffsnorm handelt, im Wege von Art. 9 Rom I-Verordnung profitieren.

Résumé

Dans l'affaire *Diamond Resorts Europe*, la CJUE a premièrement traité de la Convention européenne sur la loi applicable aux obligations contractuelles de 1980 et de sa compétence pour l'interpréter, compétence que la CJUE a nié dans le cas de renvoi préjudiciel devant elle par des tribunaux de première instance, alors qu'elle aurait dû l'affirmer. Deuxièmement, la CJUE a confirmé – ce qui est une chose positive à voir – le maintien de l'applicabilité du règlement Rome I devant les juridictions des États membres pour les contrats liés au Royaume-Uni pendant la période de transition du Brexit, mais il reste à savoir si, pour les nouveaux contrats, la Convention va renaître vis-à-vis le Royaume-Uni. Troisièmement, en ce qui concerne la protection des consommateurs à l'art. 6 du règlement Rome I, la CJUE a décidé que cette disposition est exhaustive et que l'application complémentaire d'autres règles de conflit de lois du règlement est exclue. En l'espèce, la CJUE a donc refusé au consommateur la protection de la loi du lieu de situation de l'immeuble à temps partagé; toutefois, le consommateur devrait bénéficier de cette protection, à condition qu'il s'agisse d'une loi de police, en vertu de l'art. 9 du règlement Rome I.

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Anmerkung zu EuGH, Urt. v. 6.7.2023 – C-462/22

GPR0063222

Leitsatz

- 1 Art. 3 Abs. 1 lit. a sechster Spiegelstrich Brüssel IIa-VO ist dahin auszulegen, dass er die Zuständigkeit des Gerichts eines Mitgliedstaats für die Entscheidung über einen Antrag auf Auflösung der Ehe davon abhängig macht, dass der Antragsteller, der Staatsangehöriger dieses Mitgliedstaats ist, den Nachweis erbringt, dass er seit mindestens sechs Monaten unmittelbar vor Einreichung seines Antrags einen gewöhnlichen Aufenthalt in diesem Mitgliedstaat erlangt hat.

Einleitung

- 2 In dem der Entscheidung zugrunde liegenden Fall geht es um die Scheidung einer im Jahr 2000 geschlossenen gemischt-nationalen Ehe: Der Ehemann ist deutscher Staatsangehöriger, die Ehefrau Polin, die Eheleute lebten mit ihren beiden 2003

geborenen Kindern bis zu ihrer Trennung im Laufe des Jahres 2012 gemeinsam in Polen. Am 27.10.2013 machte der Ehemann in Deutschland vor dem AG Hamm ein Scheidungsverfahren anhängig und erklärte, dass er im Juni 2012 die Ehwohnung in Polen verlassen und sich in seiner Geburtsstadt in Deutschland niedergelassen habe, wo er eine neue Partnerin habe und seine Eltern pflege. Die Ehefrau rügte die internationale Zuständigkeit des AG Hamm und trug vor, dass der Ehemann die gemeinsame Wohnung erst Anfang April 2013 verlassen und danach in der weiteren gemeinsamen Wohnung in einer anderen Stadt in Polen gewohnt habe sowie viel in den Niederlanden unterwegs gewesen sei. Die beiden Söhne seien im zweiten Schulhalbjahr 2012/2013 im täglichen Wechsel von beiden Elternteilen nach der Schule betreut worden. Am 19.11.2013 stellte die Ehefrau ihrerseits in Polen beim Bezirksgericht in Warschau einen Scheidungsantrag.