

Law Applicable to Non-Consumer Contracts Concluded at an Electronic Auction

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Abstract

The article examines the law governing a non-consumer contract concluded at an electronic auction. The paper discusses substantive international law and private international law, in particular Rome I Regulation. The analysis focuses on the autonomous interpretation of the auction and the country where this contracting process takes place. The considerations are supplemented by the study of selected auction platforms. The paper concludes that a contract formed at an electronic auction is typically governed by the law of the country where the seller has his or her habitual residence.

Keywords

Conflict of Laws; Electronic Auction; European Law; Private International Law.

1 Introduction

Electronic auctions are one of the most popular ways of concluding a contract. This is probably due to the convenient access to a wide selection of goods offered at these auctions. In addition, electronic auctions make it easier to reach a contractor, regardless of the geographic distance. They can therefore facilitate the conclusion of a contract between persons located in different countries, which in turn raises the question of the law governing such an agreement.

It should also be noted that legal scholars have so far mainly focused on consumer contracts, which is understandable given the significance of these

agreements. This paper, however, adopts a different perspective. It focuses on non-consumer contracts, i.e., agreements which are not concluded between a consumer and a trader within the meaning of the 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 Regulation”).¹ This frame of reference seems justified since the study of electronic auctions performed for this paper indicates that a considerable number of auction platforms can be used by non-consumers. This applies to regular platforms where two professionals or two non-professionals may conclude a contract (e.g., *Allegro.pl*, *eBay.com*). There are also specialised platforms related to contracts made exclusively between professionals (e.g., *Autobid.de*, *B2Bauctions.dk*), charity contracts (e.g., *CharityAuctionsToday.com*, *CharityStars.de*) and contracts made with the government or other public institution (e.g., *GovDeals.com*, *Municibid.com*). The paper may thus investigate a less explored intersection of electronic commerce and private international law.

Moreover, it is worth noting that the line between electronic auctions and on-line shops is becoming increasingly blurred. The ongoing convergence of the forms of electronic commerce thus raises new legal questions, in particular regarding the law applicable to a contract concluded in one of such virtual marketplaces.

Finally, a contract for an electronic auction should not be confused with a contract concluded at an electronic auction.² The first agreement is binding between the user and the auction platform provider. It serves to describe how the auction platform is used to conclude contracts. More importantly, the law governing this agreement is usually explicitly stipulated in the terms and conditions. For example, *B2Bauction.dk* declares that Danish law applies to this contract³, while *ShopGoodwill.com* – the laws of the State of California⁴.

¹ Art. 6 para. 1 Rome I Regulation.

² The distinction is accepted by FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 142; LEIBLE, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 118.

³ Terms & Conditions. *B2Bauctions* [online]. Section 24 [cit. 24. 5. 2022]. Available at: <https://b2bauctions.dk/en/terms-conditions>

⁴ Terms of Use. *Shopgoodwill.com* [online]. 28. 12. 2016 [cit. 24. 5. 2022]. Available at: <https://shopgoodwill.com/about/terms-of-use>

On the other hand, the contract concluded at an electronic auction creates an obligation between the users of the platform. The platform provider is not a party to this agreement, which is sometimes clearly stipulated in the terms and conditions.⁵ Furthermore, a contract concluded at an electronic auction typically does not provide for the choice of law. As a result, the law applicable to this contract can only be determined after referring to the specific rules of private international law. This paper analyses only the contracts concluded at electronic auctions.

2 Legal Framework

2.1 International Substantive Law

Contracts for the sale of goods are well-established agreements which play an important role not only in domestic but also in international trade. Likewise, auctions are not a new legal concept. It is therefore worth considering whether at least some of the rights and obligations of the parties to a contract concluded at an electronic auction are specified in harmonised or unified international substantive law.

At first glance, the United Nations Convention of 10 June 1958 on the Recognition and Enforcement of Foreign Arbitral Awards (“CISG”) appears as an act which could apply to the discussed contracts. However, the CISG only covers contracts concluded between parties whose places of business are located in different countries.⁶ The Convention therefore applies to contracts between professionals, which leaves some non-consumer contracts outside its scope of application. More importantly, sales by auction are explicitly excluded from the scope of the CISG.⁷ As indicated in the Explanatory Note, this exclusion results from the special rules which many countries

⁵ See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 7 (point 7.1) [cit. 24. 5. 2022]. Available at: <https://assets.allegrostatic.com/popart-attachments/att-ec9077a-a20c-4a2d-a54e-1ceb405539eb>; Auction General Rules. *GovDeals* [online]. [cit. 24. 5. 2022]. Available at: <https://www.govdeals.com/index.cfm?fa=Main.Faq>; User Agreement. *eBay* [online]. 11. 3. 2022, section 2 [cit. 24. 5. 2022]. Available at: <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>

⁶ Art. 1 para. 1 CISG.

⁷ Art. 2 letter b) CISG.

adopt for contracts concluded at an auction.⁸ Consequently, according to the predominant position, the CISG does not apply to contracts concluded at an electronic auction, although some scholars argue that the restriction should be limited to typical off-line auctions, and not to Internet auctions.⁹

This remark is to some extent consistent with the views expressed under Rome I Regulation, where scepticism prevails regarding the application of the rule concerning a contract for the sale of goods by auction to a contract concluded at an electronic auction (see section 5).¹⁰ Yet, the result of both positions is different. The narrow interpretation of sales by auction leads to the application of the CISG, while the narrow interpretation of a contract for the sale of goods by auction leads to the application of the law of the country where the seller has his or her habitual residence.¹¹ While this issue would certainly require a more thorough analysis, it seems that the Convention could indeed constitute the basis for defining the rights and obligations of the parties to a contract concluded at an electronic auction. This however does not change the fact that the CISG does not cover all non-consumer contracts considered in this paper. It is also worth noting that the terms and conditions of certain auction platforms expressly exclude the application of the CISG.¹²

Alternatively, the United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) (“CUECIC”)

⁸ United Nations Convention on Contracts for the International Sales of Good. *UNCITRAL* [online]. 2010, p. 35 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/19-09951_e_ebook.pdf

⁹ SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 48; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, pp. 42–43; see also SCHROETER, U. Die Anwendbarkeit des UN-Kaufrechts auf grenzüberschreitende Versteigerungen und Internet-Auktionen. *Zeitschrift für Europäisches Privatrecht*. 2004, pp. 31–32.

¹⁰ Art. 4 para. 1 letter g) Rome I Regulation.

¹¹ Art. 4 para. 1 letter a) Rome I Regulation.

¹² See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 17 (point 17.1) [cit. 24. 5. 2022]. Available at: <https://assets.allegrostatic.com/popart-attachments/att-ec9077a-a20c-4a2d-a54e-1ceb405539eb>; General Terms and Conditions of Business, online. *Autobid.de* [online]. 30. 1. 2022, section I (point 5) [cit. 24. 5. 2022]. Available at: <https://autobid.de/index.php?id=98&L=1>; Terms & Conditions. *B2Bauctions* [online]. Section 16 [cit. 24. 5. 2022]. Available at: <https://b2bauctions.dk/en/terms-conditions>

may be regarded as the reference point for determining the rights and obligations of the parties to a contract concluded at an electronic auction. The CUECIC, like the CISG, covers only contracts concluded between professionals.¹³ However, contracts concluded at an auction are generally not excluded from the scope of CUECIC.¹⁴ The Convention thus seems to be of some assistance in determining the rights and obligations of the parties to a contract concluded at an electronic auction. Nevertheless, a closer examination of the CUECIC reveals that the Convention has limited value for professionals. This stems from the fact that the CUECIC entered into force only in 15 countries.¹⁵ Furthermore, countries where electronic commerce plays an important role in the economy, such as the United States, Canada, China or the Member States of the European Union (“EU”), are not part of the CUECIC. The territorial scope of the Convention is therefore narrow.

More importantly, the CUECIC focuses primarily on the exchange of electronic communications in connection with the formation or performance of a contract.¹⁶ However, it does not contain many rules regarding the general performance of the contract, which is acknowledged in the Explanatory Note.¹⁷ As a result, the Convention seems insufficient to comprehensively define the rights and obligations of the parties to a contract concluded at an electronic auction.

Interestingly, the Explanatory Note shows that the legislators who drafted the CUECIC considered Internet auctions.¹⁸ However, they focused mainly

¹³ Art. 1 para. 1 CUECIC.

¹⁴ Similarly MARTIN, C. H. The Electronic Contracts Convention, the CISG, and New Sources of E-Commerce Law. *Tulane Journal of International and Comparative Law*. 2008, Vol. 16, no. 2, p. 470; MARTIN, C. H. The UNCITRAL Electronic Contracts Convention: Will It Be Used or Avoided? *Pace International Law Review*. 2005, Vol. 17, no. 2, pp. 274–275 (comparing the scope of the CISG and the CUECIC).

¹⁵ United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/en/texts/e-commerce/conventions/electronic_communications

¹⁶ Art. 1 para. 1 CUECIC.

¹⁷ United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. 2007, p. 28 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf

¹⁸ *Ibid.*, p. 46.

on identifying the buyer and the seller who did not disclose their names and surnames. The legislators also pointed out that click-wrap contracts concluded at an Internet auction may be legally binding.¹⁹ Apart from these brief statements, the Convention and the Explanatory Note do not expressly mention electronic auctions.

2.2 Private International Law

The lack of comprehensive and certain unified rules makes it necessary to refer to private international law in order to determine the rights and obligations of the parties to a contract concluded at an electronic auction. In the context of the EU, Rome I Regulation appears to be the primary point of reference. It should also be noted that the Regulation replaced the Convention on the Law Applicable to a Contractual Obligation (Rome, 1980) (“Rome Convention”).²⁰ However, the Convention may still apply in some cases. This refers to the territories which fall within the scope of the Convention and to which the Regulation does not apply according to the Treaty on the Functioning of the European Union.²¹

Moreover, Rome I Regulation does not take precedence over the international conventions to which one or more Member States were parties at the moment when the Regulation was adopted and which lay down conflict of law rules relating to contractual obligations.²² As a consequence, the Convention on the Law Applicable to International Sales of Goods (The Hague, 1955) (“the Hague Convention (1955)”) could also determine the law governing a contract concluded at an electronic auction. The Convention is in force in 8 countries, most of which are the Member States of the EU.²³ It should be noted that the revised and expanded versions of the Hague Convention (1955), i.e., the Convention on the Law Applicable to Contracts for the

¹⁹ United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. 2007, p. 68 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf

²⁰ Art. 24 Rome I Regulation.

²¹ Art. 299 Treaty on the Functioning of the European Union.

²² Art. 26 Rome I Regulation.

²³ Status table. 31: Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of Goods. *HCCH* [online]. [cit. 24. 5. 2022]. Available at: <https://www.hcch.net/en/instruments/conventions/status-table/?cid=61>

International Sale of Goods (The Hague, 1986) (“the Hague Convention (1986)”) has not yet entered in force.²⁴ So far, it has only been signed by 5 countries, of which only Argentina has ratified the Convention and the Republic of Moldova has acceded to it. Hence, this paper does not discuss the Hague Convention (1986) in detail.

This paper focuses on Rome I Regulation as it is of most relevance to the Member States of the EU. However, it should be noted that the rules of the Regulation and the rules of the Rome Convention and the Hague Convention (1955) are similar in determining the law applicable to a contract for the sale of goods by auction. Therefore, choosing the above point of reference for further considerations does not adversely affect the scope of analysis.

Finally, it should also be clarified that Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) does not provide for rules of private international law. While this is explicitly mentioned in the Directive²⁵, a question arose about the so-called country of origin principle.²⁶ The Court of Justice of the European Union closed this controversy in the *eDate Advertising* decision.²⁷ The judgment correctly states that the provisions of the Directive do not require transposition in the form of a specific conflict of laws rule. The conclusion is also accepted by most scholars.²⁸

²⁴ Status table. 03: Convention of 15 June 1955 on the law applicable to international sales of goods. *HCCH* [online]. [cit. 24. 5. 2022]. Available at <https://www.hcch.net/en/instruments/conventions/status-table/?cid=31>

²⁵ Art. 1 para. 4 and Recital 23 Directive on electronic commerce.

²⁶ See Art. 3 Directive on electronic commerce.

²⁷ Judgment of the CJEU (Grand Chamber) of 25 October 2011, *eDate Advertising GmbH vs. X and Oliver Martínez, Robert Martínez vs. MGN Limited*, Case C-509/09 and C-161/10, para. 53–68.

²⁸ LEIBLE, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 98; MAYER, P., HEUZÉ, V. *Droit international privé*. Issy-le-Moulineux: LDGJ, 2014, pp. 536–537; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, pp. 206–207; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 621. The prevailing position is, however, questioned by RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 778; see also AUDIT, B., D'AVOUIL. *Droit international privé*. Paris: Economica, 2013, p. 816.

3 Rules Provided for in Rome I Regulation

Taking Rome I Regulation as the main point of reference for determining the law applicable to a contract concluded at an electronic auction does not eliminate all doubts. The Regulation provides for several rules for identifying the law governing this agreement which of course cannot be applied simultaneously. The possible conflict of rules should be resolved by referring to the most detailed rule, in accordance with the principle *lex specialis derogat legi generalis*. This in turn requires a thorough analysis of the provisions in the Regulation and an autonomous interpretation of the terms used in this legal act. However, such a cascade of rules is not unique to Rome I Regulation. A similar legislative solution is also found in the Rome Convention and the Hague Convention (1955).²⁹

First of all, Rome I Regulation provides for that a contract for the sale of goods should be governed by the law of the country where the seller has his or her habitual residence.³⁰ The Regulation also indicates that the term “sale of goods” should be understood in the same way as when applying the provisions of Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation”).³¹ However, it should be noted that Brussels I Regulation is repealed by Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (“Brussels I Regulation (recast)”).³² Rome I Regulation thus aims to achieve the consistency between the provisions on jurisdiction and the provisions on the applicable law. Yet, neither Brussels I Regulation nor Brussels I Regulation (recast) include a definition of a contract for the sale of goods.

²⁹ See Art. 3 Hague Convention (1955); Art. 4 Rome Convention.

³⁰ Art. 4 para. 1 letter a) Rome I Regulation.

³¹ Recital 17 Rome I Regulation referring to Art. 5 para. 1 letter b) Brussels I Regulation.

³² Art. 7 para. 1 letter b) Brussels I Regulation (recast) corresponds to former Art. 5 para. 1 letter b) Brussels I Regulation.

It is therefore necessary to adopt an autonomous interpretation of the term in question. For this purpose, the CISG can be taken as a starting point.³³ The Convention does not explicitly define a contract for the sale of goods. However, the definition can be formulated based on the description of the obligations of the seller and the buyer.³⁴ Consequently, a contract for the sale of goods within the meaning of the CISG should be understood as an agreement under which one party is obliged to deliver goods, hand over any documents relating to them and transfer property in the goods, while the other party is obliged to pay the price for the goods and take delivery of them.³⁵ A similar definition is also accepted by scholars who do not refer to the CISG in this regard.³⁶ In addition, it is rightly stated that the discussed rule covers sales contracts concluded with the use of electronic means of communication.³⁷

The providers of auction platforms do not always specify the contract to be concluded at the auction. Nevertheless, some of the terms and conditions clearly indicate that the users of the platform conclude a sales

³³ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, pp. 92–93; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 624.

³⁴ JAGIELSKA, M. Umowa sprzedaży. In: POPIOLEK, W. (ed.). *Międzynarodowe prawo handlowe*. Warszawa: C. H. Beck, 2013, p. 867; LOOKOFSKY, J. *Understanding the CISG. A Compact Guide to the 1980 United Nations Convention on Contracts for the International Sale of Goods*. Alphen aan den Rijn: Kluwer Law International, 2008, p. 17; SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 26; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWIŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, p. 19. Similarly, MARTINUSSEN, R. *Overview of International CISG Sales Law. Basic Contract Law according to the UN Convention on Contracts for the International Sale of Goods (CISG)*. Charleston: Book Surge Publishing, 2006, p. 14.

³⁵ Art. 30, 53 CISG.

³⁶ LEIBLÉ, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, pp. 99–100; RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 777.

³⁷ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, pp. 93, 142. Similarly LEIBLÉ, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 117.

contract. For instance, *Autobid.de* states that the buyer and the seller enter into a purchase contract³⁸, while *Municibid.com* defines itself as a platform where users can buy and sell products.³⁹ This is also in line with the general assumption that electronic auctions are used to enter into such agreements. Consequently, the contract concluded at an electronic auction should be governed by the law of the country where the seller has his or her habitual residence. This rule follows from the characteristic performance theory and can be viewed as a specific case of its application.

However, it appears that the flexibility of electronic auctions may allow the user to conclude a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property. In this case, the applicable law cannot be identified with the law of the country where the seller is domiciled. This is because the autonomous understanding of goods within the meaning of Rome I Regulation does not include immovable property.⁴⁰ A similar understanding of goods is also prevailing under the CISG.⁴¹ Hence, a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property concluded at an electronic auction should be governed by the law of the country where the property is situated.⁴²

³⁸ General Terms and Conditions of Business. *Autobid.de* [online]. 30.1.2022, section III (point 5) [cit. 24.5.2022]. Available at: <https://autobid.de/index.php?id=98&L=1>

³⁹ Municibid Terms of Use Agreements. *Municibid* [online]. 23.10.2020, section h) [cit. 24.5.2022]. Available at: <https://municibid.com/Home/Terms>

⁴⁰ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C.H.Beck, 2018, pp. 93–94; MAYER, P., HEUZÉ, V. *Droit international privé*. Issy-le-Moulineaux: LDGJ, 2014, p. 537; RINGE, W.G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 777; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C.H.Beck, 2018, pp. 624–625. Similarly THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 229.

⁴¹ JAGIELSKA, M. Umowa sprzedaży. In: POPIOLEK, W. (ed.). *Międzynarodowe prawo handlowe*. Warszawa: C.H.Beck, 2013, p. 870; SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 30; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWINSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C.H.Beck, 2021, p. 22.

⁴² Art. 4 para. 1 letter c) Rome I Regulation.

Nevertheless, the study of auction platforms shows that this rule is rarely applied in practice. The terms and conditions of auction platforms often explicitly specify that an auction concerning immovable property does not lead to the conclusion of a contract.⁴³ Instead, the auction should be treated as a legally not binding advertisement. This stems from the fact that contracts relating to a right *in rem* in immovable property or to a tenancy to immovable property are usually extensively regulated in substantive law. For instance, the transfer of real property ownership may require the contract to be registered or drawn up by a notary or other trusted official. A contract concluded at an electronic auction typically does not meet these requirements even if there is no conflict of law. Therefore, the terms and conditions seem to result primarily from the requirements of substantive national law. However, the terms and conditions are also significant from the point of view of private international law, as they effectively exclude the application of the law of the country where the property is situated to the contract concluded at an electronic auction.

Moreover, Rome I Regulation provides for that a contract for the sale of goods by auction should be governed by the law of the country where the auction takes place, if such a place can be determined.⁴⁴ As pointed out previously, contracts concluded at an electronic auction can be classified as contracts for the sale of goods within the meaning of Rome I Regulation. Consequently, according to the *lex specialis derogat legi generali* principle, it takes precedence over the rule referring to the law of the country where the seller has his or her habitual residence. The above rule is thus especially worth considering in the context of this paper. For this purpose, the following sections examine the concept of an auction within the meaning of the Regulation and the question of identifying the country where the electronic auction takes place.

⁴³ See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 3 (point 3.3) [cit. 24. 5. 2022]. Available at: <https://assets.allegrostatic.com/popart-attachments/att-ec9077a-a20c-4a2d-a54e-1ceb405539eb>; User Agreement. *eBay* [online]. 11. 3. 2022, section 7 [cit. 24. 5. 2022]. Available at: <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>. Similarly, Muncibid Terms of Use Agreements. *Muncibid* [online]. 23. 10. 2020, section h) [cit. 24. 5. 2022]. Available at: <https://muncibid.com/Home/Terms>

⁴⁴ Art. 4 para. 1 letter g) Rome I Regulation.

Finally, if a contract concluded at an electronic auction is manifestly more closely connected with a country other than that indicated by the above rules, then the law of that country should apply.⁴⁵ However, this corrective rule can only be invoked if all the circumstances of the case clearly support the existence of such a strong connection between the contract and the country. This in turn can only be verified on a case by case basis. Nevertheless, the corrective rule may apply in a situation where both parties are domiciled in the same country other than that where the electronic auction takes place.⁴⁶ In this case, it could be argued that the law of the country where the parties have their habitual residence should take precedence and govern the contract.

4 Electronic Auction as an Auction Within the Meaning of Rome I Regulation

As a preliminary point, it is worth noting that the rule concerning a contract for the sale of goods by auction was not originally invented in Rome I Regulation. It should rather be seen as a continuation of the previous legislation. For example, the same rule is found in the Hague Convention (1955).⁴⁷ More importantly, the adoption of the rule in question pre-dates the development of electronic commerce. It is therefore necessary to determine whether an electronic auction can be classified as an auction within the meaning of Rome I Regulation.

This may not seem difficult at first, as the meaning of the term “auction” seems intuitive. A closer examination however reveals the richness of forms which an auction can take. For instance, depending on the different classification criteria, it is possible to distinguish Chinese, English or Dutch

⁴⁵ Art. 4 para. 3 Rome I Regulation.

⁴⁶ ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, pp. 636–637. Similarly, outside the context of electronic auction, FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 123; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, p. 211; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 255; see also AUDIT, B., D'AVOUT L. *Droit international privé*. Paris: Economica, 2013, p. 819.

⁴⁷ Art. 3 para. 3 Hague Convention (1955).

auctions, forward or reverse auctions as well as auctions with absolute price or price reservation. Finding a common core for such diverse contracting processes may thus raise doubts. Moreover, Rome I Regulation does not define an auction. Scholars in turn usually indicate that the term “auction” used in the Regulation should be interpreted similarly as in the CISG.⁴⁸ While this comment is correct, its significance is limited by the fact that the CISG also does not explain how to understand an auction. Nevertheless, an auction can be defined as a type of contracting process where (1) offers (bid) are made public and (2) participants compete with each other by placing increasingly advantageous offers. The participant who placed the best bid wins the auction and concludes the contract.⁴⁹ This definition seems specific and flexible enough to describe and include different types of auctions. A similar understanding is also recognised under Rome I Regulation.⁵⁰

From this point of view, electronic auctions can be classified as auctions within the meaning of Rome I Regulation.⁵¹ On-line and off-line auctions are obviously not identical. However, the differences between them should not be overestimated. In particular, the participants of off-line auctions usually make their bids public by meeting at the same time and place. When one of them places the bid, others know it immediately. In contrast, the participants of electronic auctions use electronic means of communication

⁴⁸ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C.H.Beck, 2018, p. 107; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

⁴⁹ SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 48; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, p. 42.

⁵⁰ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107; LEIBLÉ, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 105. Similarly ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

⁵¹ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107. On the contrary, AUDIT, B., D'AVOUT L. *Droit international privé*. Paris: Economica, 2013, p. 816.

for placing the bid as an equivalent of meeting at the same time and place. However, off-line auctions usually also allow their participants to place the bids remotely (e.g., over the telephone).⁵² For example, Sotheby's allows the participant to place the bid not only in the saleroom, but also on-line via a dedicated bidding platform, telephone and even place an absentee bid.⁵³ More importantly, the participant of an electronic auction usually has access to information about already placed bids. This functionality is usually available on the auction platform (e.g., *eBay.com*, *B2Bauctions.dk*, *CharityStars.com*). However, sometimes the participant receives information that he or she has been outbid in an e-mail.⁵⁴ Therefore, the technical differences between on-line and off-line auctions are not legally relevant.

The process of concluding a contract at an electronic auction is not always clearly defined by the platform provider. Nevertheless, the description of the process provided for in some of the terms and conditions resembles an off-line auction. For instance, eBay.com briefly states that the seller indicates the starting prices and the buyers compete with each other by placing higher bids.⁵⁵ Similarly, *PropertyRoom.com* and *ShopGoodwill.com* stipulate that the person who placed the highest bid at or above the minimum prices and the bid was accepted by the seller is bound by the transaction.⁵⁶ According to a more elaborate definition formulated by Allegro.pl, an auction is “*a type of an Offer initiated by the Seller as part of which the Bidder declares the price for which*

⁵² This is also accepted in the context of Article 4 para. 1 letter g) of Rome I Regulation. See RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 780; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

⁵³ Buy and Sell at Sotheby's. *Sotheby's* [online]. [cit. 24. 5. 2022]. Available at: <https://www.sothebys.com/en/buy-sell#buying-basics>

⁵⁴ See, e.g., How do I Place a Bid?. *Charity Auctions Today* [online]. [cit. 24. 5. 2022] Available at: <https://www.charityauctionstoday.com/p/help/how-do-i-place-a-bid/>; Terms & Conditions. *B2Bauctions* [online]. Section 4 [cit. 24. 5. 2022]. Available at: <https://b2bauctions.dk/en/terms-conditions>

⁵⁵ How bidding works. *eBay* [online]. 11. 3. 2022 [cit. 24. 5. 2022]. Available at: <https://www.ebay.com/help/buying/bidding/bidding?id=4003>

⁵⁶ Bidding And Buying. *PropertyRoom.com* [online]. [cit. 24. 5. 2022]. Available at: <https://help.propertyroom.com/support/solutions/articles/44001804935-bidding-and-buying>; Terms of Use. *Shopgoodwill.com* [online]. 28. 12. 2016 [cit. 24. 5. 2022]. Available at: <https://shopgoodwill.com/about/terms-of-use>

they are ready to purchase the Goods”⁵⁷. It also adds that transactions should be understood as “procedures for entering into and performing contracts of sale for Goods between Users on Allegro”⁵⁸. This is in line with the general assumption that electronic auctions use bidding as a means of determining the party who concludes a contract.

The study of electronic auctions shows that auction platforms often automate the bidding process.⁵⁹ The user usually declares the highest price he or she is willing to pay. The platform then automatically places incremental bids up to the limit set by the user. At first glance, this may seem significantly different from off-line auctions. In my opinion, however, the automation of the bidding process does not preclude the classification of electronic auctions as auctions within the meaning of Rome I Regulation. This is because the competition between the participants as the main feature of the bidding process remains unchanged.

Nevertheless, electronic auctions often allow the seller to set the “Buy It Now” or a similarly named option.⁶⁰ In this case, the seller sets a fixed price for the good offered at the electronic auction. The contract is concluded when the user clicks on the button “Buy It Now”. Hence, there is no competition between the users of the auction platform, which undermines the key aspect of the bidding process. In my view, such a contract should not be regarded as concluded at an auction within the meaning of Rome I Regulation. Instead, the law of the country where the seller has his or her habitual

⁵⁷ Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 1 [cit. 24. 5. 2022]. Available at: <https://assets.allegrostatic.com/popart-attachments/att-ec9077a-a20c-4a2d-a54e-1ceb405539eb>

⁵⁸ *Ibid.*

⁵⁹ See, e.g., Auction General Rules. *GovDeals* [online]. [cit. 24. 5. 2022]. Available at: <https://www.govdeals.com/index.cfm?fa=Main.Faq>; Automatic bidding. *eBay* [online]. 11. 3. 2022 [cit. 24. 5. 2022]. Available at: <https://www.ebay.com/help/buying/bidding/automatic-bidding?pid=4014>; General Terms and Conditions of Business. *Autobid.de* [online]. 30. 1. 2022, section III (para. 2) [cit. 24. 5. 2022]. Available at: <https://autobid.de/index.php?id=98&L=1>; Terms & Conditions. *B2Bauctions* [online]. Section 10a [cit. 24. 5. 2022]. Available at: <https://b2bauctions.dk/en/terms-conditions>

⁶⁰ See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 3 (para. 3.1) [cit. 24. 5. 2022]. Available at: <https://assets.allegrostatic.com/popart-attachments/att-ec9077a-a20c-4a2d-a54e-1ceb405539eb>; Auction General Rules. *GovDeals* [online]. [cit. 24. 5. 2022]. Available at: <https://www.govdeals.com/index.cfm?fa=Main.Faq>; General Terms and Conditions of Business. *Autobid.de* [online]. 30. 1. 2022, section III (para. 3) [cit. 24. 5. 2022]. Available at: <https://autobid.de/index.php?id=98&L=1>

residence should apply to such an agreement. This is also sometimes clearly recognised as a different contracting process.⁶¹ Interestingly, some charity auction platforms enable the seller to set the “Make a donation” option thanks to which he or she may receive gratuitously a sum of money from the users of the platform.⁶² The contract concluded by exercising this option is obviously not a contract for the sale of goods and should thus be governed according to the characteristic performance theory, possibly modified by the supplementary rule.⁶³

It should also be emphasised that Rome I Regulation covers only a contract concluded at a private law auction.⁶⁴ Transactions at auctions governed by public law are thus excluded from the scope of the Regulation.⁶⁵ This concerns especially auctions conducted by a bailiff or a similar public official as part of compulsory debt collection. At the same time, it is worth noting that according to the European e-Justice, on-line judicial auctions are already organised in 12 Member States.⁶⁶ While the distinction between private and public law auctions may initially seem sharp, the careful analysis of electronic auctions should not be underestimated. In particular, the mere participation of the government or other public institutions in the auction does not preclude the application of Rome I Regulation. For instance, private law auctions may be identified where the government or other public institutions act simply as a seller, without exercising any authority.

⁶¹ See, e.g., Allegro Terms & Conditions. *Allegro* [online]. 2. 5. 2022, section 3 (para. 3.31) [cit. 24. 5. 2022]. Available at: <https://assets.allegrostatic.com/popart-attachments/att-ec9077a-a20c-4a2d-a54e-1ceb405539eb>

⁶² How do I Place a Bid? *Charity Auctions Today* [online]. [cit. 24. 5. 2022] Available at: <https://www.charityauctionstoday.com/p/help/how-do-i-place-a-bid/>

⁶³ Art. 4 para. 2, 3 Rome I Regulation.

⁶⁴ Art. 1 para. 1 Rome I Regulation.

⁶⁵ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107; LEIBLÉ, S. Artikel 4. In: HÜßTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 105; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, p. 170; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

⁶⁶ Judicial auctions. *European e-Justice* [online]. 14. 4. 2022 [cit. 24. 5. 2022]. Available at: https://e-justice.europa.eu/473/EN/judicial_auctions

This applies in particular to auctions concerning surplus disposition (e.g., *GovDeals.com*, *Municibid.com*). On the other hand, a more cautious approach should be adopted with regard to the auctions of seized, found or unclaimed items since they can often be regarded as a form of judicial auction (e.g., *PropertyRoom.com*).

The above considerations lead to the conclusion that an electronic auction can in principle be classified as an auction within the meaning of Rome I Regulation. However, the application of the rule concerning a contract for the sale of goods by auction also requires the identification of the country where the auction takes place. This question is covered in the next section.

5 The Country Where the Electronic Auction Takes Place

The characteristic performance theory underpins many of the rules provided for in Rome I Regulation for determining the law applicable to a contract.⁶⁷ However, the theory is not without exceptions. This relates to the discussed rule regarding a contract for the sale of goods by auction. In this case, the applicable law is determined by the law of the country where the contract is concluded, not the country where the seller has his or her habitual residence. This observation is not inconsequential. It should be noted that the country where the contract is concluded is generally considered to be a weak indicator of the law applicable to the contract.⁶⁸

⁶⁷ See Art. 4 para. 1 letters a), b), e), f) and para. 2 Rome I Regulation as well as Recitals 19 and 21 Rome I Regulation; see also THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 208. Similarly AUDIT, B., D'AVOUTL. *Droit international privé*. Paris: Economica, 2013, p. 816.

⁶⁸ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 123; LEIBLE, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 113; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, pp. 218–219; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 254; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 649.

The rule concerning a contract for the sale of goods by auction is justified by the specificity of the auction as a contracting process. In a typical off-line auction, the parties may not know each other.⁶⁹ In particular, one party may not have sufficient knowledge about the other party's domicile. This lack of information is relevant from the point of view of the characteristic performance theory. In the absence of the discussed rule, the contract for the sale of goods by auction would be governed by the law of the country where the seller has his or her habitual residence. This in turn could lead to the application of a law not intended by the parties, especially the buyer. Applying the law of the country where the auction takes place eliminates this uncertainty as the proper law is easy to determine.

Furthermore, it can be assumed that the parties accept this law since otherwise would not participate in the auction.⁷⁰ For these reasons, it can be argued that the contract is manifestly more closely connected with the country where the auction takes place than with the country where the seller has his or her habitual residence.⁷¹ This is particularly important from

⁶⁹ BOGDAN, M. Contracts in Cyberspace and the New Regulation "Rome I". *Masaryk University Journal of Law and Technology*. 2009, Vol. 3, no. 2, p. 222; LEIBLE, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 105; MARTINY, D. In: HEIN, J. von (ed.). *Münchener Kommentar zum Bürgerlichen Gesetzbuch. Vol. 12*. München: C. H. Beck, 2018, p. 169; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, pp. 208, 214, 254; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637. Similarly RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 780; see also SCHLECHTRIEM, P. In: SCHLECHTRIEM, P., SCHWENZER, I. (eds.). *Commentary on the UN Convention on the International Sale of Goods (CISG)*. New York: Oxford University Press, 2005, p. 48; SCHWANZER, I., HACHEM, P., JĘDRYSZCZYK, B. Art. 1–6. In: SCHWANZER, I., IWŃSKI, K. (eds.). *Konwencja Narodów Zjednoczonych o umowach międzynarodowej sprzedaży towarów (CISG). Komentarz*. Warszawa: C. H. Beck, 2021, p. 42.

⁷⁰ ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

⁷¹ TANG, Z. Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation. *Modern Law Review*. 2008, Vol. 71, no. 5, p. 790. Similarly MAYER, P., HEUZÉ, V. *Droit international privé*. Issy-le-Moulineaux: LDGJ, 2014, pp. 539–540; ZACHARIASIEWICZ, M. A. Rozporządzenie Parlamentu Europejskiego i Rady (WE) nr 593/2008 w sprawie prawa właściwego dla zobowiązań umownych (Rzym I). In: PAZDAN, M. (ed.). *Prawo prywatne międzynarodowe. Komentarz*. Warszawa: C. H. Beck, 2018, p. 637.

the point of view of the Rome Convention which does not provide for a similar rule concerning sales by auction.⁷² However, the Rome Convention emphasises the significance of the connection between the contract and the country.⁷³

According to some scholars, the aforementioned lack of information does not occur in the case of electronic auctions.⁷⁴ Consequently, contracts concluded at such auctions should not be covered by the discussed rule since it is possible to identify the parties. In my opinion, this argument requires more careful consideration. Indeed, the study of electronic auctions indicates that the seller often provides some information about him or her, including the indication of the place where he or she lives or does business. The user may usually access this information by clicking on a button or a link available at each auction. In some cases, the auction platform provider requires a formal verification of the participant. For instance, *Autobid.de* requires every buyer to provide a scan of the personal identification document as well as evidence of his or her status as a professional.⁷⁵ However, this does not seem to be the prevailing practice, which to some extent undermines the argument that the level of information of persons participating in the electronic auction is satisfactory.

One should bear in mind the limited possibilities of verifying the identity of the participants of electronic auctions and the ease of creating false (fake) user accounts. Auction platform providers also frequently exclude their liability for the content of the seller's invitation to place bids.⁷⁶ In particular, they indicate that they do not verify the correctness of the information presented by the seller. On the other hand, at least some of the providers

⁷² See Art. 4 Rome Convention which corresponds to Art. 4 Rome I Regulation.

⁷³ Art. 4 Rome Convention.

⁷⁴ THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/ EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

⁷⁵ General Terms and Conditions of Business. *Autobid.de* [online]. 30.1.2022, section II (para. 1) [cit. 24.5.2022]. Available at: <https://autobid.de/index.php?id=98&L=1>

⁷⁶ See, e.g., Municibid Terms of Use Agreements. *Municibid* [online]. 23.10.2020, section h) [cit. 24.5.2022]. Available at: <https://municibid.com/Home/Terms; Terms&Conditions. B2Bauctions> [online]. Section 5 [cit. 24.5.2022]. Available at: <https://b2bauctions.dk/en/terms-conditions>. Similarly, in the context of charity auctions, see e.g., Terms of Service. *CharityStars* [online]. 24.11.2020 [cit. 24.5.2022]. Available at: <https://www.charitystars.com/company/tos>

aim to improve the certainty and transparency of the electronic transactions. This goal can be achieved by evaluating the sellers' performance. For example, *eBay.com* sets minimum standards which are used as a benchmark for distinguishing Top Rated, Above Standards and Below Standard sellers.⁷⁷ The amount of information concerning the other party to the contract concluded at an electronic auction should thus be analysed not only in terms of quantity but also in terms of quality.

Moreover, it should be emphasised that the rule regarding a contract for the sale of goods by auction applies only if the place of auction can be identified. This is also the point which raises most doubts concerning the application of the rule to contracts concluded at an electronic auction. At the same time, it is necessary to stress that the country where the contract is concluded is generally perceived as a weak indicator of the law which should govern the contract. Therefore, the discussed rule should not be overly extended. From this point of view, it is not surprising that scholars are usually sceptic as to whether this requirement can be met. Some of them even claim that it is impossible to identify the country where the electronic auctions take place and thus the rule does not apply to the contracts in question.⁷⁸

The above doubts are certainly significant and should not be dismissed hastily. In my opinion, however, the application of the discussed rule to contracts concluded at an electronic auction requires a more differentiated position by taking into account the circumstances of a particular case. Electronic means of communication seem to provide a sufficient degree of flexibility to align the contracting process to the requirements laid down in Rome I Regulation. In particular, the auction platform may be used simply as a tool for communicating the bids in an auction which takes place in a clearly identifiable physical location.⁷⁹ Moreover, the item offered at the

⁷⁷ Seller levels and performance standards. *eBay* [online]. [cit. 24. 5. 2022]. Available at: <https://www.ebay.com/help/selling/seller-levels-performance-standards/seller-levels-performance-standards?id=4080>

⁷⁸ LEIBL, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, pp. 105, 118; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

⁷⁹ See also BROWN, J., PAWLOWSKI, M. How Many Contracts in an Auction Sale? *Nottingham Law Journal*. 2016, Vol. 25, p. 14.

auction may be stored in that place. There may also be a natural person who acts as an auctioneer and with whom the participants can communicate directly. In my view, in such a situation, it can be argued that the country where the electronic auction takes place can be identified, although the need to consider all the circumstances should be emphasised.

Nevertheless, it can be expected that such an auction is not typical in practice. The auction should be treated as an exception rather than as a rule. Consequently, the general scepticism regarding the possibility of identifying the country where the electronic auction takes place seems justified.⁸⁰ As a result, the discussed rule of Rome I Regulation usually does not apply to contracts concluded at an electronic auction. Consequently, some scholars consider the application of the supplementary rule to determine the law applicable to a contract concluded at an electronic auction.⁸¹ This would in turn require identifying the law of the country with which the contract is most closely connected.⁸² However, they also correctly discern the drawbacks of such a solution.⁸³ In my opinion, it is sufficient to refer to the principle *lex specialis derogat legi generali* and the previously discussed definition of the contract for the sale of goods (see section 3). The law applicable to these agreements is thus determined by the basic rule, i.e., they are governed by the law of the country where the seller has his or her habitual residence.

The question may however arise whether the autonomous interpretation of the term “the place of auction” should be adapted to the specificity of the digital environment. In particular, it could be considered whether the place of the auction should not be equated with the location of the servers where the auction platform is stored. Nevertheless, such identification

⁸⁰ FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 107; RINGE, W. G. In: WÜRDINGER, M. et al. (eds.). *Internationales Privatrecht und UN-Kaufrecht*. Saarbrücken: Juris GmbH, 2015, p. 780; THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

⁸¹ TANG, Z. Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation. *Modern Law Review*. 2008, Vol. 71, no. 5, pp. 793–794.

⁸² Art. 4 para. 4 Rome I Regulation.

⁸³ TANG, Z. Law Applicable in the Absence of Choice – The New Article 4 of the Rome I Regulation. *Modern Law Review*. 2008, Vol. 71, no. 5, p. 794.

is correctly rejected by scholars.⁸⁴ In my opinion, it should be noted that the location of the servers is usually unknown or even irrelevant to the parties. Moreover, the auction platform providers typically do not inform the users where the servers are located. In addition, an auction platform may require several servers situated in different areas of the globe for proper functioning. Referring to their location would only increase legal uncertainty related to the law applicable to the contract. Therefore, there is no justification for treating the law of the country where the servers are located as the law governing contracts concluded at an electronic auction.

It is also worth noting that this conclusion corresponds to the CUECIC. The Convention provides for that the location of the place of business cannot be identified merely with the place where the equipment and technology supporting an information system used by a party in connection with the formation of a contract are located or where the information system may be accessed by other parties.⁸⁵ The same rule applies with regard to the dispatch and receipt of electronic communications (e.g., an offer and its acceptance).⁸⁶ As pointed out in the Explanatory Note, this cautious approach to the role of servers as an indicator of the place of business was a deliberate decision of the legislator who drew up the CUECIC.⁸⁷

The country where the auction takes place should also not be equated with the country where the auction platform provider has his or her habitual residence.⁸⁸ It should be emphasised that the auction platform provider is not a party to a contract concluded at an electronic auction. Accordingly, his

⁸⁴ THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214. Similarly, in the general context of Internet contracts, FERRARI, F. Art. 4. In: FERRARI, F. et al. (eds.). *Internationales Vertragsrecht. Rom I-VO. CISG. CMR. FactÜ. Kommentar*. München: C. H. Beck, 2018, p. 142. Similarly, in the general context of Internet transactions, LEIBLE, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 117.

⁸⁵ Art. 6 para. 3 CUECIC.

⁸⁶ Art. 10 para. 3 CUECIC.

⁸⁷ United Nations Convention on the Use of Electronic Communications in International Contracts. *UNCITRAL* [online]. 2007, pp. 14–15, 64–65 [cit. 24. 5. 2022]. Available at: https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf

⁸⁸ THORN, K. In: RAUSCHER, T. (ed.). *Europäisches Zivilprozess- und Kollisionsrecht EuZPR/EuIPR. Vol. 3*. Köln: Dr. Otto Schmidt Verlag, 2016, p. 214.

or her domicile should not generally affect the law governing the agreement between the users of the platform. In addition, the technical unity of the auction platform may not necessarily translate into a single habitual residence of the provider. For instance, *eBay.com* lists 6 national companies as parties to the contract for an electronic auction, depending on the user's domicile.⁸⁹ Therefore, there is a risk that the contract concluded at an electronic auction could be governed by random law as the result of equating the country where the auction takes place with the country where the auction platform provider has his or her habitual residence.

However, the significance of the provider's domicile should not be completely ignored. It should be noted that a contract concluded at an electronic auction frequently complies to some extent with the provisions stated in a contract for an electronic auction.⁹⁰ The latter in turn is normally governed by the law of the country where the auction platform provider has his or her habitual residence.⁹¹ The parties may also be more aware of the law applicable to the contract for an electronic auction even if they are unsure which law governs the contract concluded at an electronic auction. Hence, it is rightly argued that these arguments, together with other factors, may justify the application of the corrective rule in a specific case.⁹² As a result, the contract concluded at an electronic auction may sometimes be governed by the law of the country applicable to the contract for the electronic auction. Nevertheless, this requires careful consideration of all circumstances and should be done on a case by case basis.

6 Conclusion

Electronic auctions are a convenient way to conclude contracts. The use of electronic means of communication allows the users of auction platforms to overcome the limitations resulting from a geographical

⁸⁹ User Agreement. *eBay* [online]. 11. 3. 2022, section 1 [cit. 24. 5. 2022]. Available at: <https://www.ebay.com/help/policies/member-behaviour-policies/user-agreement?id=4259>

⁹⁰ See LEIBLÉ, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, pp. 118–119.

⁹¹ Art. 4 para. 1 letter b) Rome I Regulation.

⁹² LEIBLÉ, S. Artikel 4. In: HÜBTEGE, R., MANSEL, H.-P. (eds.). *Rom-Verordnung*. Baden-Baden: Nomos, 2019, p. 119.

distance. As a consequence, electronic auctions may facilitate the conclusions of contracts between parties located in different countries. This observation leads to the question regarding the law applicable to such agreements. The considerations carried out in this paper indicate that an electronic auction usually qualifies as an auction within the meaning of Rome I Regulation. However, it is typically not possible to indicate the country where the electronic auction takes place. This in turn precludes the application of a special rule provided for in Rome I Regulation which concerns a contract for the sale of goods by auction. It can therefore be assumed that a non-consumer contract concluded at an electronic auction is usually governed by the law of the country where the seller has his or her habitual residence.

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