



ROME I REGULATION

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Course of Private International Law

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Next Lectures

Given By Bulgarian Professor

Wednesday 11 at 10.00

Thursday 12 at 15.00

Summary

- Introduction
- Rome 1:
 - A. Party Autonomy
 - B. Law Applicable in the Absence of a Choice-of-Law Clause
 - C. Form
 - D. Protection of the Weaker Party
 - E. Mandatory Rules/ Public Policy

Why Applicable Law?

Lord Diplock, *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [House of Lords, 1984 AC 50]

«contracts are incapable of existing in a legal vacuum. They are mere piece of papers devoid of all legal effects unless they were made by reference to some system of private law which defines the obligations asumed by the parties»

Scope of the Applicable Law

Art. 12 Rome I:

The applicable law shall govern in particular:

- (a) interpretation;
- (b) performance;
- (c) the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
- (d) the various ways of extinguishing obligations, and prescription and limitation of actions;
- (e) the consequences of nullity of the contract.

Rome I Regulation 593/2008

- Applies to contractual obligations in civil and commercial matters (sales, services, employment contracts etc.)
- Applies where an element of «internationality» of the contract is present
 - Parties from different States
 - Parties from the same State, but law of another State applies after choice of the parties
- Applies also where the designated law is not one of a Member State, Art. 2 Rome I.

Difference with Brussels

Rome I, unlike Brussels, does not apply only to conflicts between the legal systems of the European Union.

A choice between the law of Mexico and Peru falls just as much within its scope as one between the laws of France and Germany.

It is not required, for Rome I to apply, that the defendant is domiciled in a Member State: courts apply Rome I to all cases in which the applicable law shall be determined (unless in cases of article 1).

Art. I Rome Regulation

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.

It shall not apply to legal capacity, family relations and others, as specified in paragraph 2.



A. Party Autonomy

A. Party Autonomy

“Freedom of contract is an essential part of the market economy... No State can hope effectively to control international contracts.” (Peter Nygh, *Autonomy in international contracts*, 1999)

Choice of law clauses enable parties to solve a conflict of laws “by themselves”.



A General Principle of PIL

Most widely recognized principle of PIL

Substantial connection to the chosen law is not required

Art. 3 Rome I Regulation

1. A contract shall be governed by the **law chosen by the parties**. The choice shall be made **expressly** or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the **whole or to part** only of the contract.

2. The parties may **at any time agree** to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. *Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.*

Depeçage

Art. 3 (1) 3 Rome I Regulation:

By their choice the parties can select the law applicable to the whole or to part only of the contract.

Not advisable in practice. Real pending case:

Contract of sale of a shipping company.

All governed by Greek law unless a clause on the «caparra» (i.e. an advanced payment, with function of guarantee, which may also function as termination) governed by Italian Law.

Is termination governed by Italian or Greek law?!?!?!?!?

Art. 3 Rome I Regulation (continued) - Limitations

Purely Domestic cases

(3) Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

Art. 3 Rome I Regulation (continued) - Limitations

Purely European Cases

(4) Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.



Express and Tacit Choice

Choice must be express, “evident”, “clearly evident” or “clearly demonstrated”

Recital 12 Rome I Regulation

Interference among choice of courts and choice of law:

“An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be *one of the factors* to be taken into account in determining whether a choice of law has been clearly demonstrated.”

Change of Choice

You can change the applicable law the contract at any time (see art. 3(2)).

The only way to “freeze” the applicable law to its state at the time of the conclusion of the contract is to insert a stabilization clause.

Be aware that the rights of third parties under the contract will not change.

Validity of choice of law clause

Art. 3 (5) Rome I Regulation

The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.

Autonomy of the clause

Choice of law clause is itself a contract (as well as jurisdictional clause), whose life is autonomous from the rest of the contract.

Rule

Art. 3(5), 10(1) Rome I: normally, the allegedly chosen law applies to the validity of the choice of law clause

BUT: Art. 10 (2) Rome I Regulation

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

Article 13 - Capacity

In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Case 1

Company A from Bordeaux orders goods from B in Rome over the internet.

B sends the goods in a box.

When A's employee opens the package, he finds inside a sheet with B's standard terms and conditions, which include a choice of the law of X.

Under the law of X, the choice-of-law clause has become part of the contract, but not under French law.


Which law would a court in Bordeaux apply to understand whether B did not consent to terms and conditions?

Case 2

Student B from Berlin sells his VW beetle for 7500 € to Student M from Madrid. The sale takes place in Berlin. As M is not familiar with German law they subject the contract to Spanish law. Possible?

Could B and M choose Swiss law to govern their contract?

How does the case need to be assessed if B and M (who choose to apply another law) both have their habitual residence in Germany?



B. Law Applicable in the Absence of a Choice-of-Law Clause

Clash of cultures

- **Civil law:** certainty: application of rules preexisting to the case at hand
- **Common law:** flexibility and appropriateness: look at the concrete case and see what is the most suitable choice: the theory of the closest connection.

Rome Convention and Regulation had to mediate between these two very different positions.

Old theories

- (1) *lex loci contractus* = place of contracting
- (2) *lex loci solutionis* = place of performance

Vs

- (3) closest connection

Art. 4 Rome I: Balance

- 4(1) List of rules relating to specific types of contracts in Article 4(1).
- Idea: clarity and legal certainty
- 4(2): default rule referring to the country of the habitual residence of the party required to effect the “characteristic performance”
- Interplay with Art. 19 (definition of “habitual residence”)

Art. 4 Rome I Regulation - Applicable law in the absence of choice

1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

(a) a contract for the **sale of goods** shall be governed by the law of the country where the seller has his habitual residence;

(b) a contract for the **provision of services** shall be governed by the law of the country where the service provider has his habitual residence;


(c) a contract relating to a **right in rem** in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;

(d) ...


(e) a **franchise** contract shall be governed by the law of the country where the franchisee has his habitual residence;

(f) a **distribution contract** shall be governed by the law of the country where the distributor has his habitual residence;

(g) ...



2. Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the **law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.**



3. Where it is clear from all the circumstances of the case that the contract is **manifestly more closely connected** with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.

4. Where the law applicable cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is **most closely connected**.

B. Law Applicable In the Absence of a Choice-of-Law Clause

The “characteristic performance” is that one which distinguishes this type of contract from others.

Most of the times the non-monetary obligation.

E.g. sales contract: delivery of good; service contract: performance of service.

Exception: loan: disbursing the loan (= monetary obligation that is at the same time characteristic).

Art. 4 Rome I Regulation – “Escape Clauses”

- Two escape clauses retained in view of flexibility:

Art. 4(4) - Law of the country with which the contract is most closely connected applies, if law applicable cannot be determined otherwise (e.g. contracts of exchange)

Article 4(3) – Law of the country with which the contract is "manifestly" more closely connected (as established according to paras. 1 and 2 of art. 4) shall prevail over law identified as applicable (e.g. contracts of guarantee)

Case 1

A opens a Burger King restaurant next to the motorway outside London. He concludes a franchise contract with BK USA.

Which law applies to the contract according to Rome I?

Case 2

Sancho from Sevilla and Pascal from Paris became friends during their camping holidays in Tuscany.

Pascal has a brand new but small tent. Sancho has a less modern, but bigger tent.

As Pascal has fallen in love with Raffaella from Rome he is exchanging tents with Sancho.

While trying to pitch his new tent in a romantic beach, he realises that some key parts are missing and so he is unable to get it constructed.

Raffaella is not amused and decides to leave.

Furious, Pascal reckons that jealous Sancho deceived him in bad faith and wonders if the contract of exchange with Sancho is invalid. Which law applies?

Golden Rule

A choice-of-law clause in a contract solves many PIL problems. It is advisable to be clearly drafted.

If you insert a choice-of-forum clause, insert a choice-of-law clause as well or clarify that you do not wish to choose the applicable law!

Real Example

Sell/supply of orange juice from Italy to Poland.

Based on a e-mail: no contract.

Jurisdiction: Poland (art. 7 Brussels I-*bis*)

Applicable law: Italian (art. 4 Rome I)....

Article 5: Contracts of carriage

Carriage of **goods**

- Law of the country of habitual residence of the carrier, if place of receipt or of delivery or habitual residence of consignor is also situated there
- Otherwise: Law of the country where agreed place of delivery is located

Article 5: Contracts of carriage

Carriage of passengers

Law of the country where the passenger has his habitual residence, *provided that* either the place of departure or of destination is situated in that country

Otherwise: Law of the country of habitual residence of the carrier

Limited ability to choose the law (5 options)

Escape clause, Art. 5 (3)

Relation to Art. 6

Art.5: Contracts of carriage - Scenarios

- Carrier A, who has his principal place of business in Germany, enters into an agreement pursuant to which his branch in Prague has to deliver goods of an English trade chain from Prague to Vienna.
- UK Passenger flies with Seychelles Airlines from London to Berlin. Choice of law in favour of the Seychelles?

C. Form

Form

- Is treated separately in most systems
- Art. 11 Rome I
- Must follow the principle of *favor validatis*
=> contract is valid if it satisfies either:
 - (1) the law of the place where the contract was entered into or
 - (2) the law applicable to the contract or some other law connected to it

Art. 11 Rome I Regulation

1. A contract concluded between persons who, or whose agents, are *in the same country* at the time of its conclusion is formally valid if it satisfies the formal requirements *of the law which governs it in substance* under this Regulation or of the *law of the country where it is concluded*.

2. A contract concluded between persons who, or whose agents, are in *different countries* at the time of its conclusion is formally valid if it satisfies the formal requirements *of the law which governs it in substance* under this Regulation, or of the law of either of the countries where *either of the parties* or their agent is *present at the time of conclusion*, or of the law of the country where *either of the parties had his habitual residence* at that time.

...

Art. 11 Rome I Regulation

Exceptions:

Consumer Contracts (law of the country where the consumer has his habitual residence).

Contracts the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property shall be subject (mandatory rules of *lex rei sitae*)

Golden Rule :

Keep cool about form: it suffices in most cases to comply either with the law in force at the place of contracting or with the law that applies to the contract.

D. Protection of the Weaker Party

Protection of the Weaker Party

- Most systems protect the weaker party in the process of selection of the applicable law
- Parties that are typically considered to be “weaker”:
 - consumers,
 - employees,
 - insured persons
- See e.g. Art. 6 Rome I

Protection of the Weaker Party

Most PIL rules:

- provide for the law of the domicile/ habitual residence of the consumer as a default rule
- limit the effect of a choice of law to prevent consumers from being deprived of their “home country protection”

Conditions of Art. 6 Rome I Regulation

A. Consumer contract

Art. 6: “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**)*...”

Conditions of Art. 6 Rome I Regulation

B. Pursuing/ Directing Activity

- “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.”

Conditions of Art. 6 Rome I Regulation

C. Application of the consumer's "home country protection"

"...shall be governed by the law of the country where the consumer has his *habitual residence*..."

Limited choice of law under Art. 6

- The parties may choose the law applicable to a consumer contract, but:
- “Art. 6(2): Such a choice may not... 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...”
- What are “mandatory provisions”?

Consequences of such choice of law

Consumer protection provisions of the law of habitual residence of the consumer apply along with provisions of the chosen law

- results of chosen law and consumer protection provisions of consumer's home country need to be compared in the concrete case; whole set of more favourable rules applies (“no cherry-picking”).
- mix of legal systems causes uncertainty.

Art. 6 Rome I Regulation *resumed*

- Applicable law is the **law of the country where consumer has his habitual residence**
- **Limited choice** of law possible
 - no deprivation of provisions which cannot be derogated from by agreement); consumer protection provisions of law of habitual residence apply if more protective
- **Condition for the application of Art. 6**
 - B2C relationship as defined in Art. 6(1)
 - the professional, **by any means, pursues** his commercial or professional **activities** in the **country of habitual residence of the consumer** or **directs** them to that country or to **several countries including that country**
 - **otherwise Art. 3 and 4 apply**

Art. 6 Rome I: Defining “Directing Activity”

- Is it sufficient that a website is accessible from consumer’s MS and a sale is conducted over the internet?
- Recital 24 Rome I Regulation:
 - ‘the mere fact that an Internet site is accessible is not sufficient ..., although a factor will be that this Internet site solicits the conclusion of distance contracts and that a contract has actually been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses does not constitute a relevant factor.
- But: See CJEU joined cases C-585/08 *Pammer*, C-144/09 *Hotel Alpenhof* on Art. 15 (1) Brussels I Regulation

CJEU, C-585/08, C-144/09 Pammer/ Hotel Alpenhof



Pammer/ Hotel Alpenhof

- *Pammer*
 - Consumer domiciled in Austria filed suit in Austrian court seeking to recover prize for a cruise on a freight vessel. The trip was publicised on the website of the company's German agent.
- *Hotel Alpenhof*
 - Austrian hotel company sued in Austria against German consumer for payment of hotel bill. German consumer discovered hotel through its website and made and confirmed his reservation by email.

CJEU on “Directing Activity”:

- Clear expression of intent to *target* consumers in the MS in question needs to be apparent from websites and trader’s overall activity.
- *Mere* accessibility of trader’s/ his intermediary’s website in consumer’s MS or use of a language or a currency which are the ones **generally used in trader’s MS** are insufficient.

CJEU on “Directing Activity”

- Indications that trader’s activity is directed to consumer’s MS:
 - international nature of the activity,
 - mention of itineraries from other MS for going to the place where trader is,
 - use of language or currency other than the ones generally used in trader’s MS with possibility of making and confirming reservation in that other language,
 - mention of telephone numbers with international code,
 - outlay of expenditure on an internet referencing service in order to facilitate access to trader’s/ its intermediary’s site by consumers from other MS,
 - use of top-level domain name other than that of trader’s MS
 - mention of an international clientele of customers from various MS

Case Scenario

A, a UK consumer wants to buy goods from a Romanian enterprise via an interactive website of this business.

The page is drafted in English and indicates clearly, that goods will be delivered to the UK and that customers can pay in GBP.

A evaluated the offer, but did not manage to complete the order before leaving for holidays in Thailand.

Sitting in a Thai internet-café, he finally orders the goods.

Applicable law?

Case Scenario 2

Ernie, a UK based student, is surfing in the internet.

He finds the website of a Polish seller P, offering an electric guitar for a really good price.

P's standard terms include a choice of law clause in favour of Polish law.

Ernie agrees to them by mouse-click as he thinks that a choice of law clause is not possible in a B2C context. Is he right?

Illustration

The image shows the Amazon logo, which consists of the word "amazon" in a bold, lowercase, black sans-serif font. Below the text is a yellow curved arrow that starts under the letter 'a' and ends under the letter 'n', pointing to the right. The logo is centered on a white background.

amazon

Overriding Mandatory Rules/ Public Policy

Definition in Art. 9 (1) Rome I Regulation

“Overriding mandatory provisions are provisions the respect for which is regarded as **crucial** by a country for safeguarding its **public interests**, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.”

See CJEU, C-369/96 and C-376/96, *Arblade/Leloup*

Overriding Mandatory Rules

- Rules that “want to be applied” to international cases regardless of the otherwise applicable law
- Protect crucial economic or social interests of the Community
- Antitrust law, protection of cultural heritage, embargos, trade restrictions (e.g. for weapons, drugs), provisions against bribery, protection of tenants, distributors

Overriding Mandatory Rules of the Forum

EU courts must apply overriding mandatory rules of the **forum**, see Art. 9(2) Rome I Regulation:

“2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.”

Overriding Mandatory Rules of Third States

Application of overriding mandatory rules **of third States**

=> positions split:

- Courts in most states do not apply them
- Courts in some states apply them under certain, limited circumstances (Art. 9(3) Rome I – mandatory rules of the country in which the place of performance is located “may be given effect”).

See Art. 9 (3) Rome I Regulation:

“3. *Effect may be given* to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract *have to be or have been performed*, in so far as those overriding mandatory provisions render the performance of the contract unlawful.

In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.”

Please note

- Rome I Regulation distinguishes between
 - “Provisions of law which cannot be derogated from by agreement” (see Art. 3 (3) or 6 (2) 2 Rome I Regulation) and
 - “Overriding mandatory provisions” (see Art. 9 Rome I Regulation)
- Not always easy to determine which rules belong to which category and how courts will consider them.
- Distinction between mandatory provisions and public policy limitation in Art. 21.

Public Policy

- Art. 21 Rome I Regulation

“The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum.”

Ingmar GB Ltd v Eaton, C-381/98

- In 1989, Ingmar and Eaton concluded a contract under which Ingmar was appointed as Eaton's commercial agent in the United Kingdom. A clause of the contract stipulated that the contract was governed by the law of the State of California.
- The contract was terminated in 1996. Ingmar instituted proceedings before the High Court of Justice of England and Wales, Queen's Bench Division, seeking payment of commission and compensation for damage suffered as a result of the termination of its relations with Eaton (pursuant to the "Commercial Agents Regulations 1993" implementing directive 86/853/EEC)
- By judgment of 23 October 1997, the High Court held that the Regulations did not apply, since the contract was governed by the law of the State of California.
- Ingmar appealed against that judgment to the Court of Appeal of England and Wales (Civil Division) which submitted the case to the CJEU.

Ingmar GB Ltd v Eaton, C-381/98

- Question:

Are the provisions relating to the payment of compensation to agents on termination of their agreements with their principals of Council Directive 86/653/EEC, as implemented in the laws of the Member States, applicable where the law applicable to the agency contract is a Non-EU Member State law?


Compensation - Art. 17 Dir. 86/653/EEC

2. (a) The commercial agent shall be entitled to an indemnity if and to the extent that:

-he has brought the principal new customers or has significantly increased the volume of business with existing customers and the principal continues to derive substantial benefits from the business with such customers, and

-the payment of this indemnity is equitable having regard to all the circumstances and, in particular, the commission lost by the commercial agent on the business transacted with such customers. ...

(b) The amount of the indemnity may not exceed a figure equivalent to an indemnity for one year calculated from the commercial agent's average annual remuneration over the preceding five years and if the contract goes back less than five years the indemnity shall be calculated on the average for the period in question;...



3. The commercial agent shall be entitled to compensation for the damage he suffers as a result of the termination of his relations with the principal.

Such damage shall be deemed to occur particularly when the termination takes place in circumstances:

depriving the commercial agent of the commission which proper performance of the agency contract would have procured him whilst providing the principal with substantial benefits linked to the commercial agent's activities,

- and/or which have not enabled the commercial agent to amortize the costs and expenses that he had incurred for the performance of the agency contract on the principal's advice.

Compensation - Art. 18 Dir. 86/653/EEC

The indemnity or compensation referred to in Article 17 shall not be payable:

(a) where the principal has terminated the agency contract because of default attributable to the commercial agent which would justify immediate termination of the agency contract under national law;

(b) where the commercial agent has terminated the agency contract, unless such termination is justified by circumstances attributable to the principal or on grounds of age, infirmity or illness of the commercial agent ...

Ingmar GB Ltd v Eaton, C-381/98

- Articles 17 and 18 of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents, which guarantee certain rights to commercial agents after termination of agency contracts, **must be applied** where the commercial agent carried on his activity in a Member State **although the principal is established in a non-member country** and a clause of the contract stipulates that the **contract is to be governed by the law of that country**.