Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

3 October 2019*

(Reference for a preliminary ruling — Area of freedom, security and justice — Judicial cooperation in civil matters — Law applicable to contractual obligations — Exclusion of company law from the scope of the Rome Convention and of Regulation (EC) No 593/2008 (Rome I) — Trust agreement concluded between a professional and a consumer for the management of shares in a limited partnership)

In Case C-272/18,

REQUEST for a preliminary ruling under Article 267 TFEU from the Oberster Gerichtshof (Supreme Court, Austria), made by decision of 28 March 2018, received at the Court on 20 April 2018, in the proceedings

Verein für Konsumenteninformation

v

TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG,

THE COURT (First Chamber),

composed of J.-C. Bonichot, President of the Chamber, C. Toader, A. Rosas, L. Bay Larsen and M. Safjan (Rapporteur), Judges,

Advocate General: H. Saugmandsgaard Øe,

Registrar: D. Dittert, Head of Unit,

having regard to the written procedure and further to the hearing on 27 February 2019,

after considering the observations submitted on behalf of:

– the Verein für Konsumenteninformation, by S. Schumacher, Rechtsanwalt,

– TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG, by C. Kux, G. Eckert and I. Haiderer, Rechtsanwälte,

– the European Commission, by M. Wilderspin and M. Wasmeier and by C. Valero, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 5 September 2019,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the interpretation of Article 1(2)(e) and Article 5(4)(b) of the Convention on the law applicable to contractual relations of 19 June 1980 ('the Rome Convention'), of Article 1(2)(f) and Article 6(4)(b) of 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) (OJ 2008 L 177, p. 6, 'the Rome I Regulation'), and of Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95, p. 29).

2 The request has been made in proceedings between the Verein für Konsumenteninformation (Association for consumer information, 'the VKI') and TVP Treuhand- und Verwaltungsgesellschaft für Publikumsfonds mbH & Co KG ('TVP'), a company incorporated under German law, concerning the validity of a choice-of-law clause used by TVP in contracts concluded with private investors.

Legal context

European Union law

The Rome Convention

3 Under the heading 'Scope', Article 1 of the Rome Convention provides:

'1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

…

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

…'

4 Under the heading 'Certain consumer contracts', Article 5 of the Rome Convention provides:

'1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

– if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or

– if the other party or his agent received the consumer's order in that country, or

– if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

…

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

…'

Regulation Rome I

5 Recitals 7 and 25 of the Rome I Regulation read as follows:

'(7) The substantive scope and the provisions of this Regulation should be consistent with 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) [(OJ 2001 L 12, p. 1)] and Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) [(OJ 2007 L 199, p. 40)].

…

(25) Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing his commercial or professional activities in that particular country. …'

6 Under the heading 'Material scope', Article 1 of that regulation provides:

'1. This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.

It shall not apply, in particular, to revenue, customs or administrative matters.

2. The following shall be excluded from the scope of this Regulation:

…

(f) questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, and the personal liability of officers and members as such for the obligations of the company or body;

…'

7 Under the heading ‘Freedom of choice’, Article 3(1) of the regulation provides:

‘A contract shall be governed by the law chosen by the parties. …’

8 Under the heading ‘Consumer contracts’, Article 6 of the regulation provides:

‘1. Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

…

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

…’

Directive 93/13

9 According to the tenth recital of Directive 93/13:

‘… inter alia contracts relating to employment, contracts relating to succession rights, contracts relating to rights under family law and contracts relating to the incorporation and organisation of companies or partnership agreements must be excluded from this Directive’.

10 Article 3(1) of that directive provides:

‘A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties’ rights and obligations arising under the contract, to the detriment of the consumer.’

Austrian Law

11 Paragraph 6(3) of the Konsumentenschutzgesetz (Consumer Protection Law) of 8 March 1979 (BGBl. 140/1979, 'the KSchG') provides:

'Any term in general terms and conditions or standard form contracts shall be ineffective if it is unclear or unintelligible.'

12 Paragraph 13a(2) of the KSchG provides:

'Paragraph 6 […] shall be applied for the consumer's protection without regard to the law applicable to the contract when such a contract has been entered into in connection with an entrepreneur's or his agent's activity pursued in Austria and directed towards entering into such contracts.'

13 Under Paragraph 864a of the Allgemeines Bürgerliches Gesetzbuch (Austrian Civil Code) of 1 June 1811 (JGS No 946/1811, 'the ABGB'):

'Unusual terms used by one of the parties to the contract in its general terms and conditions or in standard form contracts shall not form part of the agreement if they are disadvantageous to, and, including in the light of the circumstances, in particular the objective appearance of the legal instrument, could not be expected by, the other party, unless the former specifically drew the attention of the latter to those terms.'

14 Paragraph 879 of the ABGB provides:

'(1) A contract which infringes a legal prohibition or is *contra bonos mores* shall be null and void.

…

(3) A term in the general terms and conditions of a contract or in standard form contracts which does not govern a fundamental obligation of one of the parties shall be regarded as void if, in the light of all of the circumstances, it is seriously detrimental to one of the parties.'

The dispute in the main proceedings and the questions referred for a preliminary ruling

15 As a public-interest consumer organisation established in Austria, the VKI is entitled to bring proceedings for prohibitory injunctions for the protection of the interests of consumers resident in Austria.

16 TVP is a company incorporated in Hamburg (Germany), a fully owned subsidiary of MPC Münchmeyer Capital AG Hamburg ('the MPC Group'), which sets up and markets closed investment funds. Those investment funds are structured as limited partnerships governed by German law in which private and institutional investors can invest as limited partners.

17 Until 19 December 2014, there was a management and profit transfer agreement between TVP and its parent company. The management of TVP was thus controlled by the MPC Group.

18 The numerous limited partnerships structured by the MPC group include Dreiundvierzigste Sachwert Rendite-Fonds Holland GmbH & Co KG ('Fund 43'), Einundfünfzigste Sachwert Rendite-Fonds Holland GmbH & Co KG and Zweiundsiebzigste Sachwert Rendite-Fonds Holland GmbH & Co KG.

19 TVP holds shares inter alia in Fund 43, which was set up in 2003, as a founding managing partner. Since that fund was not marketed in Austria alone, a fiduciary account was set up with an Austrian bank for the purposes of receiving payments in the amount of the subscription monies of those investors who were resident in Austria. Some of TVP's other funds were marketed exclusively in Austria, such as the Einundfünfzigste Sachwert Rendite-Fonds Holland (set up in 2004) and the Zweiundsiebzigste Sachwert Rendite-Fonds Holland (set up in 2011). Fiduciary accounts were opened by TVP with an Austrian bank for those two investment funds.

20 In accordance with clause 3(3) of the partnership agreement of Fund 43, TVP is authorised to introduce further limited partners. Potential investors, and thus future limited partners, then paid subscription monies into the fiduciary account of that investment fund. Investors thus became partners of the investment fund indirectly as settlor-beneficiaries vis-à-vis TVP, the trustee. Their interests are managed by TVP on the basis of a trust agreement. This approach was also adopted in relation to the other funds.

21 TVP was not itself responsible for recruiting those investors, the activity of which was carried out by another fully owned subsidiary of the MPC Group, CPM Anlagen Vertriebs GmbH i.L. That subsidiary, as well as other intermediaries, such as Austrian banks or financial consultants, sent targeted offers and advertisements to consumers resident in Austria. TVP, which has no office or branch in Austria, has no direct contact with its limited partners, nor does it undertake any advisory activities itself.

22 Investors can buy shares in the investment funds by sending a declaration of accession to TVP in the form of an offer to enter into a trust agreement. As appears from the order for reference, the investors at issue in the case in the main proceedings before the referring court all signed their application for subscription in Austria. The subscription monies were payable to the relevant investment fund fiduciary account in TVP's name at an Austrian bank. In no case were subscription monies transferred to a German fiduciary account.

23 TVP offers to supply fiduciary services to the investors. It is responsible for an investor's limited shares and manages those shares as a trustee. It exercises its rights in relation to the limited partner's interest in its own name but for the benefit of the investor, and it transfers dividends and any other financial benefits deriving from the shares to the investor. On an ongoing basis, TVP forwards information received from the relevant investment fund relating to the performance of that partnership in which they hold shares. For these services TVP receives an annual flat-rate fee of 0.3% of the investor's investment.

24 TVP uses standard form contracts for its business transactions with private investors. The necessary juridical acts (signature of the declaration of accession) are undertaken by the investors in Austria and accepted by TVP's contracting parties or the latter's contracting parties.

25 TVP undertakes its management duties on the basis of a trust agreement. The trust agreements in question provide inter alia:

'The trust agreement shall be governed by the law of the Federal Republic of Germany. The place of performance and jurisdiction for all disputes arising from this contract and concerning the conclusion of this contract is the seat of the trustee, in so far as this may legally be agreed.'

26 That clause was not individually negotiated and can be found in the standard form contracts. Nor does an obvious reference in those standard form contracts inform a future investor of that clause without difficulty.

27 According to the referring court, TVP directs its services to the Austrian market and operates a website, www.tvp-treuhand.at, visitors to which are redirected to the German website, www.tvp-treuhand.de. The domain name is owned by a company in the MPC group which is responsible for IT issues for the entire group. The German homepage of the website is also managed by that company. Since 2006, Austrian investors have been able to log in through that website. Since 2011, investors who expressly wish to do so can vote online and no longer need to vote in writing. Investors can also use the website to view copies of letters which have been sent to them.

28 By an action for an injunction brought on 6 September 2013 before the Handelsgericht Wien (Commercial Court, Vienna, Austria), the VKI sought an order prohibiting TVP from using the choice-of-law clause at issue and equivalent clauses, or to rely on such clauses, in the general terms and conditions of business which form the basis of the trust agreements concluded by it, or in the standard form contract used for that purpose, with investors resident in Austria, who must, in its view, be regarded as consumers.

29 The VKI claims that the choice-of-law clause at issue contravenes EU and Austrian law. In particular, it maintains that that clause is contrary both to Paragraph 6(3) of the KSchG and to Paragraphs 864a and 879(3) of the ABGB. Under Articles 4 and 6 of the Rome I Regulation, the validity of the clause at issue must not be assessed according to the law applicable to the contract but the law applicable to non-contractual obligations, that is Austrian law. According to the VKI, Austrian law is also applicable by virtue of the Rome Convention and the Rome I Regulation on the grounds that TVP consciously directed its activities towards the Austrian market and that the services attributable to it were performed in Austria.

30 The court at first instance dismissed the action in a judgment of 3 September 2015. Having applied Austrian law, it therefore ordered TPV to refrain from using the clauses at issue in that action in its business dealings with consumers resident in Austria.

31 By order of 13 September 2016, the Oberlandesgericht Wien (Higher Regional Court, Austria), before which an appeal was brought, overturned that judgment and referred the case back to the court of first instance for further findings of fact and a new decision to be made. It took the view that, whilst the validity of the choice-of-law clause should be considered according to German law, a clause in general terms and conditions of business is also unfair under that law if it misleads the consumer by giving him the impression that only German law applies to the contract, without informing him that under the Rome I Regulation and the Rome Convention he enjoys legal protection in the form of the mandatory provisions of the law of the country in which he has his habitual residence, namely Austrian law. The court of appeal stated that, even if the choice-of-law clause were valid under German law, in principle, it would have been necessary to consider the other terms of the contract in the light of that law. It held that it would also have been necessary to consider whether mandatory consumer protection provisions of Austrian law would have precluded the application of German law when assessing the validity of the clauses at issue.

32 The VKI and TPV each brought an appeal before the Oberster Gerichtshof (Supreme Court, Austria) against the judgment of the court of appeal. TVP maintains that the Rome Convention and the Rome I Regulation do not apply to questions of the law of companies and other bodies, corporate or unincorporated. Since the partnership and trust agreements are intertwined, the settlor-beneficiaries are bound directly in the legal relationship between the partners. Moreover, the exceptions referred to in Article 5(4)(b) of the Rome Convention and Article 6(4)(a) of the Rome I Regulation also apply on the ground that TVP is, as a trustee, exercising the rights of a limited partner and therefore supplies services.

33 In those circumstances, the Oberster Gerichtshof (Supreme Court) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

‘(1) Does the exclusion from the scope of the legislation provided for in Article 1(2)(e) of the Rome Convention and in Article 1(2)(f) of the Rome I Regulation also apply to agreements between a settlor and a trustee who holds shares in a limited partnership on trust for that settlor, particularly where the partnership agreements and the trust agreements are interwoven?

(2) If Question 1 is answered in the negative:

Is Article 3(1) of Directive 93/13 to be interpreted as meaning that a clause in a trust agreement concluded between a professional and a consumer concerning the management of shares in a limited partnership, which was not individually negotiated and which provides that the law of the State in which the limited partnership has its seat is to apply, is unfair if the sole purpose of the trust agreement is the management of shares in the limited partnership and the settlor-beneficiary is granted the rights and obligations of a direct partner?

(3) If Question 1 or 2 is answered in the affirmative:

Does this answer change if the professional does not need to go to the consumer’s State in order to perform his obligations, but is obliged to transfer to the consumer dividends and other financial benefits deriving from the shares, and to forward to him information about the performance of the business in which he holds the shares? Does it make a difference whether the Rome I Regulation or the Rome Convention is applicable?

(4) If Question 3 is answered in the affirmative:

Does this answer still hold if, in addition, the consumer’s subscription application was signed in his State of residence, the professional also provides information on the internet about the shares and a payment agency has been established in the consumer’s State, to which the consumer must pay his subscription monies, even though the professional has no right to give directions as to that bank account? Does it make a difference whether the Rome I Regulation or the Rome Convention is applicable?’

Consideration of the questions referred

The first question

34 By its first question, the referring court wishes to know, in essence, whether Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome I Regulation must be interpreted as excluding from the scope of that convention and of that regulation contractual obligations, such as those at issue in the main proceedings, which are based on a trust agreement for the purposes of administering shares in a limited partnership.

35 In that regard, the Court has held that the exclusion from the scope of the Rome I Regulation of matters relating to questions governed by the law of companies and other bodies, corporate or unincorporated, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or unincorporated, set out in Article 1(2)(f) of that regulation, applies exclusively to the structural aspects of those companies and other bodies, corporate or unincorporated (judgment of 8 May 2019, *Kerr*, C-25/18, EU:C:2019:376, paragraph 33).

36 That interpretation is supported by the Report on the Convention on the law applicable to contractual obligations, by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris I (OJ 1980 C 282, p. 1), according to which the exclusion of those questions from the scope of the Rome Convention, replaced between the Member States by the Rome I Regulation, affects all the complex acts which are necessary to the creation of a company or firm and to the regulation of its internal organisation and winding-up, that is to say acts which fall within the scope of company law (judgment of 8 May 2019, *Kerr*, C-25/18, EU:C:2019:376, paragraph 34).

37 As the Advocate General stated in points 49 to 55 of his Opinion, although transactions such as a sale of, or trust over, shares may raise questions governed by company law, the same is not true of the contracts underlying those transactions. In particular, the mere fact that there is a link between a contract and such 'questions governed by the law of companies' does not have the effect of excluding from the scope of the Rome I Regulation the obligations arising from that contract. Accordingly, those questions must be distinguished from questions of a contractual nature. In the present case, the action for an injunction brought by the VKI concerns the unfairness and therefore the validity of certain terms of the trust agreements at issue. Therefore, the questions arising from the case in the main proceedings fall within the field of *lex contractus* and therefore of the Rome I Regulation.

38 It should be noted that the Court has also held, as regards the obligations arising from a loan agreement concluded by a company before its cross-border acquisition, which fell, before its merger by acquisition, within the scope of the Rome Convention, that the applicable law for the interpretation and performance of those obligations after the merger remained the same as before (see, to that effect, judgment of 7 April 2016, *KA Finanz*, C-483/14, EU:C:2016:205, paragraphs 52 to 58).

39 Furthermore, although the parties in the main proceedings disagree as to whether or not the settlor-beneficiaries are partners, that question, which falls within the scope of law of companies and other bodies corporate or unincorporate, is not conclusive in the case in the main proceedings. That question does not concern the extent of any rights and obligations that the settlor-beneficiaries may, under the applicable law of companies and other bodies corporate or unincorporate, have in relation to the limited partnerships, or any obligations the settlor-beneficiaries may owe to third party creditors of the partnership, but concerns the unfairness and therefore the validity of certain terms of the trust agreements.

40 Those terms, which cover issues such as the extent of TVP's liability as a trustee, the place of performance of the fiduciary services and the law applicable to the trust agreement, are intended to govern the contractual relationship between the settlor-beneficiaries and the trustees and therefore fall within the field of the *lex contractus*. The obligations at issue in the main proceedings are therefore not excluded from the scope of the Rome Convention or of the Rome I Regulation.

41 In the light of the foregoing, the answer to the first question is that Article 1(2)(e) of the Rome Convention and Article 1(2)(f) of the Rome I Regulation must be interpreted as not excluding from the scope of that convention or of that regulation contractual obligations, such as those at issue in the main proceedings, which are based on a trust agreement for the purposes of administering shares in a limited partnership.

The third and fourth questions

42 By its third and fourth questions, which it is appropriate to consider together, the referring court wishes to know, in essence, whether Article 5(4)(b) of the Rome Convention and Article 6(4)(a) of the Rome I Regulation must be interpreted as meaning that a trust agreement pursuant to which the services owed to a consumer must be provided in the country of the consumer's habitual residence at a distance, from another country, falls within the scope of the exclusion in those provisions.

43 In that regard, the referring court has already held that the trust agreements at issue are consumer contracts capable of falling within the scope of the provisions on consumer protection laid down in Article 5 of the Rome Convention and in Article 6 of the Rome I Regulation. Those agreements are binding between a 'professional', namely TVP, acting in the exercise of his trade or profession, and various investors who are 'consumers', namely natural persons having acted for a purpose which can be regarded as being outside their trade or profession.

44 Nevertheless, subparagraph 4 of each of those articles expressly excludes certain contracts from their scope. In particular, identical wording in Article 5(4)(b) of the Rome Convention and Article 6(4)(a) of the Rome I Regulation provides that the provisions on consumer protection are not to apply to 'a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence'.

45 It is clear from their wording that Article 5 of the Rome Convention and Article 6(1) and (2) of the Rome I Regulation do not apply, first, to a contract for the supply of services where, second, the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

46 First, the concept of a 'contract for the supply of services' must be given the same meaning as 'contract for the provision of services' in Article 4(1)(b) of that regulation and 'the provision of services' in Article 5(1)(b) of Regulation No 44/2001, namely an obligation to carry out a particular activity in return for remuneration (see, to that effect, judgment of 8 May 2019, *Kerr*, C-25/18, EU:C:2019:376, paragraphs 36 to 41).

47 In the present case, it must be found that, under a trust agreement such as those at issue in the main proceedings, the trustee carries out the activity of administering the trust property in return for remuneration. Therefore, such a contract must be regarded as a contract for the provision of services within the meaning of Article 5(4)(b) of the Rome Convention and of Article 6(4)(a) of the Rome I Regulation.

48 Second, as regards the country in which the services are to be supplied to the consumer, it must, first of all, be established whether that question must be determined before designation of the *lex contractus* or whether that question is determined by the *lex contractus*.

49 As the Advocate General set out in point 71 of his Opinion, the question of the place where the services are to be supplied to the consumer is intended to designate the *lex contractus* and must therefore be determined before the *lex contractus* is designated.

50 In that regard, it is clear from the Report on the Convention on the law applicable to contractual obligations, cited in paragraph 36 above, that the exclusion in Article 5(4)(b) of the Rome Convention is justified by the fact that, in the case of contracts for the supply of services to be supplied exclusively outside of the consumer's country of habitual residence, the consumer cannot reasonably expect that the law of his home State be applied in derogation to the general rules of Articles 3 and 4 of that convention.

51 Thus, unless a service provider, such as TVP, is to be permitted to choose the applicable law through the use of a term in the contract determining the place of supply at the expense of the objective of consumer protection, the exclusion in question cannot be interpreted as meaning that the words 'are to be supplied', within the meaning of Article 6(4)(a) of the Rome I Regulation, refer to a contractually stipulated obligation to supply services in a particular place. As the Advocate General stated in point 76 of his Opinion, it is necessary to ascertain whether it follows from the very nature of the contracted services that they can be supplied, as a whole, only outside the State in which the consumer has his habitual residence.

52 Where, as stipulated in the contracts at issue in the main proceedings, the place of the actual supply of services is in a country other than that in which the consumer receives those services, it must be considered that the services are supplied 'exclusively' outside of the consumer's Member State of habitual residence only where the consumer has no possibility of receiving them in his State of residence and must travel abroad in order to do so.

53 In the present case, as the Advocate General stated in point 81 of his Opinion, the fact that the amounts required for subscription to the partnership were paid into fiduciary accounts held by TVP in Austria, that it paid dividends to Austrian consumers into Austrian accounts, that it fulfils its information obligations arising from the trust agreement by sending reports on its fiduciary management to Austrian consumers in Austria and that it has a website for Austrian consumers on which they may consult information and exercise their voting rights tend to show, which is for the referring court to ascertain, that those services are supplied at a distance in the country in which the consumer is resident. It follows that the exclusion in Article 5(4)(b) of the Rome Convention and in Article 6(4)(a) of the Rome I Regulation should not apply.

54 It follows from the foregoing that the answer to the third and fourth questions is that Article 5(4)(b) of the Rome Convention and Article 6(4)(a) of the Rome I Regulation must be interpreted as meaning that a trust agreement pursuant to which the services owed to a consumer must be provided in the country of the consumer's habitual residence at a distance, from another country, do not fall within the scope of the exclusion in those provisions.

The second question

55 By its second question, the referring court wishes to know, in essence, whether Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a trust agreement concluded between a professional and a consumer for the management of shares in a limited partnership, which was not individually negotiated and which provides that the law of the State in which the limited partnership has its seat is to apply, is unfair within the meaning of that provision.

56 As a preliminary matter, it should be noted that Article 5(3) of the Rome Convention and Article 6(1) of the Rome I Regulation provide that, in principle, a consumer contract is to be governed by the law of the country in which the consumer has his habitual residence.

57 Since the action in the main proceedings was brought in respect of consumers residing in Austria, in principle, Austrian law should govern the trust agreements that those consumers concluded with TVP. Nevertheless, it must be ascertained whether the choice-of-law clause used in those agreements which designates the law where TVP has its seat as the applicable law, namely German law, is invalid on the ground that it is unfair.

58 Although Article 5(2) of the Rome Convention and Article 6(2) of the Rome I Regulation do, in principle, allow a choice-of-law clause, it must nevertheless be borne in mind that, within the meaning of Article 3(1) of Directive 93/13, such a term in the general terms and conditions of a seller or supplier which has not been individually negotiated, in so far as it leads the consumer into error by giving him the impression that only the law of the Member State of that professional's seat applies to a contract concluded by electronic means, without informing him that under Article 6(2) of that regulation he also enjoys the protection of the mandatory provisions of the law that would be applicable in the absence of that term, this being for the national court to ascertain in the light of all the relevant circumstances, is unfair (judgment of 28 July 2016, *Verein für Konsumenteninformation*, C-191/15, EU:C:2016:612, paragraph 71).

59 The foregoing considerations are not limited to a specific form for the conclusion of contracts, namely, inter alia, by electronic means, and are of a general nature. They must therefore lead the referring court to find that the choice-of-law clause at issue is unfair if the conditions referred to in the previous paragraph are satisfied, which is for that court to ascertain.

60 In the light of the foregoing the answer to the second question is that Article 3(1) of Directive 93/13 must be interpreted as meaning that a term in a trust agreement concluded between a professional and a consumer for the management of shares in a limited partnership, such as those at issue in the main proceedings, which has not been individually negotiated and according to which the applicable law is the law of the Member State of the partnership's seat, is unfair, within the meaning of that provision, where it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 5(2) of the Rome Convention and Article 6(2) of the Rome I Regulation he also enjoys the protection of the mandatory provisions of the national law that would be applicable in the absence of that term.

Costs

61 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (First Chamber) hereby rules:

1. **Article 1(2)(e) of the Convention on the law applicable to contractual relations of 19 June 1980 and Article 1(2)(f) of 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) must be interpreted as not excluding from the scope of that convention or of that regulation contractual obligations, such as those at issue in the main proceedings, which are based on a trust agreement for the purposes of administering shares in a limited partnership.**

2. **Article 5(4)(b) of the Convention on the law applicable to contractual relations and Article 6(4)(a) of Regulation No 593/2008 must be interpreted as meaning that a trust agreement pursuant to which the services owed to a consumer must be provided in the country of the consumer's habitual residence at a distance, from another country, do not fall within the scope of the exclusion in those provisions.**

3. **Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts must be interpreted as meaning that a term in a trust agreement concluded between a professional and a consumer for the management of shares in a limited partnership, such as those at issue in the main proceedings, which has not been individually negotiated and according to which the applicable law is the law of the Member State of the partnership's seat, is unfair, within the meaning of that provision, where it leads the consumer into error by giving him the impression that only the law of that Member State applies to the contract, without informing him that under Article 5(2) of the Convention on the law applicable to contractual relations and Article 6(2) of Regulation No 593/2008 he also enjoys the protection of the mandatory provisions of the national law that would be applicable in the absence of that term.**

[Signatures]