

# Consumer Protection through Conflict-of-Laws Rules under Qatari and Bahraini Laws: A Comparative Study<sup>(\*)</sup>

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## Abstract

Qatari and Bahraini laws acknowledge the principle of party autonomy; the parties to international commercial contracts may choose the law or rules of law applicable to their contract, explicitly or tacitly. In consumer contracts, in which the professional has a stronger economic, social, and legal position than the consumer, the professional may abuse party autonomy to the detriment of the consumer. This paper identifies how the Bahraini specific conflict-of-laws rule on consumer contracts (enacted in 2015) protects the consumer. Since Qatar does not enact a peculiar conflict-of-laws rule on consumer contracts, the paper will explain to which extent the conflicts rules concerning contracts in general may protect the consumer. The paper discusses the solutions available under these two laws and compares each of them with the other to conclude the best approach to protect the consumer in conflict of laws. The paper concludes with some recommendations to both legislators and judiciary in Bahrain and Qatar.

**Keywords:** consumer contracts; conflict-of-laws; chosen law; law of the consumer's habitual residence; direct applicable rules; and CISG.

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### 1. Introduction

The principle of party autonomy is well-established in today's private international law. The parties may choose the law governing their international commercial contracts. However, since one of the contract parties (e.g. the consumer or the employee) may have a weaker economic, social and legal position vis-à-vis the other<sup>(1)</sup>, the parties' real freedom to choose the law governing such contracts would be in question<sup>(2)</sup>.

The Qatari law determines the law applicable to international commercial contracts in general. Following Article (19/1) of the Egyptian civil code no 131/1948, Article (27/1) of the Qatari civil code no 22/2004<sup>(3)</sup> (hereinafter: Qatari civil code) states that,

In terms of the substantive conditions to be imposed and the effects thereof, a contract shall be governed by the law of the jurisdiction of the domicile common to the contracting parties. If the domicile of one party is different from that of the other party, the law of jurisdiction where the contract is concluded shall be applied, unless the contracting parties agree otherwise, or the circumstances indicate that another law is intended to be applied.

To protect the employee, the Qatari civil code precisely defines the law applicable to employment contracts<sup>(4)</sup>. Like most Arab laws, however,

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(1) F. Ragno, 'The Law Applicable to Consumer Contracts under the Rome I Regulation' in F. Ferrari & S. Leible (eds.), *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Berlin, New York: Otto Schmidt/De Gruyter European law publishers, 2009) 129 <https://doi.org/10.1515/9783866538573.129>, accessed 19 June 2022. N. Eksi, 'The Law Applicable to Consumer Contracts under the EU Rome Convention', *J. S. Afr. L.* 2 (2005): 299 at 311. F. Hawwa, *Legal Regulation of Consumer Protection in Qatari Law* (Ministry of Qatar: Commerce and Industry, 2020) 37 (Arabic). H. Al-Rahmoni, 'Sphere of Application of the Consumer Protection Law', *Moroccan Review for Legal and Economic Studies* 4 (2013): 53 at 59-60 (Arabic).

(2) R. Schu, 'The Applicable Law to Consumer Contracts Made Over the Internet: Consumer Protection through Private International Law', *Int'l J. L. & Info. Tech.* 5 (1997): 192 at 200, 'the freedom of choice of the parties [of consumer contracts], which is in fact a freedom of only one party to choose the governing law, must be restricted in some way.' A. Salama, *Law of International Contract: Negotiations of International Contracts – Law Applicable and its Crisis* (Cairo: Dar En-Nahda El-Arabiyya, 2000-2001), 207 (Arabic), 'the consumer consent is incomplete, because under the pressure of advertising inducements by the other party, there is no opportunity for consumer to consider the offer freely and carefully, or to examine the object of the contract.' See also A. Qayed, *Consumer Protection: A Study in Consumer Protection Laws and General Rules of Civil Law*, (Center for Arab Studies for Publishing and Distribution, 2016) 883 (Arabic). A. Dawwas, 'Parties' Choice of Law Applicable to e-Contracts', *An-Najah University Journal for Research – Humanities* 25(10) (2011): 2535 at 2551-52 (Arabic).

(3) An English translation of this law is available online: <https://www.almeezan.qa/LawPage.aspx?ID=25559&language=en>, accessed 15 July 2022.

(4) Art. (28) Qatari civil code.

the Qatari civil code does not include peculiar conflicts rule on consumer contracts. This means that, pursuant to the Article (27/1) of the Qatari civil code, consumer contracts shall be subject to the law chosen by the parties, expressly or tacitly. In the absence of the parties' choice, the applicable law shall be the law of the parties' common domicile or, otherwise, the law of the place of making the contract.

Beside the conflict-of-laws rule concerning contracts in general<sup>(5)</sup>, the Bahraini law on conflict of laws includes specific conflicts rules regarding certain contracts, like stock-exchange contracts (Article 18), employment contracts (Article 19), franchise contracts (Article 20), agency contracts and commercial representation (Article 21), and consumer contracts (Article 22). As for consumer contracts, Article (22) thereof states that,

Consumer contracts shall be subject to the law of the state of consumer's habitual residence, unless otherwise agreed by the parties, or if it is evident from the circumstances that another law is intended to be applied. Such 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 virtue of the law of his habitual residence<sup>(6)</sup>.

The Bahraini law has taken a paramount role in making a specific conflict-of-laws rule to consumer contracts, with the purpose to protect consumers vis-a-vis professionals. The specific conflicts rule in Article (22) of the Bahraini law on conflict of laws takes precedence over the general conflict-of-laws rule on contracts stated in Articles (4) and (17) of the same.

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(5) Art. (17) of the Bahraini law on conflict of laws in civil and commercial matters with a foreign element (hereinafter: Bahraini law on conflict of laws) partially states that, 'Formal and substantive validity of a contract, in addition to its legal effects shall be governed by the law of the state of common habitual residence of the parties. If no common habitual residence was established, the applicable law shall be that of the state where the contract was concluded. Unless the parties agree otherwise, or it is evident from the circumstances that another law is intended to be applied.' Art. (4) thereof states that, 'Parties may agree to choose the applicable law, and may agree to choose International Trade Law and its customs.' An English translation of the entire law is available online: <https://bahrainbusinesslaws.com/laws/Conflict-of-Laws-in-Civil-and-Commercial-Matters>, accessed 15 July 2022.

(6) The legislature in other countries, as well as at regional and international levels, already intervened to protect the weaker party in consumer contracts, namely the consumer. See, e.g., Art. (120) of the Swiss federal private international law statute, online at: [https://www.fedlex.admin.ch/eli/cc/1988/1776\\_1776\\_1776/en](https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en), accessed 16 July 2022. Art. (5/2) of the 1980 Rome Convention on the law applicable to contractual obligations (hereinafter: Rome Convention), online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41998A0126\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41998A0126(02)), accessed 16 July 2022. Art. (6) 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) (hereinafter: Rome I Regulation), online at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>, accessed 16 July 2022.

Both jurisdictions have special substantive rules on consumer protection. The Qatari civil code, as well as the Bahraini one, already include provisions on protection of the weaker party (e.g. the consumer)<sup>(7)</sup>. Furthermore, the Qatari law no 8/2008 on consumer protection<sup>(8)</sup>, and its supplements<sup>(9)</sup> (hereinafter: Qatari law on consumer protection), as well as the Bahraini law no 35/2012 with respect to consumer protection<sup>(10)</sup> (hereinafter: Bahraini law on consumer protection) include mandatory rules to protect consumers having their habitual residence in Qatar or Bahrain, respectively.

The objectives of this paper are the following:

- identifying the extent to which the Qatari and Bahraini Laws protect the consumer through private international law rules;
- analyzing the specific Bahraini conflict-of-laws rule on consumer contracts and the general Qatari conflicts-of-laws rule on contracts;
- comparing the approaches of the said laws to conclude the best approach to protect the consumer in conflict of laws.

This paper is limited to the laws in Bahrain and Qatar; it may refer to legal instruments or laws of other jurisdictions only when it is necessary. This paper tackles the conflict-of-laws rules applicable before courts in these jurisdictions only; it does not deal with settlement of consumers disputes through arbitration or mediation<sup>(11)</sup>. The paper will not also tackle the procedures followed by the

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(7) For instance, if a contract is made by adhesion and contains arbitrary conditions, the judge may at the request of the adhering party amend such conditions in order to expunge them fully, even if the adhering party proves to have known thereof as prescribed by justice. Any agreement to the contrary shall be invalid. (Art. 106 Qatari civil code & Art. 58 of Bahraini civil code no 19/2001 (hereinafter: Bahraini civil code)). Doubt shall be interpreted in favor of the adhering party. (Art. 107 Qatari civil code & Art. 59 of Bahraini civil code). See also J. Geredly, 'The Legal Protection for the Consumer in the Contracts of Compliance: A Comparative Study in the Egyptian Civil Law, the Bahraini Civil Law and the Saudi Legal System', *IJTIHALD Journal on Legal and Economic Studies* 8(1) (2019): 26 (Arabic).

(8) The Qatari Law no 16/2010 on electronic commerce and transactions include some provisions on protection of e-consumers (Arts. 51-59), too. An English translation of this law is available online: [https://www.qcert.org/sites/default/files/public/documents/e-commerce\\_law\\_en.pdf](https://www.qcert.org/sites/default/files/public/documents/e-commerce_law_en.pdf), accessed 15 July 2022.

(9) An English translation of this law is available online: <https://www.almeezan.qa/LawView.aspx?opt&LawID=2647&language=en>, accessed 15 July 2022.

(10) This law includes 25 Articles that aim at protecting the consumer before and after contracting. An English translation of this law is available online. <https://bahrainbusinesslaws.com/laws/Consumer-Protection-Law>, accessed 15 July 2022.

(11) Art. (16) of the Qatari law no 1/2019 on regulating non-Qatari capital investment in the economic activity generally allows 'the Non-Qatari Investor ... [to] agree to settle any dispute between them and others through arbitration'. <https://investmentpolicy.unctad.org/investment-laws/laws/314/qatar-law-no-1-of-2019>, accessed 19 July 2022. This law only excludes labor disputes from ADR 'since the resolution of employment disputes has traditionally been the domain of State Courts (Special Com-

court to settle disputes over consumer contracts<sup>(12)</sup>.

The paper will start with identifying the notion of consumer contracts (part 2). Part 3 explains the specific Bahraini conflict-of-laws rule on consumer contracts. Part 4 discusses the consumer protection under the Qatari conflicts-of-laws rule concerning contracts in general. Part 5 concludes with some recommendations.

## 2. Consumer Contracts

Article (22) of the Bahraini law on conflict of laws determines the law applicable to “consumer contracts”. To protect the consumer, this rule emphasizes the entitlement by the consumer of the mandatory protection granted to him by the law of his habitual residence.

The applicability of this conflict-of-laws rule entirely depends on a consumer being involved in the contract at issue. The definition of “consumer” may focus on the purpose of the contracting party (whether private or professional) or on nature of the goods or services supplied under the contract (whether for consumption or not). The Qatari and Bahraini laws on consumer protection define the consumer in terms of purpose of contracting and the object rendered under the contract. Accordingly, this paper tackles the purpose for which the consumer enters the contract (subjective sphere of application) as well as the subject matter of consumer contracts (objective sphere of application).

### 2.1 Subjective sphere of application

Consumer contracts are made between a business or a professional and a consumer (B2C), whereby the former generally has a stronger position than the latter. The professional shall be acting in the course of his trade or profession; the consumer acts outside his trade or profession<sup>(13)</sup>. B2C contracts are different from B2B (i.e. contracts between two professionals) or C2C

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mittees such as Labour Dispute Settlement Committee in Qatar.’ S. Yaacoub, Towards International Mechanisms for Resolving Investment Disputes in Qatar, *Arab Law Quarterly* (published online ahead of print 2021): 11. doi: <https://doi.org/10.1163/15730255-bja10097>, accessed 19 July 2022.

(12) Obviously, delays in procedures will negatively influence the accessibility of the court, thereby making a separate study of this issue important. It is worth here mentioning that Qatar enacted the law no 21/2021 regarding the establishment of the Investment and Commerce Court (in force since 10 May 2022). Under Article 7 of this law, the Investment and Commerce Court may be faced with disputes over consumer contracts, particularly when such contracts are made electronically. Article 13 of this law provides that all actions related to the proceedings, from filing the lawsuit until the issuance of the judgment, may be conducted electronically. This, *inter alia*, would accelerate the proceedings.

(13) Hawwa, *supra* note 1 at 40–41, 54. M. Wilderspin, ‘Article 6: Consumer Contracts’ in Ulrich Magnus & Peter Mankowski (eds.), *Volume 2 Rome I Regulation – Commentary* (Köln: Verlag Dr. Otto Schmidt, 2016) 857, <https://doi.org/10.9785/9783504384814-012>, accessed 8 July 2022.

contracts (i.e. contracts between two consumers)<sup>(14)</sup>.

Article (1) of the Qatari law on consumer protection defines “the consumer” as any person who purchases and uses a commodity or service, for or without any consideration, for his or his family’s personal needs, or any person with whom a transaction or agreement is made in respect of the said commodity or service.

Article (1) of the Bahraini law on consumer protection defines “the consumer” as ‘Every natural or [juridical] person who obtains products to satisfy his/its needs or the requirements of persons belonging thereto’<sup>(15)</sup>.

The definition of consumer by both laws clearly focuses on the purpose for which the consumer makes the contract with a supplier (a professional): The aim of the consumer shall be the consumption of the goods or services by him or his family members; the consumer (or his dependent) shall be the final consumer<sup>(16)</sup>.

This approach reflects the narrow concept of consumer<sup>(17)</sup>; the law on consumer protection in Qatar and Bahrain does not cover persons acquiring goods or services for professional purposes beyond their personal or family use<sup>(18)</sup>. A person who acquires goods or services for a purpose somehow relating to his trade or profession, like the one who works in the field of construction and buys computers for his office, will not qualify as a consumer<sup>(19)</sup>. A lawyer, engineer, or a doctor, when buying a copy machine for his office, may not be granted the identity of consumer either.

This is in line with the 1980 UN Convention on Contracts for the International Sale of Goods (CISG)<sup>(20)</sup>, to which Bahrain (but not Qatar)<sup>(21)</sup>

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(14) For more information about B2B, C2C or B2A (i.e. contracts between a professional and an administration), see A. Erenoglu, ‘Determination of the Law Applicable to Electronic Consumer Agreements Made through Websites’, *GSI ARTICLETTTER* 24 (2021): 108 at 112-13.

(15) The Bahraini court of cassation reaffirmed this definition on many occasions. See, e.g. decision no 81/2019, dated 17 June 2019; and decision no 1246/2018, dated 17 June 2019. Online at: [www.east-laws.com](http://www.east-laws.com), accessed 8 July 2022.

(16) Hawwa, *supra* note 1 at 54-56. B. Younes, ‘Consumer Protection under Bahraini Law No. 35 of 2012 on Consumer Protection: A Comparative Study’, *AlQanouniya* 4 (2015): 209 at 220 (Arabic).

(17) Al-Rahmoni, *supra* note 1 at 62.

(18) Hawwa, *supra* note 1 at 58.

(19) Younes, *supra* note 16 at 219. *Contra* Hawwa, *supra* note 1, p. 41.

(20) W. Jnahi, ‘Role of the Rules of Private International Law in Protecting the Consumer in Contractual Obligations with a Foreign Element’, *University of Sharjah Journal for Legal Studies* 16(1) (2019): 438 at 442 (Arabic).

(21) Despite Qatar is not a party to CISG, a court in Qatar may apply CISG as part of the law of a CISG-contracting state when the forum’s conflict-of-laws rule designates the law of this other state as the

is already a party<sup>(22)</sup>. Under the provision of Article (2/a) CISG, the so-called consumer contracts, to which CISG does not apply, include ‘sales of goods bought for personal, family or household use, unless the seller, at any time before or at the conclusion of the contract, neither knew nor ought to have known that the goods were bought for any such use’<sup>(23)</sup>.

Obviously, the “unless” clause in Article 2(a) CISG

narrows the reach of the article 2 (a) exception and leads to the possibility of a conflict between domestic consumer protection law and the Convention in those cases where applicability of the domestic law does not require that the seller either knew or ought to have known of the buyer’s intended use<sup>(24)</sup>.

The Bahraini and Qatari laws on consumer protection do not require that the consumer’s private purpose of the contract was recognizable to the supplier. Instead, it makes no difference whether the supplier knows or is aware of the consumer’s personal or family purpose of use of the commodities or services. Unlike with CISG<sup>(25)</sup>, the consumer who actually contracts for a personal or family purpose but appears to the supplier as a professional could avail himself from the protection provided to consumers by national law<sup>(26)</sup>. Only if the general requirement that ‘honesty and confidence ... should prevail between the parties’<sup>(27)</sup> were breached, the consumer might not enjoy the protection of national law.

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applicable one. Art. 1(1) CISG partially states that, ‘This Convention applies to contracts of sale of goods between parties whose places of business are in different States ... when the rules of private international law led to the application of the law of a Contracting State’.

- (22) CISG is effective in Bahrain since 1 October 2014. Other Arab Countries (namely, Egypt, Iraq, Lebanon, Mauritania, Palestine and Syria) are also parties to this convention; online at: [https://uncitral.un.org/en/texts/salegoods/conventions/sale\\_of\\_goods/cisg/status](https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status), accessed 5 July 2022.
- (23) In the same sense, Art. (2/1)(a) of the 2005 UN Convention on the Use of Electronic Communications in International Contracts says that, ‘This Convention does not apply to electronic communications relating to ... [c]ontracts concluded for personal, family or household purposes’. Online at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452\\_ebook.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/06-57452_ebook.pdf), accessed 15 July 2022.
- (24) UNCITRAL, *Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods* (2016), 17 (hereinafter: UNCITRAL Digest), online at: [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg\\_digest\\_2016.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/cisg_digest_2016.pdf), accessed 15 July 2022.
- (25) T. Neumann, ‘*Extie du Hardrais: Jumping the Obstacle of Distinguishing International Consumer and Commercial Sales*’, *Int’l Trade & Bus. L. Rev.* 17 (2014): 392 at 400.
- (26) Cf. Ragno, *supra* note 1 at 135.
- (27) Art. 169 Qatari civil code; Arts. 127 & 129 Bahraini civil code.

The consumer may be a natural or juridical person. The Qatari law use a general term, i.e. ‘any person’ that encompasses legal persons<sup>(28)</sup>. Article (1) of the Bahraini law on consumer protection expressly speaks about ‘natural or juridical person’. Juridical consumers, e.g. small and medium-sized enterprises (SME) or charity associations may purchase goods or services for non-profit purposes<sup>(29)</sup>, i.e. for personal use (outside their professional activities)<sup>(30)</sup>.

Charities may buy foodstuff, warming equipment or school-stuff to give to poor people or provide them with health and insurance services<sup>(31)</sup>. The same applies to co-operative associations and professional syndicates<sup>(32)</sup> when they acquire goods or services for their members’ welfare<sup>(33)</sup>. Like the individual consumer, such legal persons often lack professional knowledge and bargaining power.

As for mixed contracts, i.e. contracts that a person makes partly for a personal purpose and partly for a professional purpose, they fall under the scope of application of CISG; they are not consumer contracts in the sense of Article (2/a) of the same<sup>(34)</sup>. According to the Supreme Court of Finland, since the agent had purchased the log house not only for personal use, but also partly for the professional use of the agent, in accordance with article (2/a) CISG, the Convention applies to the case<sup>(35)</sup>.

The Bahraini and Qatari laws on consumer protection say nothing about mixed contracts. However, based on general rules of contracts, a person should be considered a consumer if his personal purpose predominates the professional one<sup>(36)</sup>. Accordingly, unlike with CISG, the consumer should not acquire the goods (or services) exclusively for a personal or family purpose. Rather, it would suffice to consider a person as a consumer if his private purpose were the primary one.

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(28) Hawwa, *supra* note 1 at 57. Younes, *supra* note 16 at 222. *Contra* Qayed, *supra* note 2 at 70.

(29) Younes, *supra* note 16 at 215. Al-Rahmoni, *supra* note 1 at 66.

(30) Jnahi, *supra* note 20 at 442.

(31) A. Hamza, ‘Sphere of Application of the Consumer Protection Law: A Comparative Study in Algerian and Sultanate of Oman Laws’, *Ziane Achour University of Djelfa – Journal of Law and Humanities* 22 (2015): 1 at 7 (Arabic).

(32) Al-Rahmoni, *supra* note 1 at 64.

(33) Younes, *supra* note 16 at 233.

(34) Neumann, *supra* note 25 at 399.

(35) Supreme Court of Finland, Case no KKO:2005:114, 14 October 2005; online at: <http://unilex.info/cisg/case/2020>, accessed 5 January 2022.

(36) Younes, *supra* note 16 at 223.



## 2.2 Objective sphere of application

Generally, the forum's court characterizes the related legal relationship based on the *lex fori*. A Bahraini or Qatari court should therefore determine the concept of consumer contracts according to the national (substantive) law on consumer protection<sup>(37)</sup>. Although Article (22) of the Bahraini law on conflict of laws deals with (all) 'consumer contracts', the Bahraini law on consumer protection restricts the objective sphere of application of this conflicts rule<sup>(38)</sup>.

The Bahraini and Qatari laws on consumer protection define the object of consumer contracts. The Bahraini law does this in positive and negative ways: It outlines the products that are included or excluded from the scope of application of the consumer protection law. The Qatari law on consumer protection, in contrast, adopts a positive approach only; it defines which goods and products are included within this law's sphere of application.

Under Article (1) of the Bahraini law on consumer protection, the object of consumer contract shall be a product. In general, a product is 'something that is made to be sold, usually something that is produced by an industrial process or, less commonly, something that is grown or obtained through farming'<sup>(39)</sup>. However, this law makes it clear that products include 'goods and services'. Accordingly, the object of a consumer contract may be tangible (new or old) or intangible, like software (when not incorporated in a tangible support). Tangible goods can be of a one-time-consumption (like, foodstuff) or more (like, cars, home electronic devices, mobiles ... etc)<sup>(40)</sup>.

Under Article (1) of the Bahraini law on consumer protection, products do not include certain goods, like 'medicines, health preparations and health foods authorised to be imported by the concerned authority at the Ministry of Health and are sold in licensed pharmacies and health centres'. The same Article also excludes 'the services provided by professionals involved in medicine, engineering, law, accounting and insurance.'

By contrast, the coverage of the Qatari law on consumer protection is comprehensive as it covers all contracts the object of which is the supply of

(37) Under Art. 10 of the Qatari civil code and Art. 3 of the Bahraini law on conflict of laws, national (Qatari or Bahraini, respectively) law shall determine all matters related to characterization of legal positions and relations with foreign element(s).

(38) Cf. Jnahi, *supra* note 20 at 443.

(39) (<https://dictionary.cambridge.org/dictionary/english/product?q=products>, accessed 19 July 2022).

(40) Younes, *supra* note 16 at 223. Hamza, *supra* note 31 at 9.

commodities or services for private purposes<sup>(41)</sup>; this law applies to all contracts by virtue of which a person purchases or uses a commodity or service for his or his family's personal needs.

Article (1) of the Qatari law on consumer protection defines commodity as 'any industrial, agricultural, animal or manufactured product, including the product's raw material and components.' Commodity includes any 'substance or product that can be traded, bought, or sold'<sup>(42)</sup>. In order to extend the consumer protection, the Qatari law governs all consumer contracts the object of which is a movable, tangible commodity<sup>(43)</sup>.

Services - under the same law provision - include 'any work performed by any entity for the consumer, whether paid or unpaid'. The service may be supplied with or without a commodity. The consumer may enjoy the service in exchange for consideration (whatsoever: monetary or non-monetary) or free of any charge<sup>(44)</sup>.

This Qatari law clearly extends the concept of services. Unlike Bahraini law, Qatari law encompass all types of services, including material (like, hotel services, car repair services, and transportation), financial (like, credits) or intellectual services<sup>(45)</sup> (like, services provided by professionals involved in medicine, engineering, and law)<sup>(46)</sup>.

Under both laws, the object of consumer contracts may be an immovable thing<sup>(47)</sup>. The consumer may make a construction work contract<sup>(48)</sup>; he may buy or rent an apartment for family use<sup>(49)</sup>. However, the specific provisions of Article (15/b) of the Bahraini law on conflict of laws and Article (27/2) of the Qatari civil code recognize the importance of the link between immovable property and the territory where this immovable property is situated.

Accordingly, the law of the state in which the immovable property is located shall govern all contracts relating to this immovable property. Article

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(41) Hawwa, *supra* note 1 at 58.

(42) <https://dictionary.cambridge.org/dictionary/english/commodity>, accessed 19 July 2022.

(43) Hawwa, *supra* note 1 at 58.

(44) *Ibid.*

(45) S. Fatiha, 'Conflict of Laws in the Field of International Consumer Contracts in Algerian Law Compared', *JiL Journal of Comparative Studies* 9 (2019): 61 at 67 (Arabic). Hamza, *supra* note 31 at 10.

(46) Younes, *supra* note 16 at 212.

(47) Cf. Hamza, *supra* note 31 at 9.

(48) Ragno, *supra* note 1 at 139.

(15/b) of the Bahraini law on conflict of laws also allows the parties to agree otherwise, explicitly or tacitly.

### **3. Special Protection of Consumer under Bahraini Conflict-of-Laws Rule**

Since the standard for determination of consumer contracts under CISG differs from the one adopted by Bahraini law on consumer protection, an overlap may exist. CISG may govern some sale of goods contracts, which at the same time qualify as consumer contracts under Bahraini law.

Under Article 22 of the Bahraini law on conflict of laws, the law governing consumer contracts shall be the law chosen by the parties (with some restrictions) or, else the law of the consumer's habitual residence. This paper will now explain which law should govern consumer contracts in Bahrain, whether there is overlapping with CISG or not.

#### ***3.1 Relationship between CISG and Bahraini law***

Article (2/a) CISG excludes consumer contracts from the convention's sphere of application 'in order not to disturb various protection domestic laws'<sup>(50)</sup>. This exclusion requires two conditions. Firstly, the buyer must have intended, at the time of making the contract, to use the goods for a personal, family or household purpose. Secondly, the seller should have known or been aware of the buyer's purpose of use of the goods.

As for the definition of consumer contracts, the Bahraini law on consumer protection differs from Article (2/a) CISG in two ways: Firstly, the Bahraini law does not require the supplier (the professional) to know or be aware of the consumer's private purpose of use of the goods (or services). Secondly, the consumer shall not acquire the goods (or services) exclusively for a personal or family purpose; rather, it would suffice if such purpose were the primary one. This could eventually result in falling of some contracts within the scope of application of CISG, though they qualify as consumer contracts under Bahraini law.

In such overlaps, the Bahraini court may not apply the conflict-of-laws rule stated in Article (22) of the Bahraini law on conflict of laws. Instead, the Bahraini court must apply CISG. Since Bahrain is a party to this convention, the CISG's uniform substantive rules shall have priority in application over the (national) conflict-of-laws rules<sup>(51)</sup>. CISG is *lex specialis vis-à-vis*

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(50) Neumann, *supra* note 25 at 396.

(51) UNCITRAL Digest, *supra* note 24 at 4, 'when a situation is international, courts resort to the private international law rules in force in their country to determine which substantive rules to apply. In those countries, however, where international uniform substantive rules are in force, such as those

national law, including rules of private international law<sup>(52)</sup>. As CISG shall be interpreted autonomously, this convention will solely apply to contracts on sale of goods that fall within its scope of application, regardless of whether national Bahraini law considers such contracts as consumer contracts.

### 3.2 *Application of the Chosen Law to Consumer Contracts*

The Bahraini law on conflict of laws acknowledges party autonomy. Articles (4) and (17) allow the parties to choose the law or rules of law applicable to their contract, explicitly or tacitly. In the absence of such a choice, the law of the parties of common domicile or, else the law of the place of making the contract shall govern the contract.

The same Bahraini law includes some restrictions on party autonomy concerning different groups of contracts<sup>(53)</sup>. As for consumer contracts, Article (22) of the Bahraini law on conflict of laws limits the application of the chosen law to the extent it does not deprive the consumer from the protection afforded to him by the law of his habitual residence.

With the exception of (consumer) contracts falling within the CISG' sphere of application, Article (22) of the Bahraini law on conflict of laws shall apply to consumer contracts once the aforementioned requirement for the subjective and objective sphere of application of the Bahraini law on consumer protection are met. Contrary to other legislations<sup>(54)</sup>, Bahraini law does not require any

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set forth by the Convention, courts must determine whether those international uniform substantive rules apply before resorting to private international law rules at all. This means that recourse to the Convention prevails over recourse to the forum's private international law rules.' See also Neumann, *supra* note 25 at 395.

(52) UNCITRAL Digest, *supra* note 24 at 4, 'as a set of uniform substantive law rules, the Convention is more specific insofar as its sphere of application is more limited and leads directly to a substantive solution, whereas resort to private international law requires a two-step approach— that is, the identification of the applicable law and the application thereof.' See also Ragno, *supra* note 1 at 163-64.

(53) For instance, stock exchange contracts shall solely be subject to the law of the state within which the stock exchange is situated (Art. 18 of the Bahraini law on conflict of laws). As for employment contracts, Art. (19) of the Bahraini law on conflict of laws states that, 'a. Employment contracts shall be subject to the law of the state where the contract is substantially performed. b. If the contract is substantially performed in more than one state, then the law applicable shall be of the state within which the principal place of business is situated. c. If the principal place of business is abroad, nevertheless, employment contracts were concluded by a branch located in Bahrain, then Bahraini law shall apply provided that the employment contract is substantially performed in the Kingdom of Bahrain. d. Without prejudice to the overriding mandatory rules of the applicable law as stated in paragraphs (a) and (b) of this article, parties have the freedom to choose another law to be applied to their employment contract.'

(54) In order to apply the law of the state of the consumer's habitual residence, Art. (120) of the Swiss federal private international law statute requires the satisfaction of at least one of a series of conditions, namely: "

further conditions indicating a close connection with the consumer's habitual residence<sup>(55)</sup>. The Bahraini conflict-of-laws rule is not limited to passive consumers. Rather, this conflicts rule protects the consumer per se<sup>(56)</sup>; it applies to both passive and active consumers so long as the consumer contract (in the meaning of the Bahraini law on consumer protection) involves a foreign element.

The consumer contract will have a foreign element when, e.g. the place of the conclusion or execution of the contract locates in a country other than the one in which the consumer habitually resides<sup>(57)</sup>. It makes no difference whether the supplier or the consumer initiates the formation of the consumer contract. The professional may seek out the consumer. The consumer may from his home country approach the foreign professional or go abroad and be

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- a. if the supplier received the order in that state;
  - b. if the contract was entered into after an offer or advertising in that state and if the consumer performed in that state the acts required to enter into the contract; or
  - c. if the consumer was induced by the supplier to go to a foreign state for the purpose of delivering the order”.

Online at: [https://www.fedlex.admin.ch/eli/cc/1988/1776\\_1776\\_1776/en](https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en), accessed 16 July 2022.

To apply the chosen law (under the condition it does deprive 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), Art. (5/2) of the Rome Convention requires the satisfaction of at least one of the following conditions: “ - 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”.

Online at: [https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41998A0126\(02\)](https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:41998A0126(02)), accessed 16 July 2022.

In order to apply the chosen law (when it does deprive 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), Art. (6) para 1 & para 2 of the Rome I Regulation requires 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”.

Online at: <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593>, accessed 16 July 2022.

(55) Jnahi, *supra* note 20 at 445-46.

(56) Cf. Z. Tang, ‘Consumer contracts and the Internet in EU private international law’, in Andrej Savin & Jan Trzaskowski (eds.), *Research Handbook on EU Internet Law* (Cheltenham, UK: Edward Elgar Publishing, 2014) 261, <https://doi.org/10.4337/9781782544173.00020>, accessed 3 July 2022.

(57) Erenoglu, *supra* note 14 at 116.

contacted there<sup>(58)</sup>. In such cases, it is unconceivable to protect the consumer because the professional ‘has never intended to be subject to any foreign [legal] systems’<sup>(59)</sup>.

Article (22) of the Bahraini law on conflict of laws acknowledges (with some limitations) the possibility of a choice of law in consumer contracts<sup>(60)</sup>. Accordingly, in terms of substantive validity<sup>(61)</sup> (except legal capacity<sup>(62)</sup>) and legal effects, the consumer contracts shall be subject to the law chosen by the parties, explicitly or tacitly. This rule applies so long as such choice may not have ‘the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by virtue of the law of his habitual residence.’

The Bahraini law on conflict of laws does not define the concept of habitual residence. However, Article (12/a) of the Bahraini civil code equates ‘the place where a person habitually resides’ with domicile. Thus, the consumer’s habitual residence (domicile) refers to the place where the consumer ordinarily resides<sup>(63)</sup>. Logically, the consumer’s habitual residence excludes places in which the consumer temporarily resides, like holiday places. It also excludes places of formal (not actual) residence.

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(58) Cf. O. Lando, ‘Some Issues Relating to the Law Applicable to Contractual Obligations’, *K. C. L. J.* 7 (1996-1997): 55 at 73.

(59) Tang, *supra* note 56 at 266.

(60) On one hand, Art. (22) of the Bahraini law on conflict of laws is in line with Art. (5/2) of the Rome Convention and Art. (6/1) of the Rome I Regulation. On the other hand, Art. (22) of the said Bahraini law totally differs from Art. (120/2) of the Swiss federal private international law statute, which states that, ‘No choice of law is allowed.’ Online at: [https://www.fedlex.admin.ch/eli/cc/1988/1776\\_1776\\_1776/en](https://www.fedlex.admin.ch/eli/cc/1988/1776_1776_1776/en), accessed 16 July 2022. See also Art. (42) of the 2010 Chinese Act on the Application of Laws over Foreign-related Civil Relationships, cited in Z. Huo, ‘Highlights of China’s New Private International Law Act: From the Perspective of Comparative Law’, *R.J.T.* 45 (2011): 637 at 674.

(61) Under Art. (17) of the Bahraini law on conflict of laws, the formal validity of contract in general shall be subject to the law chosen by the parties, explicitly or tacitly. In absence of such choice, formal validity shall be subject to the law of the state of common habitual residence of the parties. If no common habitual residence was established, the applicable law should be that of the state where the contract was concluded.

(62) Art. (11) of the Bahraini law on conflict of laws states that, ‘Foreign natural persons are subject to the law of their nationality to determine their capacity and civil status. If a foreign person -who is party to a legal action with effects taking place in Bahrain-, is considered to have capacity under Bahraini law yet is considered a minor under the law of his nationality, then this party cannot invoke his incapacity if it was due to a hidden reason that is not evident for the other party. If upon obtaining a new nationality one’s legal capacity is affected, then legal actions concluded before obtaining the new nationality shall not be affected.’

(63) Cf. Ragno, *supra* note 1 at 151.

The Bahraini law on conflict of laws does not define the moment of time relevant to establish where the consumer resides in order to apply Article (22) of the same. In order to protect the other party's legitimate expectations, however, the place of the consumer's habitual residence that matters should be the one in which the consumer habitually resides at the time of making the contract. Any change of residence later on should not have any impact on the law applicable under Article 22 of the Bahraini law on conflict of laws. Otherwise, such a change may constitute fraud against law (i.e., *fraude à la loi*).

Generally, Arab courts *ex officio* apply the conflict-of-laws rules. After the Bahraini court characterises the dispute according to Bahraini law, it will apply the related conflicts rule and the substantive law it designates<sup>(64)</sup>. However, Article 6 of the Bahraini law on conflict of laws considers the application of foreign law (e.g. the one chosen by the parties to a consumer contract) a matter of fact; the party basing his / her claim on the foreign law should establish this law. It clearly states that, 'Parties to a dispute shall submit provisions of the applicable law. If no provisions were submitted, Bahraini law may be considered as the applicable law to the subject-matter of the dispute'<sup>(65)</sup>.

Accordingly, if the professional establishes before the Bahraini court the chosen law to, but the consumer submits related provisions of the law of his habitual residence, the court must make a comparison between these two laws. The Bahraini court must verify whether or not the chosen law deprives 'the consumer from of the protection afforded to him by provisions that cannot be derogated from by virtue of the law of his habitual residence', whether it is in Bahrain or in another state<sup>(66)</sup>. Generally, the court will look for such mandatory provisions in the special law on consumer protection in the consumer's habitual residence<sup>(67)</sup>. In addition, the court shall consider the common private law mandatory provisions that favor the consumer's interest<sup>(68)</sup>.

Article (22) of the Bahraini law on conflict of laws adopts a 'preferential

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(64) A. Dawwas, 'Kuwaiti Perspectives on the Hague Principles', in Girsberger, Kadner, Graziano and Neels (eds.), *Choice of Law in International Commercial Contracts: Global Perspectives on The Hague Principles* (Oxford: OUP, 2021) para. 29.33.

(65) Art. 6 of the Bahraini law on conflict of laws.

(66) Cf. Lando, *supra* note 58 at 59.

(67) Art. (10) of the Bahraini law on consumer protection states that, '... every condition contained in a contract, document, deed or otherwise related to entering into contract with a consumer shall be invalid where such condition results in prior exemption of the supplier from its obligations under this Law.'

(68) Younes, *supra* note 16 at 213. Ragno, *supra* note 1 at 152.

approach<sup>(69)</sup>. When comparing the mandatory provisions of the law of the consumer's habitual residence with the chosen law, the Bahraini court will only apply this latter law if it affords the consumer higher (or at least equal) protection than the one afforded to him by the mandatory provisions of the law of his habitual residence<sup>(70)</sup>. If, on the contrary, the mandatory provisions of the law of the consumer's habitual residence are more beneficial to the consumer, the Bahraini court shall exclude the chosen law and, instead apply the mandatory provisions of the law of the consumer habitual residence<sup>(71)</sup>.

Obviously, the mandatory provisions in the law of the consumer's habitual residence are 'a kind of minimum standard of protection that must be met'<sup>(72)</sup>. In all events, the Bahraini court must save the consumer the protection afforded to him by the mandatory provisions of the law of his habitual residence.

The Bahraini court may also 'exploit the protection of both laws, for separate aspects of the contract, if necessary'<sup>(73)</sup>. This would result in *dépeçage* of contract, i.e. bifurcation of the laws applicable to contract, which the Bahraini law on conflict of laws already acknowledges<sup>(74)</sup>.

### ***3.3 Law Applicable to Consumer Contracts in the Absence of Choice***

If the parties to a consumer contract have not (validly) chosen the applicable law, the court, pursuant to Article (22) of the Bahraini law on conflict of laws, shall apply the law of the state where the consumer has his habitual residence (at the time of making the contract). Here, the consumer does not only enjoy the protection of the mandatory rules in his law of habitual residence like in the presence of a choice of law, but this law of the consumer's habitual residence is made the applicable one. The consumer is deemed to be 'most familiar' with his law of habitual residence<sup>(75)</sup>.

This conflict-of-laws rule differs from the one relating to contracts in

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(69) Cf. R. Poir & K. Sein, 'Law Applicable to Consumer Contracts', *Juridica Int'l* 24 (2016): 63 at 69.

(70) Cf. Fatiha, *supra* note 45 at 77-8. Ragno, *supra* note 1 at 152.

(71) Cf. Ragno, *supra* note 1 at 152-53. Ch. Riefa, 'Article 5 of the Rome Convention on the Law Applicable to Contractual Obligations of 19 June 1980 and Consumer E-contracts: The Need for Reform', *Info. & Comm. Tech. L.* 13(1) (2004): 59 at 68.

(72) Ragno, *supra* note 1 at 153. See also Erenoglu, *supra* note 14 at 116-17. Riefa, *supra* note 71 at 65. K. Zok, 'Law Applicable to Cloud Computing Contracts Concluded with Consumers under Regulation 593/2008, according to the CJEU Case Law', *Masaryk U. J. L. & Tech.* 14(1) (2020): 83 at 88.

(73) Cf. Poir & Sein, *supra* note 69 at 69.

(74) Art. 17(c) states that, 'Parties may choose different laws to be applied to different parts of a contract, provided that such parts can be separated from other contract parts.'

(75) Wilderspin, *supra* note 13 at 455.



general. In the absence of parties' choice of law, the contract will generally be subject to the law of the parties' common domicile, or else the law of making the contract (Article 17), whereas the consumer contract (including electronic consumer contracts<sup>76</sup>) shall be subject to the law of the consumer's habitual residence (Article 22).

Truly, the law of the consumer's habitual residence has a very close relationship to the consumer contract. The goal is to provide the consumer with full protection as ensured by this law. However, the law of the professional's residence or domicile (where the contract has been concluded) may be more developed; it may afford the consumer higher protection.

Under Article (22) of the Bahraini law on conflict of laws, the Bahraini court will apply the Bahraini law to consumer contracts if the consumer's habitual residence locates in the State of Bahrain. Therefore, the consumer ordinarily residing in Bahrain will always enjoy the protection afforded to him by the Bahraini Law on consumer protection, regardless of whether there is a choice of law (Article 22) or not (Article 22 (first sentence)).

If, on the contrary, the consumer habitual residence locates in another state, the consumer may assert before the Bahraini court the application of the law of this other state<sup>(77)</sup>. However, the Bahraini court may ex officio exclude the application of this (foreign) law if it collides with Bahraini public policy<sup>(78)</sup> and, instead apply Bahraini law<sup>(79)</sup>.

To sum up, Article (22) of the Bahraini law on conflict of laws restricts party autonomy with regard to consumer contracts. By doing so, the Bahraini law reconciles the principle of parties' freedom to choose the law applicable to their contract with the need to protect the weaker party, i.e. the consumer. When requiring that the chosen law shall not deprive the consumer from the protection afforded to him by mandatory provisions of the law of his habitual residence, the Bahraini law actually deprives the professional from abusing party autonomy as a connecting factor<sup>(80)</sup>. In addition, Article 22 of the Bahraini

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(76) Jnahi, *supra* note 20 at 462.

(77) Arts. (6) & (22) of the Bahraini law on conflict of laws.

(78) Art. (5) of the Bahraini law on conflict of laws states that, 'The law to be applied to the subject-matter of a dispute shall not be contrary to public order in Bahrain.'

(79) Cf. M. Es-Sallam, 'Defence with Public Order in Conflict of Laws: An Analytical Study of the Jordanian Law', *Islamic University Journal of Sharia Science* 53(109) (2019): 527 at 599. S. Mahmoud, 'Defence with Public Policy and its Effect', *Mosel University Rafidain Journal of Law* 12(43) (2010): 88 at 97.

(80) Cf. Ragno, *supra* note 1 at 151.

law adopts a special connecting factor (i.e. the consumer's habitual residence) to apply in the absence of choice by the parties of the applicable law.

#### 4. Protection of Consumer under Qatari General Conflict-of-Laws Rule on Contracts

Qatari law does not contain a specific conflict-of-laws rule to consumer contracts. Thus, such contracts shall be subject to the law governing international commercial contracts in general<sup>(81)</sup>. Article (27/1) Qatari civil code states that,

In terms of the substantive conditions to be imposed and the effects thereof, a contract shall be governed by the law of the jurisdiction of the domicile common to the contracting parties. If the domicile of one party is different from that of the other party, the law of jurisdiction where the contract is concluded shall be applied, unless the contracting parties agree otherwise, or the circumstances indicate that another law is intended to be applied.

Accordingly, substantive validity<sup>(82)</sup> (except legal capacity<sup>(83)</sup>) and legal effects of consumer contracts shall be subject to the law chosen by the parties, explicitly or tacitly. In the absence of such a choice, the contract shall be governed by the law of the parties' common domicile and if there is no such domicile by the law of the place of making the contract.

##### 4.1 Application of the Chosen Law to (Consumer) Contracts

Since the conflict-of-laws rule on contracts (like any other conflict-of-laws rule) is neutral in nature, the chosen law should apply regardless of whether or not the substantive rules of such law well safeguards the parties' interests<sup>(84)</sup>, particularly the weaker party (e.g. the consumer)<sup>(85)</sup>. Accordingly, the stronger

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(81) Cf. Fatiha, *supra* note 45 at 72. Dawwas, *supra* note 2 at 2552.

(82) As for formal validity of contracts, Art. (29) of the Qatari civil code states that, 'The form of contracts shall be governed by the law of jurisdiction of the country where such contracts are concluded. The law governing the contract in its substantive provisions, the law of the domicile of the contracting parties, or their common national law, may also apply.'

(83) Under Art. (11) of the Qatari civil code, the legal capacity of a person is governed by the law of the country which they have its nationality. Where, however, in a transaction of a financial nature, concluded and effective in Qatar, one of the parties is an incapacitated foreigner and such incapacity is due to a cause neither apparent to nor easily detected by the other party, such cause shall have no effect on the legal capacity of such foreigner.

(84) K. Kehl, 'Law of International Contract and its Impact on Consumer's Interest', *Fikr and Ibdā'* 50 (2009): 397 at 405 (Arabic). A. Salama, 'The Necessary Applicable Rules in Private International Law', *Egyptian Journal of International Law* 40 (1984): 133 at 178 (Arabic).

(85) Kehl, *supra* note 84 at 406. A. Alasadi & H. Alobaidi, 'Impact of Conflict-of-Laws Rules on e-Consumer Protection in International Private Relationships', *University of Babylon Al-Mouhakiq Al-Hilly Journal for Legal & Political Science* 13(3) (2021): 282 at 284-85 (Arabic).

party in consumer contracts (the professional) may abuse the party autonomy as a connecting factor<sup>(86)</sup>. Based on his strong economic, social and legal position, the professional may impose a choice of law that protects his own interests at the expense of the consumer's interests<sup>(87)</sup>.

This inconvenience of party autonomy for consumer contracts called for the intervention of the legislature in some jurisdiction to restrict or even prevent the choice of law by the parties of these contracts. In Switzerland, the parties to consumer contracts may not choose the applicable law<sup>(88)</sup>. In Bahrain, as with the Rome Convention and Rome I Regulation<sup>(89)</sup>, the parties may choose the law applicable to consumer contracts. However, the court shall apply the chosen law so long as it does not deprive the consumer of the protection afforded to him by the mandatory provisions in the law of his habitual residence.

Some Arab legal writers also call for the restriction of party autonomy in consumer contracts. For instance, Salama says that the court should consider the party autonomy as a secondary connecting factor and starts with an objective one<sup>(90)</sup> to protect the weaker party<sup>(91)</sup>. In order to afford the consumer a minimum protection, Salama<sup>(92)</sup> and Kehl<sup>(93)</sup> suggest the consumer's domicile or habitual residence as an objective connecting factor to define the law governing consumer contracts. Salama<sup>(94)</sup> and Kehl<sup>(95)</sup> continue to say that, the chosen law should only apply if it affords the consumer more protection than the law of the consumer's domicile or habitual residence.

This opinion may have some support in Article 34 of the Qatari civil code,

(86) Jnahi, *supra* note 20 at 439. Alasadi & Alobaidi, *supra* note 85 at 285.

(87) Kehl, *supra* note 84 at 406. Fatiha, *supra* note 45 at 76. Jnahi, *supra* note 20 at 439.

(88) Art. (120) of the Swiss federal private international law statute.

(89) Art. (5) of the Rome Convention; Art. 6 of the Rome I Regulation.

(90) Salama, *supra* note 2 at 375.

(91) Salama, *ibid*, pp. 379, 391-92.

(92) Salama, *ibid*, pp. 207, 209.

(93) Kehl, *supra* note 84 at 407. See also A. Limjedri, 'The Legal protection of Moroccan Tourists in Traditional and Electronic Systems: A Comparative Study', *University of Sharjah Journal for Legal Studies* 16(2) (2019): 221 at 244 (Arabic). M. Abo-Moghle & M. Al-Sararia, 'Law Applicable To Consumer E-Contracts of International Nature', *University of Jordan DIRASAT Journal – Sharia' and Law Sciences* 41(2) (2014): 1339 at 1357 (Arabic). K. Majdoub, 'Will Limits in Determining the Applicable Law on The Consumer Electronic Contract', *Ziane Achour University of Djelfa – Journal of History of Science* 8(2) (2017): 265 at 271 (Arabic).

(94) Salama, *supra* note 2 at 209.

(95) Kehl, *supra* note 84 at 408. See also Limjedri, *supra* note 93 at 244. Abo-Moghle & Al-Sararia, *supra* note 93 at 1357. Majdoub, *supra* note 93 at 271.

which requires the court to apply ‘the principles of private international law ... in the case of a conflict of laws for which no provision is made in the preceding Articles.’ According to Al-Amin and Jawad, recent developments have made the traditional conflict-of-laws rule on contracts impracticable<sup>(96)</sup>; the court may not apply this conflicts rule to define the law applicable to some new categories of contracts, like employment contracts<sup>(97)</sup> or consumer (e-) contracts<sup>(98)</sup>. Al-Amin and Jawad call for the application of the principles of private international law to determine the law proper to these new categories of contracts<sup>(99)</sup>.

Despite its merits, a court – where the forum’s law does not include specific conflicts rule on consumer contracts - may not uphold this opinion. Considering the clear provision of the conflict-of-laws rule concerning contracts in general (Article 27(1) of the Qatari civil code), the Qatari courts must apply the law chosen by the parties to consumer contracts, regardless of whether it is more advantageous to the consumer than the law of the consumer’s domicile or habitual residence or not.

Truly, the chosen law (e.g. the law of the professional’s place of business) may afford the consumer more protection than the law of the consumer’s domicile or habitual residence<sup>(100)</sup>. However, as indicated *infra*, the Qatari court will still have to directly apply the mandatory provisions of the law of the consumer’s domicile or habitual residence (whether it is in Qatar or elsewhere).

If the parties have chosen the law governing the consumer contract and the consumer’s domicile or habitual residence locates in Qatar, the court should – according to some Arab legal writers - verify whether this (foreign) chosen law collides with the forum’s public policy<sup>(101)</sup> (including mandatory provisions on consumer protection)<sup>(102)</sup>. In case the chosen law affords the consumer lesser protection than the national law, the (Qatari) court should

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(96) Kh. Al-Amin & N. Jawad, ‘Self-Role of the Principles of Private International Law in Addressing the Legislative Lacuna (A Comparative Study)’, *University of Babylon Al-Mouhakiq Al-Hilly Journal for Legal & Political Science* 13(3) (2021): 589 at 598 (Arabic).

(97) *Ibid.*

(98) *Ibid.*, pp. 20, 619.

(99) *Ibid.*, pp. 598, 620.

(100) Cf. Fatiha, *supra* note 45 at 77.

(101) Fatiha, *ibid.*, p. 78. Qayed, *supra* note 2 at 883.

(102) Fatiha, *supra* note 45 at 78. Qayed, *supra* note 2 at 883. Cf. Schu, *supra* note 2 at 205. Alasadi & Alobaidi, *supra* note 85 at 294.

exclude the application of this law, and instead apply national law<sup>(103)</sup>.

The present writer does not support this opinion. The Qatari mandatory provisions on consumer protection<sup>(104)</sup> generally qualify as direct applicable rules<sup>(105)</sup>. As such, these rules claim application to all related contractual relationships, whether national or international (i.e. with a foreign element) (106). Therefore, the Qatari court must apply the mandatory provisions in Qatari law without even considering the conflict-of-laws rule<sup>(107)</sup>. In contrast, the court cannot consider the forum's public policy unless the court has already applied the national conflict-of-laws rule and this rule led to the application of a foreign law.

Indeed, the Qatari court may not apply the chosen law in cases in which the Qatari legislature governs a specific contract or contract aspect with mandatory rules for political, legal, economic and social grounds<sup>(108)</sup>. This is very valid to consumer contracts<sup>(109)</sup>, for which the legislature – in order to maintain the order of society and economy - makes unique rules to protect the consumer. In this sense, Eksi says that,

certain rules of law of the court have to be protected. The legal arrangements of the *lex fori*, which are related to ... the protection of consumers can be

(103) Fatiha, *supra* note 45 at 78.

(104) R. Dotevall, 'Chapter 63: Sweden' in Jan M. Smits (ed.) *Elgar Encyclopedia of Comparative Law* (Cheltenham, UK: Edward Elgar Publishing, 2006) 700, 'A statute that has a purpose to protect consumer interest is mandatory.' Online at: DOI: <https://doi.org/10.4337/9781847200204>, accessed 21 January 2022.

(105) Jnahi, *supra* note 20 at 448-49, 460. Abo-Moghle & Al-Sararia, *supra* note 93 at 1358. Majdoub, *supra* note 93 at 269.

(106) H. Sadeq, *Law Applicable to International Commercial Contracts* (Alexandria: Dar El-Fikr Al-Jami'e, 2001) 764 (Arabic). Abo-Moghle & Al-Sararia, *supra* note 93 at 1358. Eksi, *supra* note 1 at 307. Wilderspin, *supra* note 13 at 882-83.

(107) Cf. Jnahi, *supra* note 20 at 447-48. Sadeq, 822. Majdoub, *supra* note 93 at 269. Salama, *supra* note 84 at 142. Eksi, *supra* note 1 at 308.

(108) Cf. Dawwas, *supra* note 64 at 29.65. B. Muhammad & S. Jamil, 'Challenges of Application of the Foreign Police Laws', *The Iraqi University Journal* 46(2) (2020): 391 at 393 (Arabic). Eksi, *supra* note 1 at 308.

(109) Sadeq, 828, 'all rules the legislature makes to protect the contract weaker party, e.g. the employee in the employment contract or the consumer in consumer contracts, are police rules of necessary application.' See also Hawwa, *supra* note 1 at 43. Muhammad & Jamil, *supra* note 108 at 393. Al-Amin & Jawad, *supra* note 96 at 600. Majdoub, *supra* note 93 at 269. Lando, *supra* note 58 at 73. Schu, *supra* note 2 at 207. Riefa, *supra* note 71 at 68-9. A. Shaba', 'Extent of Application of the Necessary applicable Rules in International Commercial Contracts: A Comparative and Analytical Study', *University of Thi-Qar - Journal of Arts* 21(3) (2017): 312 at 325 (Arabic).

accepted of being of mandatory nature<sup>(110)</sup>.

Piir and Sein mention that, ‘the abuse of weaker parties can be viewed as a threat to civil society’<sup>(111)</sup>.

Accordingly, to materialize the goals the forum’s imperative rules of direct application concerning consumer protection seek to achieve<sup>(112)</sup>, such rules should apply regardless of the foreign law chosen by the parties<sup>(113)</sup>; otherwise, the court would undermine the national legislature’s goals<sup>(114)</sup>. Under Article (2/1) of the Qatari law on consumer protection, no person may conclude any agreement or conduct any activity that prejudices the basic rights of a consumer<sup>(115)</sup>. In addition, Article (24) of the same states that,

Any condition referred to in a contract, document or other similar instrument in respect of contracting with the consumer shall be null and void where such condition relieves the supplier of any of his obligations stipulated in this Law.

The Qatari court should apply the national mandatory rules on consumer protection next to the chosen law<sup>(116)</sup>. In other words, this chosen law will govern all aspects of the consumer contract that fall outside the sphere of application of the direct applicable rules on consumer protection<sup>(117)</sup>.

Unlike with Bahraini law, the Qatari court may not compare the chosen law

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(110) Eksi, *supra* note 1 at 310.

(111) Piir & Sein, *supra* note 69 at 69-70.

(112) Sadeq, *supra* note 106 at 765.

(113) Dawwas, *supra* note 64 at 29.67. See also Eksi, *supra* note 1 at 310. H. Mahmoud, ‘Protection of Consumer in e-Contracts and the Applicable Law (a Comparative Study)’, *Journal of Islamic University* 22 (2009): 375 (Arabic). Majdoub, *supra* note 93 at 269.

(114) Shaba’, *supra* note 109 at 342. Muhammad & Jamil, *supra* note 108 at 399. Sadeq, *supra* note 106 at 765, 828.

(115) These basic rights of the consumer, that cannot be taken away, include ‘in particular the following: The right to safety and protection from commodities or services that are unsafe, or whose use might cause injuries to others; The right to obtain correct data and information about commodities or services; The right to choose commodities that meet conditions of quality and conform to specifications; The right to respect religious values, customs and traditions; The right to obtain knowledge related to protection of the consumer’s legitimate rights and interests; The right to participate in associations, private institutions, councils and committees whose activities are related to consumer protection; and The right to file lawsuits concerning anything that may violate, harm or restrict the consumer’s rights.’ Art. (2/1) of the Qatari law on consumer protection.

(116) Salama, *supra* note 2 at 209.

(117) *Ibid.*

with mandatory provisions in the Qatari law to verify which of them affords the consumer more protection<sup>(118)</sup>. The Qatari court will rather apply the forum's mandatory rules directly<sup>(119)</sup> (i.e. without recourse to conflict-of-laws rules). Thus, even if the chosen law were more advantageous to the consumer than the *lex fori*, the Qatari court would not apply the chosen law but the mandatory provisions of the law of the forum.

In general, courts may apply the direct applicable rules of the law of a foreign country too<sup>(120)</sup>. A Qatari court may therefore apply the law of the foreign country in which the consumer resides because of the close connection this country has to the contract at issue<sup>(121)</sup>. This may have its reasoning in the aforementioned Article (34) of the Qatari civil code.

In principle, the Qatari court should not apply foreign direct applicable rules when they collide with public policy in Qatar. Article (38) of the Qatari civil code states that,

The provisions of a foreign law applicable by virtue of the preceding Articles shall not be applied if they conflict with the public order or morals in Qatar. In such event, the Qatari law shall apply.

However, when examining the compliance of foreign direct applicable rules with national public policy and morals, the Qatari court should not only take into consideration the content of such rules, but also the goals they seek to achieve<sup>(122)</sup>.

#### **4.2 Law Applicable to (Consumer) Contracts in the Absence of Choice**

If the parties have not made a choice of law, explicit or implicit, or if a choice of law is found to be invalid, the court should – according to an opinion<sup>(123)</sup> – apply the law of the consumer's habitual residence.

This opinion aims to afford the consumer the protection he deserves in conflict of laws. However, the present writer cannot support this opinion. In

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(118) Cf. Piir & Sein, *supra* note 69 at 64.

(119) Cf. Eksi, *supra* note 1 at 310, 'the mandatory rules of the law of the forum ..., due to their nature and purpose, are applied directly.'

(120) Sadeq, *supra* note 106 at 764. Shaba', *supra* note 109 at 323. Eksi, *supra* note 1 at 308. Schu, *supra* note 2 at 207. Wilderspin, *supra* note 13 at 883.

(121) Cf. Dawwas, *supra* note 64 at 29.68. Sadeq, *supra* note 106 at 764. Muhammad & Jamil, *supra* note 108 at 400.

(122) Cf. Sadeq, *supra* note 106 at 929.

(123) Qayed, *supra* note 2 at 889.

light of the express provision of Article (27/1) the Qatari civil code, the court shall apply the law of the parties' common domicile, or otherwise the law of the place of making the contract.

In general, the parties to a contract, including a consumer contract, will most likely have different domiciles. The court will therefore apply the law of the country where the contract was concluded. However, this country may be an incidental one<sup>(124)</sup>; it may not have a close connection to the contract.<sup>(125)</sup> Therefore, this connecting factor may not protect the consumer's interests.

As with the chosen law, the Qatari court may – next to the law of the place of making the contract - apply the direct applicable mandatory provisions of the law of the consumer's habitual residence, whether it is Qatar<sup>(126)</sup> or any other state that has a close connection with the contract.

### 5. Conclusion

Some remarks can be made from the analyses and comparison of Qatari and Bahraini laws concerning consumer protection in conflict of laws. In Bahrain, there is a specific conflicts rule concerning consumer contracts; this rule permits the parties to choose the law applicable to such contracts. The court must make a comparison between the chosen law and the law of the consumer's place of habitual residence and apply the one of them that is more advantageous to the consumer. However, the law does not make any distinction between passive and active consumers.

Yet, it is unconceivable to protect the active consumer because the professional has never intended to be subject to any foreign legal system.

In Qatar, because of the absence of a peculiar conflicts rule concerning consumer contracts, the courts may apply the law governing contracts in general, that is to say, the law selected by the parties, the law of the country where the parties have their common domicile or the *lex loci contractus*. Regardless of the law applicable, the Qatari courts must apply the forum's direct applicable mandatory provisions on consumer protection. In some cases, the Qatari courts may even apply the mandatory provisions of another country that has a close relationship with the contract, like the one in which the consumer habitually resides. However, unlike with Bahraini law, the Qatari courts may not adopt a 'preferential approach'.

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(124) Alasadi & Alobaidi, *supra* note 85 at 297.

(125) *Ibid.*

(126) Abo-Moghle & Al-Sararia, *supra* note 93 at 1358.



Accordingly, the present writer recommends the following:

- The legislature in Bahrain should reform the specific conflicts rule concerning consumer contracts to make it applicable only to cases of passive consumers, i.e. where the professional has a true intention to reach the consumer's habitual residence. Here, Rome I Regulation could be a good model to follow.
- The legislature in Qatar should make peculiar conflicts rule on consumer contracts, with the specific purpose to protect more consumers versus professionals. Again, Rome I Regulation could be followed.
- In the absence of a specific conflicts rule on consumer contracts in Qatar, the courts, by virtue of Article 34 Qatari civil code, should apply the principles of private international law to determine the best law applicable to consumer contracts.

Needless to say that, a good organization of the conflicts rules concerning consumer contracts would encourage consumers from Bahrain and Qatar to make contracts with foreign traders. On one side, the consumer may benefit from his autonomy to determine the law applicable to the contract. On the other side, the consumer knows in advance that, in all events, he will enjoy the protection given to him by his national law.

Vice versa, such good organization will attract consumers in other countries to make contracts with traders in Bahrain or Qatar. The courts in these jurisdictions would respect the minimum protection granted to the consumers by the law of their habitual residence.

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