Rome Regulations

Commentary

Second Edition

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ARTICLE 10 CONSENT AND MATERIAL VALIDITY

(1) The existence and validity of a contract, or of any term of a contract, shall be
dermined by the law which would govern it under this Regulation if the contract
or term were valid.

(2) Nevertheless, a party, in order to establish that he did not consent, may rely
up on the law of the country in which he has his habitual residence if it appears
from the circumstances that it would not be reasonable to determine the effect of
his conduct in accordance with the law specified in paragraph 1.

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I. Purpose

1. The purpose of Article 10 is to create a uniform treatment of all aspects of the
   formation of the contract. Assuming that the putative applicable law shall determine
   the existence and validity of a contract, the same law will be applicable for its
   interpretation and the juridical consequences (cf. Article 12). The aim is to create a
   uniform lex contractus\(^1\) and to avoid a severance (dépeçage), which would lead to
   different applicable laws governing the separated contract terms.

2. Article 10(2) is a special rule that relates only to the contractual consent as a part of
   the existence of a contract mentioned in paragraph 1. The purpose of paragraph 2 is to
   protect the (negative) freedom of contract through the right not to enter into a

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1. Hausmann, Art. 10 Rom I-VO, in Staudinger Kommentar zum Bürgerlichen Gesetzbuch (Magnus
   ed., revised edition 2011), para. 1; Spickhoff, in Kommentar zum Bürgerlichen Gesetzbuch
   (Bamberger and Roth eds, 3rd ed. 2012), Art. 10 Rom I, para. 2; Lesble, Art. 10 Rom I-VO, in
   NomosKommentar GGB Vol. 6 (Mansel and Hüßjege eds, 2013), para. 1; Ferrari, Art. 10 Rom
   I-VO, in Kommentar zum Internationalen Vertragsrecht (Ferrari, Kieninger, Manowski et al. eds,
   2nd ed. 2012), para. 2 (Einheitsstatut); Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar
   zum BGB Vol. 10 (Sacker and Rixecker eds, 6th ed. 2015), para. 6; Rauscher/Freitag,
   EuZPR/EuIPR (Rauscher ed., 2011), Art. 10, para. 1 (einheitliches Vertragsstatut).
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contract under the specific provisions of private international law. In international cases it would be unfair to deem someone to have consented when his actions (or silence) would not have this effect under that person’s ‘own law’ if he relies upon that law. Paragraph 2 presumes that a person will be familiar with and able to be advised upon the law of the country in which he has his habitual residence. That law applies under the further condition that this appears reasonable in all circumstances.

II. Scope of Application

1. General Remarks. The Rome I Regulation gives no definition either for the contract or for the terms ‘existence’, ‘validity’ or ‘consent’. Under the Rome I Regulation it is necessary to apply a uniform meaning of these notions equally to all Member States. The matters for application of a uniform and autonomous law are, for example, the question whether a particular obligation is to be characterized as contractual or whether any kind of agreement is a contract. For the understanding of Article 10, reference will be made to the definitions for the European Private Law set out in the Draft Common Frame of Reference (DCFR). One of its politically accepted functions is to be an instrument for the development of a coherent terminology.

Article 10 covers every type of contract understood as an agreement, which is intended to create obligations in a binding legal relationship or to have some other legal

2. Art. 10(2) is an indirect application of the fundamental principle of freedom of the parties to enter into contract; see further Wicker/Sautonie-Lagoujonie/Bujoli, Guiding Principles of European Contract Law, in European Contract Law, Materials for the Common Frame of Reference (Fauvarque-Cosson and Mazeaud eds, 2008), 423 et seq.; under German law cf. Staudinger, Art. 10 Rom I-VO, in Handkommentar zum Bürgerlichen Gesetzbuch (Schulze, Dörner and Ebert eds, 8th ed. 2014), para. 6; Looschelders, Art. 31 EGBGB, Internationales Privatrecht – Kommentar (Looschelders ed., 2004), para. 14; Ferrari, Art. 10 Rom I-VO, in Kommentar zum Internationalen Vertragsrecht, para. 16.


4. See annotations to Art. 19 and para. 37, infra.


7. See for the political progress Council 2.12.2009, Doc. 17024/09, Annex: The Stockholm Programme, 33, 3.4.2: The European Council reaffirms that the common frame of reference for European contract law should be a non-binding set of fundamental principles, definitions and model rules to be used by the lawmakers at Union level to ensure greater coherence and quality in the lawmaking process; cf. further the Second Progress Report from the Commission on The Common Frame of Reference, COM(2007) 447 final: ‘CFR is intended to be a “toolbox” or a handbook for the Commission and the EU legislator to be used when revising existing and preparing new legislation in the area of contract law… The Commission considers the CFR a better regulation instrument… with the purpose of ensuring consistency and good quality of EC legislation in the area of contract law. It would be used to provide clear definitions of legal terms, fundamental principles and coherent modern rules.’

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effect. The contract will be a bilateral or a multilateral one.\textsuperscript{8} \textbf{Unilateral acts} will be included to the extent that they are part of the formation making in the pre-contractual time phase, like offer and acceptance.\textsuperscript{9}

5 The scope of Article 10 must be extended by Article 3(5) to cover the existence and validity of the parties’ consent to a \textbf{choice-of-law clause}. As is mentioned in the Giuliano-Lagarde report for the Rome Convention,\textsuperscript{10} the word ‘term’ shall cover cases in which there is a dispute as to the validity of a term of the contract, such as a choice-of-law clause. Hence, the presumptive law has also to decide about the existence and the validity of such a clause.\textsuperscript{11}

6 The scope of the Rome I Regulation excludes \textbf{choice-of-forum agreements} and \textbf{arbitration clauses} (Article 1 (2) (e)). As far as Article 23 of the Brussels I Regulation is applicable for choice of forum clauses it takes precedence over any national law. Art. 23 regulates finally and conclusively questions of international jurisdiction agreements.\textsuperscript{12} Beyond, the existence (consent) and material validity of a choice-of-forum clause and of an arbitration clause depend on the law that would govern the contract. The Rome I Regulation will be applicable by analogy in so far.\textsuperscript{13}

7 The status of legal \textbf{capacity} of the contractual partners, either of individuals or of companies and other bodies, corporate or incorporate, will be excluded from the scope of application (Article 1 (2)(a) and (f)). This will be governed by the proper conflict-of-laws rules of the forum.\textsuperscript{14} Article 13 sets out a single exception clause to protect the other contractual party under certain circumstances. No change is intended as compared with Article 1(2)(a) and (e), 11 of the Rome Convention.

8 The wording of Article 10(1) is identical with Article 8(1) of the Rome Convention, and also with Article 10(2), no change in substance is intended as compared to Article 8(2) of the Convention. That intention reflects that the Convention proved its worth,

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\textsuperscript{8} For that definition see Art. II.-1: 101 DCFR Outline Edition, 183 and Annex, Definitions: Contract, 549; for a similar functional definition, see \textit{Lehmann}, Anwendungsbereich, 17, 28 et seq.


\textsuperscript{10} Cf. Giuliano-Lagarde report, Art. 8, para. 1.


\textsuperscript{12} Cf. Magnus/Mankowski, Brussels I Regulation (2007), Art. 23, paras 14 and 76.


\textsuperscript{14} In German international private law, e.g., individuals were treated in accordance with the law of their nationality (Art. 7 para. 1 of the \textit{Einführungsgesetz zum Bürgerlichen Gesetzbuch} (EGBGB), cf. \textit{Schulze}, Art. 7 EGBGB, in Anwaltskommentar zum BGB, Vol. 1 (Heidel et al. eds, 2nd ed. 2012) para. 2) or the law of the country of the corporate domicile of the company (cf. \textit{Kindler}, Internationales Gesellschaftsrecht, in Münchener Kommentar zum BGB Vol. 11 (Säcker and Rixecker eds, 5th ed. 2010), paras 420 et seq.). See also \textit{Hohloch}, Anh. III Art. 26 EGBGB, Art. 10 Rom I, in Erman, Bürgerliches Gesetzbuch (Westermann ed., 14th ed. 2014), para. 3; \textit{Leible}, Art. 10 Rom I-VO, in NomosKommentar BGB, para. 4; Rauscher/Freitag, EuZPR/EulPR (2011), Art. 10, para. 8.

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and there was no need for change. As was set out by the CJEU for the interpretation of the Brussels I Regulation in relation to the prior Brussels Convention, these articles must be interpreted consistently.

As mentioned above, the existence and the material validity is related to law matters that are also treated in the principles, definitions and model rules of European Private Law set out in the DCFR. Recital 14, which opens the choice of law to other future legal instruments adopted by the Union, will be relevant, in that future case, also for those matters.

2. Article 10(1) Existence and Validity of the Contract. The differentiation between the existence and material validity in Article 10(1) is of practical relevance only for Article 10(2), which is solely related to consent as a prerequisite for the contract’s existence.

a. Existence means the conditions for the formation of a contract from an external point of view. Article 10 includes therefore the requirements for the conclusion of a contract like the intent to enter into a binding legal relationship and the reaching of a sufficient agreement. Also the pre-contractual phase will be covered to the extent that a contract is later concluded.

aa. Formation of the Contract. (1) Offer and acceptance are the most relevant unilateral juridical acts to form a contract. The putative applicable law determines whether the parties have reached an agreement by offer and acceptance. Article 10 embraces the whole process of conclusion of a contract. That includes all parties’ statements or conduct with the intention to enter into a binding relationship. It further includes the question whether the contractual obligation has come into

15. Mankowski, Die Rom I-Verordnung – Änderungen im europäischen IPR für Schuldverträge, IHR (2008), 139, 149; Cheshire/North/Fawcett, Private International Law, 746.
17. DCFR Outline Edition, 183 et seq.
18. Recital 14 reads: ‘Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.’
19. Cf. Art. II.-4: 302 DCFR Outline Edition, 200, the intention is to be determined from the party’s statement or conduct as they were reasonably understood by the person to whom it is addressed.
20. For action of liability see Art. 12(1) of the Rome II Regulation (culpa in contrahendo) where reference is made to the (putative) applicable law of the (hypothetical) contract.
21. Other ways of conclusion will also be included. The process of conclusion of a contract can sometimes not be analysed in offer and acceptance. For example if a negotiated draft agreement will be signed by both parties, cf. Lando/Beale, Principles of European Contract Law, Part I (Lando and Beale eds, 2000), Commentary to Art. 2, 211, 208. The provisions for the formation by offer and acceptance then normally apply with appropriate adaptations, cf. Art. II.-4: 211 DCFR Outline Edition, 200.
22. For definition cf. DCFR Outline Edition, Annex, Definitions, 548: ‘Conduct’ means voluntary behaviour of any kind, verbal or non-verbal: it includes a single act or a number of acts,

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existence when there was a mistake of such a fundamental character as to prevent the contractual bond from being tied.\textsuperscript{23} This is discussed as a consequence of fundamental lack of willpower\textsuperscript{24} or as a joke. The presumptively applicable law decides the question whether the terms of the contract have been sufficiently defined by the parties as well as the consequences of a merger clause.\textsuperscript{25} The putative applicable laws further have to determine whether a proposal amounts to an offer concerning the intention to create a contractual obligation as opposed to an invitation to render an offer (\textit{invitatio ad offerendum}). Equally, the revocation of an offer is included, or the question whether an offer lapses by rejection. Embraced is, for example, also the question whether a contract has been formed if the letter of acceptance is lost in the post.\textsuperscript{26}

Furthermore, Article 10 applies to the formation of a contract \textit{by electronic means} with all related e-commerce problems, such as, for example, the necessity of an acknowledgement of receipt, the possibility to correct input errors or the question whether a proposal on a website is a legally binding offer \textit{ad incertas personas} or not.\textsuperscript{27}

13 Article 10 covers the question whether the creation of the contractual obligation depends on an element of \textit{consideration},\textsuperscript{28} if it will not be considered as an element of form with the consequence that Article 11 would apply,\textsuperscript{29} or whether an incomplete agreement has been subsequently completed by a further agreement.\textsuperscript{30}

14 The putative applicable law also addresses the legal effects of silence or inactivity of a person. The \textit{conduct}\textsuperscript{31} of the offeree may indicate tacit assent to the offer (but see

\begin{itemize}
  \item behaviour of a negative or passive nature (such as accepting something without protest or not doing something) and behaviour of a continuing or intermittent nature (such as exercising control over something).\textsuperscript{'}
  \item \textsuperscript{24} Fundamental lack of willpower, since the juridical act does not emerge (German: \textit{fehlendes Erklärungsbewusstsein}); Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 22. The dispute in the German doctrine whether a (avoidable) contract will be reached in that case, Medicus, Allgemeiner Teil des Bürgerlichen Rechts (10th ed. 2010), paras 605 et seq.; for vitiated consent or intention, especially mistake, as questions of validity see para. 18, \textit{infra}.
  \item \textsuperscript{25} Cf. the definition in Art. II.-4: 104(1) DCFR Outline Edition: ‘If a contract document contains an individually negotiated term stating that the document embodies all the terms of the contract.’
  \item \textsuperscript{27} Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, paras 16 et seq.; Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 25; Hohloch, Anh. III Art. 26 EGBGB, Art. 10 Rom I, in Erman, Bürgerliches Gesetzbuch, para. 6.
  \item \textsuperscript{29} Cf. with concern made to the American Law under German international private law, Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 29.
  \item \textsuperscript{30} Cf. Egon Oldendorff v. Liberia Corp. [1995] 2 Lloyd’s Rep. 64.
  \item \textsuperscript{31} For definition of the notion conduct, see fn. 22, \textit{infra}.
\end{itemize}
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Article 10(2)). This determines also whether a contract has been validly formed if an offeror remains silent in the face of an acceptance that attempts to vary the terms of the original offer\(^3\) (see mn. 33).

**bb. Incorporation.** Article 10(1) covers the question of incorporation as a matter of existence of the contract. This may concern whether a contract has validly incorporated another document by reference\(^3\) or the important question of a successful incorporation of standard terms, including the problem of a ‘battle of forms’\(^3\) (see also mn. 30). Thus, the putative applicable law must address in which kind (e.g., plain and intelligible language)\(^3\) and in which language a standard term is formulated.\(^3\)

However, the question whether a term forming part of standard terms is unfair (contrary to good faith and fair dealing) is a matter of material validity.

**b. Material Validity of the Contract.** Validity of a contract or of any of its terms set out in Article 10(1) means, first of all, material validity as opposed to formal validity, which is addressed in Article 11. The latter covers particular requirements on external manifestation of expression of will, such as writing, signing and declaring under seal. Article 10(1) denotes the law, which determines whether a contract or a term of a contract, either forming part of standard terms or individually negotiated, is materially valid.

**aa. A consent may be invalidated by mistake, by fraudulent or non-fraudulent misrepresentation, by improper economic pressure, duress or threat.** In the German doctrine it is disputed whether these threats to consent go to the existence\(^3\) or to the validity\(^3\) of a contract, which would have as consequence an impact on the application of Article 10(2).

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32. Stone, EU Private International Law, 294; Staudinger, Art. 10 Rom I-VO, in Handkommentar zum BGB, para. 5.
33. Stone, EU Private International Law, 295.
35. A surprising provision will not be part of the contract under German law (§ 305c (1) BGB), Lindlacher, § 305c BGB, in AGB-Recht Kommentar (Wolf, Lindlacher and Pfeiffer eds, 6th ed. 2013), para. 4 (negative legal condition for incorporation). Such a provision may therefore a matter of existence.
39. Also Hohloch, Anh. III Art. 26 EGBGB, Art. 10 Rom I, in Erman, Bürgerliches Gesetzbuch, para. 15; Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 208; Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, para. 52; v. Hoffmann, Art. 28 EGBGB, in Soergel, Bürgerliches Gesetzbuch, para. 32; Staudinger, Art. 10 Rom I-VO, in Handkommentar zum BGB, para. 8; Looschelders, Art. 31 EGBGB, Internationales Privatrecht – Kommentar, para. 20. For the English doctrine see 37, supra.
A further aspect of material validity is illegality. Illegality is, under the Rome Regulation, a matter of the applicable law, rather than that of the place of contracting or the place of performance. Where it is alleged that the contract is void for illegality in accordance to, for example, the applicable English law, the English rule on supervening illegality will apply. The decision would be the same in an English court or if the place of performance was in England. There may also be overriding mandatory rules of the law of the forum or of the law of the country where the obligations arising out of the contract must be or have been performed, which renders the performance of the contract unlawful (see Article 9(2) and (3) section 1).

Article 10(1) also governs the effects of invalidity. Where it is alleged that the contract is void for an infringement of exchange restrictions or for the avoidance of a particular term, as, for example, an exemption clause (partial invalidity or ineffectiveness), the putative applicable law will give answer.

The conditions according to which a party has the right to withdraw or to terminate a contract or to give a notice of avoidance (Anfechtung) and their legal consequences take part of the validity of the contract and will be contained by the putative lex contractus. This will also apply to the question whether a person is bound to respect the terms of a contract concluded between the preceding owner of a good and another person in the absence of any novation. However, the effect of a novation to a contract is governed by the law applicable to the new contract.

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3. Article 10(2) Protection Clause. The special rule of exception in Article 10(2) applies to consent as an element of the existence of the contract and not to questions of validity. It covers any issues of offer and acceptance except the material validity of consent (see mn. 16–20). Article 10(2) is solely related to the existence of the contract and cannot be extended by analogy to other matters of formation or validity, such as the right to withdraw or elements of formal validity. Paragraph 2 does not have a specific function to protect consumers.
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III. Legislative History

The origin of Article 10 lies in Article 8 Rome Convention of 1980. The wording of Article 10(1) is identical with Article 8(1) of the Rome Convention, and there is no change in substance intended in paragraph 2 of the two legal norms. Article 10 also remains unaltered as compared to the Proposal of the Commission, which would have integrated the provisions as Article 9(1) and (2).

IV. Content

1. Article 10(1) and Article 3(5) Putative Applicable Law and Choice of Law. The existence (consent) and material validity of a contract, or any term of it, including a choice-of-law clause (cf. Article 3(5)), depend on the law that would govern the contract if it existed and was valid. The so-called bootstrap principle denotes either the law of a country chosen by the parties in accordance to Article 3 or, in absence of choice, the objective applicable law determined by the conflict-of-laws rules set out in this Regulation. The Regulation ignores the logical problem behind that solution and lays down the rule that the putative applicable law governs these issues.

For consumer law contracts the special rules set out in Article 6 will apply. For individual employment contracts the rules in Article 8 of this Regulation apply to denote the putative lex contractus. In choice-of-law cases the provisions that cannot be derogated from by agreement by virtue of the law that, in absence of choice, would have been applicable (Article 6(2) section 2 and Article 8(1) section 2), may also concern the existence and validity of a contract and will take part of the putative applicable law under Article 10. A Consumer will be protected against unclear choice-of-law clauses set out in standard terms by the law of his habitual residence. Hence for German consumers articles 305–310 BGB are also applicable concerning the choice-of-law clause itself. Furthermore, as far as existence and validity are concerned, overriding mandatory rules in accordance with Article 9 will take part of the putative applicable law.

51. That means that the parties are able to pull themselves up by their own bootstraps, Cheshire/North/Fawcett, Private International Law, 74; but also understood for the objective applicable law Kaye, The New Private International Law, 271; Plender/Wilderspin, The European Private International Law of Obligations, 6-050, 157.
52. Clarkson/Hill, The Conflict of Laws (Clarkson and Hill eds, 4th ed. 2011), 246: ‘Questions of formation cannot be governed by the applicable law, for until such questions have been decided it is not clear that there is a contract at all.’; contrary Giuliano-Lagarde report, 1980, OJC 282/1 (Annex IV), 30: ‘This is to avoid the circular argument that where there is a choice of the applicable law no law can be said to be applicable until the contract is found to be valid.’
53. Art. 6 mainly refers to the law of the country of consumers’ habitual residence, meanwhile, Art. 8 mainly refers to the law of the country of the employee’s place of work.
54. BGH ZR 40/11 (19 July 2012), NJW 2013, 421, para. 33 (transparency); contrary Pfeiffer, LMK (2013), 343552: The control of Art 6(2) are limited to the material law determined by Art. 3 and 10(1); unclear Thorn, Art. 6 Rom I, in Palandt, para. 8. For consumers in member states the
Article 3(5) expressly refers to Article 10, which allows that by the parties’ choice, the law applicable to the contract in whole or part is selected (Article 3(1) section 2). That applies also to matters of Article 10. For example, the formation of a contract may be governed by a different law than the consequences of the contract. The matter of severability (depeçage) in relation to a contract is only allowed for a choice of law. The objective connection does not permit severance by the court. Furthermore, there remains the right to change the choice of law for the contract at any time.

The application of Article 3(5) with its reference to Article 10 suggests that the existence of the alleged choice-of-law clause should be considered independently before the contract as a whole is examined. The validity of a New York choice-of-law clause, for example, is as such governed by New York law. A clause providing for arbitration in England is validly incorporated into a contract governed by English law.

Problems arise in the case of negotiations involving a so-called battle of forms, when each party tries to push through its own standard terms. Where there has been no choice-of-law provision, the problem is solved by reference to the law that would govern the transaction by the objective rules of conflict set out mainly in Article 4 of the Regulation. If only one party tries to impose a choice-of-law clause, then the chosen law will be the putative applicable law to decide whether he may succeed. But if both sets of terms contain choice-of-law clauses with different chosen laws, there is no chosen law in accordance with Article 3(5). The solution can be found in the rule that the standard terms form part of the contract to the extent that they are common in substance. There is no consent in the choice-of-law question with the consequence that the objective rule of conflict must dictate which law would govern the transaction. However, it also seems to be appropriate to determine first whether there is a contract on the terms of the first-issued form in accordance with the chosen law. Another consideration is whether there is a contract on the terms of the second-issued

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uniform material standard is set out in Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (transparency, Art. 5 ph. 1) which will be paramount to Art. 6 (Art. 23 Rom I).


56. With reference to former Art. 8 Rome Convention, see Haussmann, Art. 10 Rom I-VO, in Staudingers Kommentar, paras 12 and 39.

57. Different regarding Art. 4(1)2 of the Rome Convention, see Hoge Raad Ned. Jur. 2008 Nr. 181. (The Hoge Raad referred three of five questions concerning aspects of the severance set out in Art. 4(1) Rome Convention 1980 to the European Court of Justice for a Preliminary Ruling according to Art. 267 FEU; see as well the Opinion of the Advocate General Bot, C-133/08 ICF v. Balkenende and MIC from 19 May 2009).


62. That is also the solution in Art. II. 209(1) s. 2 DCFR Outline Edition.

63. Dicey/Morris/Collins, Conflict of Laws, para. 32-177.
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form, taking similar account of its choice-of-law clause. If there is an inconsistency, the latter formed contract supersedes the earlier to the extent of the inconsistency. 64

2. Article 10(2) Confidence Protection and Negative Freedom of Contract. As already noted, the special rule of exception in Article 10(2) applies only to consent as an element of the existence of the contract, not to questions of validity (see paragraph 22). A party can rely on the absence of its consent under the law of the country of its habitual residence if this appears reasonable under all circumstances. The effect of Article 10(2) is that the contract will be deemed non-existent by reference to the law of habitual residence of the party denying that he consented. 65 In general, Article 10(2) will be applied with caution. 66 It is not applicable only in case of intransparency of a choice-of-law clause. 67

The Giuliano-Lagarde report for the Rome Convention already pointed out that the conduct of the protected party means any action and failure; it does not, therefore, relate solely to silence. 68 Offer and acceptance or other juridical acts with an impact to the existence of a contract (e.g., options) may be ascertained as implied from conduct as it was reasonably understood by the person to whom the act is addressed. 69

Problems arise with regard to the implications of conduct in the sense of silence 31 by a party in receipt of an offer from another. Especially under German law, which may in a given case be the chosen or the ascertained objective applicable law (Article 10(1)), merchants will be taken to have accepted an offer they do not expressly reject, in particular where certain terms or conditions as well as standard terms are included in subsequent written confirmation of an oral contract (so-called ‘commercial letter of confirmation’). 70 Furthermore, standard terms will be included by silence in some commercial branches in accordance with German law. A silent incorporation takes place by common practice in a specific branch 71

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64. Stone, EU Private International Law, 296; Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, paras 164 et seq.
65. Thorn, Art. 10 Rom I, in Palandt, para. 4; Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 216; Leible, Art. 10 Rom I-VO, in NomosKommentar BGB, para. 38.
69. For that definition see Art. II.-4: 302 DCFR Outline Edition; any action implying intention (e.g., receipt of the goods, part payment, signature on the bill), see Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, para. 47.
70. German: Kaufmännisches Bestätigungsschreiben; cf. Canaris, Handelsrecht (Canaris ed., 24th ed. 2006), § 23 II, paras 9 et seq.; to the meaning of silence in German law generally, see Kramer, Vor § 116 BGB, in Münchener Kommentar, paras 8 et seq.; for commercial matters see Hopt, Art. 346 HGB, in Kommentar zum Handelsgesetzbuch (Baumbach and Hopt eds, 36th ed. 2014), paras 25, 30 et seq.
71. Acknowledged for B-to-B transactions of banks, ports and airports, for the standard terms of bills of lading (carriage contracts) and for contracts with a forwarding agent (so-called ADSp); Pfeiffer, § 305 BGB, in AGB-Recht Kommentar, paras 145 et seq.
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(Branchenüblichkeit)\textsuperscript{72} or by usages\textsuperscript{73} (Handelsbräuche)\textsuperscript{74}. However, under English law a contract cannot be concluded by silence alone.\textsuperscript{75} Paragraph 2 may, for example, apply where an English resident ignored an offer received from Germany and governed in accordance with paragraph 1 by German law under which silence was treated in the situation as consent. The application of the law under Article 10(1) could also operate unfairly where a person residing in England goes on holiday in a hotel in Switzerland, at which he receives an offer under German law to which he gives no reply.\textsuperscript{76} The offeree should be protected by absence of consent under the law of the country of his own habitual residence with which he could be presumed to be familiar and able to be advised.\textsuperscript{77} Also, the converse situation may appear. An offeror receiving no reply from the offeree could himself be prejudiced on selling goods to another, if the applicable law treats silence as acceptance. In this situation as well, the offeror may get help from Article 10(2).

A dispute arises in German doctrine over whether a mistake due to a misunderstanding of a foreign language\textsuperscript{78} falls within the scope of Article 10(2)\textsuperscript{79} or not.\textsuperscript{80} The situation seems to be similar to the implications of silence (see mn. 33). Under the restrictive conditions of the reasonableness test (see mn. 38), a party may invoke the provisions of the law of the country of his habitual residence\textsuperscript{81} to show that he had no

\textsuperscript{73} Acknowledged for the usage of a specific standard term set in timber trade (so called: Tegernseer Gebräuche), for German General Rules of Marine Insurance (Allgemeine Deutsche Seever sicherungsbedingungen, ADS) and for the Uniform Customs and Practice for Documentary Credits (Einheitlichen Richtlinien und Gebräuche für Dokumentenakkreditive, ERA), cf. Grüneberg, § 305 BGB, in Palandt, para. 57; Schlosser, § 305 BGB; in Staudingers Kommentar (amended 2013), para. 188.
\textsuperscript{74} Set out in Art. 346 German commercial code (HGB), Hopt, Art. 346 HGB, in Kommentar zum Handelsgesetzbuch, para. 38; cf. for a definition of usage Art. II.-1: 104 DCFR Outline Edition: The parties are bound by usages that would be considered generally applicable by persons in the same situation as the parties, except where the application of such usage would be unreasonable; Canaris, Handelsrecht, § 23 II, paras 9 et seq.
\textsuperscript{75} In England regarded as a settled law, cf. Plender/Wilderspin, The Rome Convention on the Choice of Law for Contracts, 14-064, 422 with reference to Fetthouse v. Bindley [1862] 11 C.B. (N.S.) 869. Thereby an offer can be accepted by conduct, of which an eloquent silence may form part (ibid.). However, the German ‘commercial letter of confirmation’ is not an exhaustive silence but rather an eloquent silence, Canaris, Handelsrecht, § 23 II, paras 12 et seq.
\textsuperscript{77} Cf. with reference to CISG, Pitz, Praktische Handreichung für die Gestaltung internationaler Kaufverträge. Vorteile des UN-Kaufrechts gegenüber nationalem Recht, NJW (2012), 3061, 3064 f.
\textsuperscript{78} In German doctrine so-called Sprachrisiko, since Jayme, Sprachrisiko und internationales Privatrecht beim Bankverkehr mit ausländischen Kunden, in FS Bärmann (Bökelmann, Henckel and Jahr eds, 1975), 509, 515; detailed Kling, Sprachrisiken im Privatrechtsverkehr, 2009, 7 et seq.
\textsuperscript{79} Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, para. 115; Ferranti, Art. 10 Rom I-VO, in Kommentar zum Internationalen Vertragsrecht, para. 39; Kling, Sprachrisiken im Privatrechtsverkehr, 132 et seq.
\textsuperscript{80} Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 55, 212; v. Hoffmann, Art. 28 EGGBGB, in Soergel, Bürgerliches Gesetzbuch, para. 33.
\textsuperscript{81} Such material law provisions were set out, e.g., in Art. II.-9: 402 DCFR, 224 and Art. II.-9: 109 DCFR, 222.
incidental obligation to understand the contract or the standard terms in the language practised.

Only the non-consenting party may invoke Article 10(2) to become free from a contractual binding (defence plea). He is not obliged to do so. Furthermore, only he has to rely on the law of its habitual residence. The other party cannot refer to that law to prove that the former did not consent.\(^\text{82}\)

If the putative *lex contractus* (Article 10(1)) cancels out an element necessary for the existence of a contract, nobody can refer to the law of its habitual residence to uphold contractual existence. The law of habitual residence can only be relied on to show that a party did not consent. The effect of Article 10(2) is entirely negative.\(^\text{83}\)

To establish his lack of consent, a person must prove that the law of the country of his habitual residence regards him as not having consented. That concerns individuals as well as companies. The notion of *habitual residence for companies* is defined in Article 19, which states that the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of their central administration – that is, the principal place in which commercial operations are conducted (real management and control). The habitual residence of a natural person for acting in the course of his business activity is his principal place of business (Article 19(1)). Where the contract is concluded in the course of the operations of an establishment, the place where the establishment is located shall be treated as the place of habitual residence (Article 19(2)). The relevant point in time to determine the habitual residence of the carrier shall be the time of the conclusion of the contract (Article 19(3)).

The court must decide whether the application of the law in accordance to paragraph 1 would not be reasonable from the circumstances. The concept of reasonableness is a policy decision in respect of the preceding circumstances. The judge must determine whether it would be reasonable to determine the effect of the conduct under the chosen or ascertained applicable law. Thus, the **reasonableness test** is open-textured.\(^\text{84}\) The Regulation gives no guidance on how the test should be applied since the judge of the forum has a significant margin of appreciation.\(^\text{85}\) All relevant aspects must be evaluated by the court. The circumstances to be taken into account include the parties’ previous practice *inter se*, their business relationship as well as the ordinary commercial expectations concerning provisions in such an international contract.\(^\text{86}\) For example, the existence of a London arbitration clause cannot be ignored by a party under Japanese law if this is precisely the sort of clause that would be expected in an

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82. Cf. Kaye, The New Private International Law, 276; Collier, Conflict of Laws, 300;
86. Cheshire/North/Fawcett, Private International Law, 745; Leible, Art. 10 Rom I-VO, in NomosKommentar BGB, paras 34 et seq; Ferrari, Art. 10 Rom I-VO, in Kommentar zum Internationalen Vertragsrecht, para. 28; Spickhoff, in Bamberger/Roth, Art. 10 Rom I, para. 13; Rausher/Frettag, EuZPR/EuPR (2011), Art. 10, para. 24.
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international charter agreement.\textsuperscript{87} However, a party who does not recognize that his partner has his habitual residence in a foreign country since the law of that country will apply may reasonably be protected by his own law if he acts without negligence.\textsuperscript{88} For internet based distance contracts the application of foreign law is foreseeable.\textsuperscript{89} The standard of care, which could reasonably be expected in the circumstances from a contractual party, must be ascertained case by case. Hence, that party would not be heard if an international jurisdiction clause has been individually negotiated,\textsuperscript{90} nor if the contract was concluded in the country of the other party\textsuperscript{91} or in a third state.\textsuperscript{92} The experience of a party in commercial matters will also be considered.\textsuperscript{93} In a current trade relation, each party normally knows that a foreign law will apply, so that a mistake about the legal consequences of their conduct seems to be avoidable.\textsuperscript{94} Unreasonableness must be \textbf{proved} by the party who wishes to displace Article 10(1). That party also bears the onus of showing to the satisfaction of the judge that the terms of Article 10(2) have been met, including that it would not be reasonable to employ the putative applicable law.\textsuperscript{94} Unreasonableness of reference to applicable law on consent needs not to be proved conclusively. All that is required is to be shown that this appears to be unreasonable.\textsuperscript{95}

\textsuperscript{87} Egon Oldendorff v. Liberia Corp. [1995] 2 Lloyd’s Rep. 64; Cheshire/North/Fawcett, Private International Law, 746; Stone, EU Private International Law, 295.
\textsuperscript{88} Cf. Ferrari, Art. 10 Rom I-VO, in Kommentar zum Internationalen Vertragsrecht, para. 25; Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, paras 224 et seq.; Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, para. 67; Leible, Art. 10 Rom I-VO, in NomosKommentar BGB, para. 37.
\textsuperscript{89} Rauscher/Frettag, EuZPR/EuIPR (2011), Art. 10, para. 26.
\textsuperscript{90} Cf. Ferrari, Art. 10 Rom I-VO, in Kommentar zum Internationalen Vertragsrecht, para. 26.
\textsuperscript{91} Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, para. 71; Leible, Art. 10 Rom I-VO, in NomosKommentar BGB, para. 37; contrary Spellenberg, Art. 10 Rom I-VO, in Münchener Kommentar, para. 237.
\textsuperscript{92} Hausmann, Art. 10 Rom I-VO, in Staudingers Kommentar, para. 72.
\textsuperscript{93} Staudinger, Art. 31 EGBGB, in Handkommentar zum BGB (Schulze, Dörner and Ebert eds, 6th ed. 2009), para. 7.
\textsuperscript{94} Cf. Stone, EU Private International Law, 295; Plender/Wilderspin, The European Private International Law of Obligations, 14-066, 208.
\textsuperscript{95} Cf. Kaye, The New Private International Law, 278.