

Jurisdiction and applicable law

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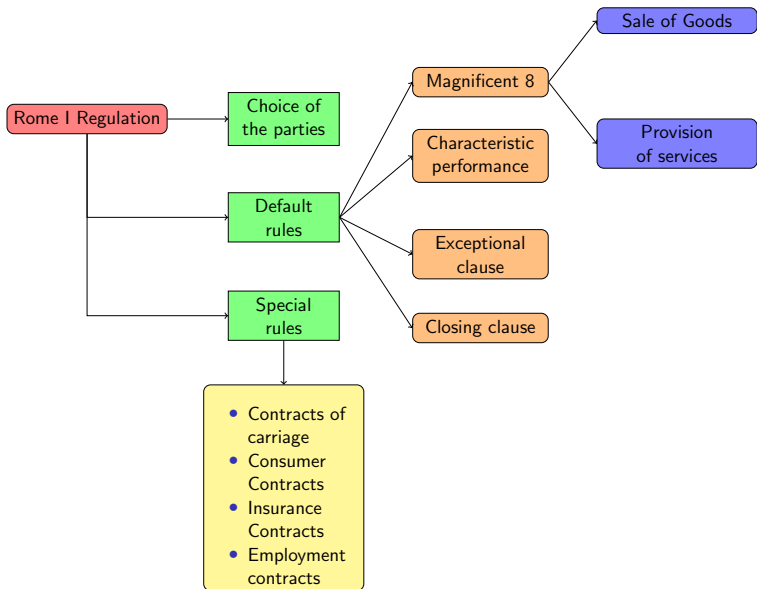
Joint venture agreement

- Successor of the 1980 Rome Convention.
- Universal application \Rightarrow It must be applied regardless of the domicile of the parties and the law resulting from the application of the Regulation.
- Application of domestic rules of Member States restricted to:
 - ① Contracts falling outside the scope of application of the Regulation; and,
 - ② Interregional issues \Rightarrow Which law apply to a contract made in Navarre and in the Basque Country? (SAP of Navarre 16 November 2001).

- Geographical ⇒ All Member States save Denmark.
- Temporal ⇒ Art. 28: Contracts concluded after 17 December 2009.
- Substantive:
 - ① Situations involving a Conflict of Laws ⇒ Ambiguous concept
e.g. In STS 30 June 1983, the Spanish Supreme Court held that a contract for the carriage of goods by sea made between two Spanish parties in London was not *international*.
 - ② Contractual obligations in civil and commercial matters ⇒ Obligations arising under a contract subject to private law ⇒ The Regulation will not apply to:
 - a Non-contractual obligations ⇒ Rome II Regulation.
 - b Obligations arising under an *acta iure imperii*.
 - c Obligations subject to specific regulations ⇒ Law applicable to an arbitration agreement [see, e.g., art. V(1)(a) NYC].
 - d Obligations subject to Family Law.

Rome I Regulation

System of rules



- The choice must be clear, unequivocal and entirely certain ⇒ **Cannot be presumed.**
- The choice can be:
 - ① Express - "*The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law*"- or implied -e.g. Incorporation by reference-.
 - ② In relation to the whole contract or to a part of it ⇒ *Depeçage*: "*The obligations concerning the delivery of goods shall be governed by English law, but the obligations concerning the payment of the price shall be governed by American law*".
- As any other agreement, the choice can be updated or amended at any time.

- The law must belong to an **existing State or an territory of an existing State** ⇒ They cannot choose:
 - ① The *lex mercatoria*.
 - ② The law of pseudo-States (e.g., Seborga, Sealand, etc.).
 - ③ The law of a State which does not exist at the time of making the choice (e.g., The law of the GDR at the time it no longer existed).
- Is it possible to stabilize the choice? ⇒ *"Any controversy or claim arising out of or relating to this Agreement, including any controversy or claim relating to the validity, interpretation or performance of this Agreement, shall be finally settled in accordance with English law, as then in effect"*.
- Any other agreement, the choice is binding as long as it is the result of the free and unimpeded will of the parties ⇒ Consent and material validity (Art. 10), formal validity (Art. 11) and capacity (Art. 13).
- Limitations:
 - ① Art. 3(3): Obligation utterly connected to X and Y's law chosen by the parties ⇒ Mandatory provisions of X applies irrespective of the election of Y's law.
 - ② Art. 3(4): Obligation connected to one or more Member States ⇒ Provision of European law cannot be excluded.

Rome I Regulation

Default rules: the magnificent eight [Art. 4(1)]

- In the absence of a valid choice and without prejudice to Arts. 5 (Contract of carriage), Art. 6 (Consumer contracts), Art. 7 (Insurance contracts) and Art. 8 (Individual employment contracts) ⇒ Specific rules for eight specific contracts:
 - ① Contract for the sale of goods ⇒ Law of the country where the seller has his habitual residence.
 - ② Contract for the provision of services ⇒ Law of the country where the service provider has his habitual residence.
 - ③ Contract relating to a right *in rem* in immovable property or to a tenancy of immovable property ⇒ Law of the country where the property is situated.
 - ④ Contracts for the temporal rent of an immovable property ⇒ Provided that certain requirements are met, the law of the country where the landlord and the tenant have their habitual residence.
 - ⑤ Franchise contract ⇒ Law of the country where the franchisee has habitual residence.
 - ⑥ Distribution contract ⇒ Law of the country where the distributor has his habitual residence.
 - ⑦ Contract for the sale of goods by auction ⇒ Law of the country where the auction takes place.
 - ⑧ Contract concluded within a multilateral system concerning interests in financial instruments ⇒ Law of that market.

- Residual scope of application \Rightarrow The rule applies to:
 - ① *Non-magnificent* contracts.
 - ② Contracts with elements connected to more than one *magnificent* contract.
- Meaning of *characteristic performance*:
 - ① Bilateral/Synallagmatic contracts \Rightarrow **Non-monetary obligation**.
 - ② Rest of contracts \Rightarrow Recital 19: it must be determined having regard to its **centre of gravity**.
- Habitual residence:
 - Legal person \Rightarrow Place of central administration [Art. 19(1)].
 - Natural person:
 - ① Acting in the course of his business \Rightarrow Principal place of business [Art. 19(1)].
 - ② Not acting in the course of his business \Rightarrow Not defined.
 - Temporally fixed \Rightarrow At the time of concluding the contract [Art. 19(3)].

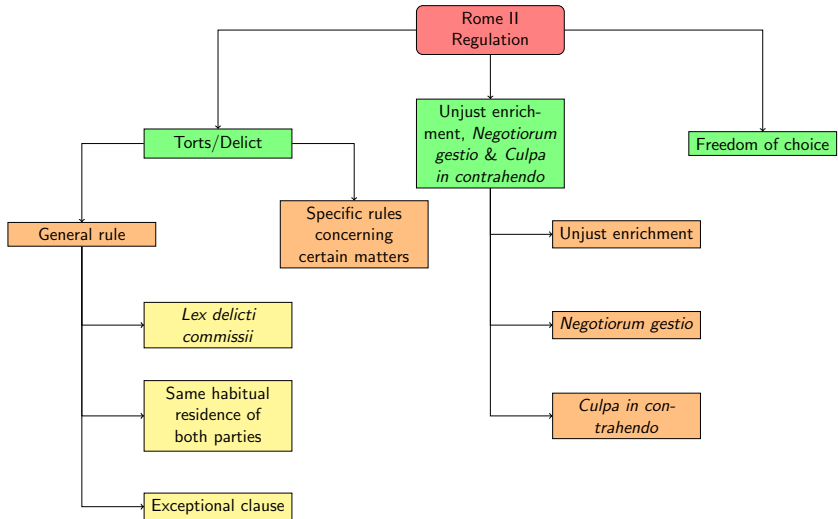
- Exceptional clause \Rightarrow Ensure the application of the law most closely connected with the contract.
 - **Clear and manifest connection** of the contract with a jurisdiction other than the one whose law would apply in accordance with the choice of the parties or the rules applicable in the absence of that choice.
 - The connection must result from **all the circumstances** surrounding the contract.
 - The decision to apply this clause must be based on sound and reasonable reasons \Rightarrow It must be obvious that it is not an **arbitrary decision**.
- Closing clause \Rightarrow Ensure the application of a law.
 - The clause applies where the law applicable **cannot be determined** under the standard rules.
 - Lack of a choice and impossible to identify some of the points of connection of the contract to an specific jurisdiction.

- **Scope of application** ⇒ Art. 12:
 - a Interpretation and performance of the contract.
 - b Consequences of a total or partial breach of the contract, including the potential damages caused by the breach.
 - c Limitations (prescription and caducity of obligations and actions).
 - d Consequences of nullity of the contract
- **Overriding mandatory provisions**
 - **Concept** ⇒ Art. 9(1): *"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"*.
 - **Two scenarios:**
 - 1 **Lex fori** ⇒ Applicable **come hell or high water**.
 - 2 **State where obligations have been performed or have to be performed** ⇒ Discretionary application where they would render the performance of the contract unlawful.

- Universal application (Art. 3).
- **Scope of application:**
 - Geographical: All Member States save Denmark.
 - Temporal: Harmful events occurred after its entry into force.
 - Substantive:
 - ① **Situation involving a conflict of laws.**
 - ② **Non-contractual obligations** ⇒ **Autonomous concept:** *"The concept (...) must be regarded as an autonomous concept which is to be interpreted, for the application of the Convention, principally by reference to the scheme and objectives of the Convention in order to ensure that the latter is given full effect"* (Case C189/87, *Kafelis v Schröder* [1988] ECR 5579, paras 16)
⇒ Relationship not resulting from the consent or agreement of the parties (e.g., Case C-167/00, *Verein für Konsumenteninformation v Henkel* [2002] ECR 8126 or Case C-265/02, *Frahuil SA v Assitalia SpA* [2004] ECR 1546).
 - ③ In civil and commercial matters.
 - ④ Negative delimitation: Art. 1(1) and (2).

Rome II Regulation

System of rules



Rome II Regulation

General rules: Choice of the parties & *Lex Domicilii Communis Partium*

- **Choice of the parties:**

- As a general rule, the choice must be subsequent to damages, except where parties are pursuing a commercial activity.
- Express or implied choice.
- Choice not admissible in relation to some contractual obligations ⇒ Restrictions expressly (Unfair competition and acts restricting free competition or Infringement of intellectual property rights) or impliedly (*Culpa in contrahendo*) established.
- Same limitations as in the case of the choice of *lex contractus* under Rome I Regulation [Arts. 14(2) and (3)].

- **Lex Domicilii Communis Partium:**

- Common habitual residence of the **person claimed to be liable** and the **person sustaining damage** ⇒ Irrelevant the habitual residence of the **person causing the damage**.
- Definition of habitual residence (Art. 23):
 - ① Companies and other bodies, corporate or unincorporated ⇒ Place of central administration.
 - ② Damages caused in the course of operation of a branch, agency or any other establishment ⇒ Place where the branch, agency or any other establishment is located.
 - ③ Natural person acting in the course of his or her business ⇒ Place of business.
 - ④ Natural person not acting in the course of his or her business ⇒ The domestic law of each Member State.

Rome II Regulation

General rules: *Lex Loci Delicti Commissi* & Exceptional clause

- **Lex loci delicti commissi:**

- Law of the **country in which the damage occurs** irrespective of the country in which the harmful event occurred and of the country in which the indirect consequences of the event occur.
- Residual scope of application ⇒ Main application to traffic accidents, but not in Spain (1971 The Hague Convention).
- Damages occurring in multiple places? ⇒ Mosaic principle: Whereas damages occurred in X are governed by the law of X, the ones occurred in Y are governed by the law of Y, the ones occurred in Z are governed by the law of Z, etc.

- **Exceptional clause:**

- Law of the **country which, considering all the circumstances of the case, is manifestly more closely connected** with the tort.
- The so-called **proper law of the tort** ⇒ e.g., *Babcock v Jackson* [1986] 2 Lloyd's Rep 286, *Boys v Chaplin* [1971] AC 356 or *Red Sea Insurance Co Ltd v Bouygues SA & Others* [1995] 1 AC 190.

Rome II Regulation

Special rules: *Culpa in contrahendo*

- Product liability (Art. 5).
- Unfair competition and acts restricting free competition (Art. 6).
- Environmental damage (Art. 7).
- Infringement of intellectual property rights (Art. 8).
- Industrial action (Art. 9).
- Unjust enrichment (Art. 10).
- *Negotiorum gestio* (Art. 11).
- *Culpa in contrahendo* (Art. 12):
 - **Autonomous concept** ⇒ it extends to the breakdown of contractual negotiations and the violation of duty of disclosure.
 - Law applicable:
 - ① Either the *lex contractus* -the law that applies to the contract- or the *lex hypothetici contractus* -the law that would have been applicable to the contract had it been entered into-.
 - ② Where these laws cannot be determined, similar rules to the ones contained in Art. 4 apply.
 - Parties cannot agree on the law applicable in this case.

- **Scope of application** (Art. 12):
 - a The basis and extent of liability.
 - b The grounds for exemption from liability.
 - c The existence, the nature and the assessment of damage or the remedy claimed.
 - d Subject to the limits established in the procedural law of the seised Court, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation.
 - e Transferability of the claim.
 - f Persons entitled to compensation for damage sustained personally.
 - g Liability for the acts of another person.
 - h The manner in which an obligation may be extinguished and rules of prescription and limitation.
- **Overriding mandatory provisions** (Art. 16):
 - **Only one scenario** ⇒ **Lex fori** ⇒ Applicable **come hell or high water**.

Application to our tasks

Design and engineering contract: Jurisdiction ⇒ Default position

- **Parties:**

- **XYZbis LLC:** Incorporated in Abu Dhabi and constituted in accordance with UAE law ⇒ Non-EU Member State.
- **ENGIN:** Domiciled in Lisbon (Portugal) ⇒ EU Member State.

- **Legal relationship:** A design and engineering contract ⇒ Is it a contract for the provision of services, for the sale of goods, etc.? ⇒ Is the relationship *civil and commercial* for the purposes of the Regulation?

- **Actions**

- ❶ **XYZbis vs ENGIN:**

- Could jurisdiction be established under any of the exclusive fora?
 - Could jurisdiction be established under the general forum? ⇒ Could it be established in more than one Member State under special jurisdiction rules?

- ❷ **ENGIN vs XYZbis:**

- Could jurisdiction be established under any provision of the Regulation?

"The Parties to this Agreement shall not [be] authorised to bring any dispute relating to this Agreement before the courts of the United Arab Emirates".

Questions:

- 1 Where should disputes be litigated?
- 2 Could the Courts of a Member State examine this clause in the light of the Regulation?
- 3 In case of breach of the clause by XYZbis, what could ENGIN do? \Rightarrow Would the Regulation apply to the recognition and enforcement of Emirati judgment? Would the breach preclude XYZbis from obtaining the recognition and enforcement of such judgment?
- 4 Would you recommend this wording?

- **Default position:**
 - Can the relationship arising out of the contract be deemed as a situation involving a Conflict of Laws?
 - Would the closing clause be applicable? \Rightarrow What law would be applicable under Art. 4(2)? \Rightarrow Is the contract more closely connected to another jurisdiction?
- **Analysis of the clause proposed by ENGIN** \Rightarrow Does this clause amount to a choice of *lex contractus* for the purposes of Art. 3 of the Regulation?
- **Potential impact of Emirati provisions** \Rightarrow In case of discovery of national treasures during the execution of the contract, to what extent can the parties exclude the potential application of those provisions to their relationship?

- **Parties:**
 - **XYZbis LLC:** Incorporated in Abu Dhabi and constituted in accordance with UAE law ⇒ Non-EU Member State.
 - **BADLEASING:** Domiciled in Turin (Italy) ⇒ EU Member State.
- **Claim: Breakdown of contractual negotiations**
 - XYZbis vs BADLEASING.
 - Could jurisdiction be established under any of the exclusive fora contained in the Regulation?
 - Could jurisdiction be established under the general forum of the Regulation? ⇒ Could it be established in more than one Member State under special jurisdiction rules?
 - Law applicable ⇒ Art. 12(1) of the Rome II Regulation: *lex hypothetici contractus* ⇒ Italian law.

- **First counterclaim: Violation of duty of disclosure**
 - BADLEASING vs XYZbis.
 - Could jurisdiction be established under any provision of the Regulation?
 - Law applicable \Rightarrow Art. 12(1) of the Rome II Regulation: *lex hypothetici contractus* \Rightarrow Italian law.
- **Second counterclaim: Vendetta of XYZbis' employees**
 - BADLEASING vs XYZbis.
 - Is XYZbis vicariously liable for the actions of its employees?
 - Could jurisdiction be established under any provision of the Regulation?
 - Law applicable \Rightarrow Art. 4(1) of the Rome II Regulation \Rightarrow Italian law.
- Could jurisdiction in relation to these actions be established under a prorogation agreement in accordance with Art. 25 of the Regulation?

Application to our tasks

Joint venture agreement: Jurisdiction \Rightarrow Constitution of consortium

- **Parties:**
 - **A company of the consortium:** No data about its domicile
 - **XYZbis LLC** (other members of the Consortium):
Incorporated in Abu Dhabi and constituted in accordance with UAE law \Rightarrow Non-EU Member State.
- **Legal relationship:** Memorandum of Association \Rightarrow Disproportionate contribution to the capital \Rightarrow Is a contractual or a corporate matter?
- **Jurisdiction:**
 - Contractual matter \Rightarrow Could a Spanish Court settle the dispute?
 - Corporate matter \Rightarrow Could a Spanish Court settle the dispute?
- **Law applicable:**
 - Contractual matter \Rightarrow Choice of Emirati law for the purposes of Art. 3 of Rome I Regulation?
 - Corporate matter \Rightarrow Does Rome I or Rome II Regulation apply?

Application to our tasks

Joint venture agreement: Jurisdiction \Rightarrow Authorization to the manager

- **Parties:**
 - **A company of the consortium:** No data about its domicile
 - **XYZbis LLC:** Incorporated in Abu Dhabi and constituted in accordance with UAE law \Rightarrow Non-EU Member State.
- **Legal relationship:** Memorandum of Association \Rightarrow Corporate matter?
- **Jurisdiction** \Rightarrow Could a Spanish Court settle the dispute?
- **Law applicable** \Rightarrow Does Rome I or Rome II Regulation apply?