

Jurisdiction and applicable law module

Outline of the second session

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1 Regulation Rome I

1.1 Introduction

1. Successor of the 1980 Rome Convention.
2. Universal application \Rightarrow Art. 2: it must be applied regardless of the domicile of the parties or the law resulting from the application of the rules of the Regulation.
3. Scope of application of domestic rules on the law applicable to contractual obligations becomes restricted to:
 - (a) Contracts fallen outside the scope of the Regulation; and,
 - (b) Interregional contractual issues \Rightarrow *e.g.*, SAP of Navarre 16 November 2001 concerning a contract signed in Pamplona/Iruña and Vitoria-Gasteiz.

1.2 Scope of application

1. Geographical \Rightarrow All Member States save Denmark.
2. Temporal \Rightarrow Contracts concluded after 17 December 2009 (art. 28).
3. Substantive \Rightarrow Art. 1(1): *"This Regulation shall apply, (1) in situations involving a conflict of laws, (2) to contractual obligations in civil and commercial matters"*
 \Rightarrow Two requirements:
 - (a) Situations involving a conflict of laws \Rightarrow Does a contract for the carriage of goods by sea made in London between two Spanish parties involve a conflict of laws?
 - (b) Contractual obligations in civil and commercial matters \Rightarrow Obligations arising under a contract subject to private law \Rightarrow It will not apply to:
 - Non-contractual obligations \Rightarrow *e.g.*, torts, obligations arising under an unilateral decision of a person, *naturalis obligatio*, etc.
 - Obligations arising under an *acta iure imperii* \Rightarrow Revenue, customs or administrative matters.
 - Obligations subject to specific regulations \Rightarrow *e.g.*, Arbitration agreements.

- Obligation subject to Family law \Rightarrow *e.g.*, Obligations arising out of matrimonial property regimes.

1.3 General rules

1.3.1 Choice of the parties

Clear choice

- The choice must be clear, unequivocal, and entirely certain \Rightarrow Therefore, the choice cannot be presumed or hypothetical.
- The choice can be either express or implied \Rightarrow "*The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case*" \Rightarrow Examples of implied choice:
 - The parties concluded a contract for the sale of rice in March. This contract contains a clause providing for English law to be the *lex contractus*. In July, they conclude a new contract which, along with the quantity of rice and the price, provides for the incorporation of the rest of clauses contained in the previous contract.
 - The Claimant argues that German law applies to the merits and the Defendants accepts such application.
- The choice can be either in relation to the whole contract or in relation to only a part of it (*Depeçage*) \Rightarrow *e.g.*, in relation to a contract for the sale of goods, the parties may agree that one law governs the delivery of goods and another the payment.
- At any time, parties can update or amend a choice \Rightarrow Art. 3(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*".

Choice of the law a State

- Parties must select the law of an existing State or of one of the territories of an State \Rightarrow *e.g.*, they can choose the law of Navarre or Scotland, but they cannot choose:
 - The *lex mercatoria*;
 - The law of non-existing or fictional States (*e.g.*, Seborga, Sealand, etc.); or,
 - The law of States which does not exist at the time of making the choice (*e.g.*, the law of the GDR at the time the Berlin wall had already fallen [STS 4 July 2006]).
- Potential stabilization? \Rightarrow *e.g.*, The law applicable is the one in force at the time of concluding the contract or at the time of triggering the action.

In essence, an agreement *"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" [Art. 3(5)].*

Limitations

- Art. 3(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(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**".*

1.3.2 Default rules

The magnificent eight

- Eight contracts enlisted in art. 4(1).
- **Contract for the sale of goods** ⇒ Law of the country where the seller has his habitual residence.
- **Contract for the provision of services:** ⇒ Law of the country where the service provider has his habitual residence.

The characteristic performance *Where **(1)** 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 **(2)** the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence" [art. 4(2)].*

- Residual scope of application ⇒ *contracts not covered by paragraph (1) or contracts covered by more than one of paragraph (1).*
- Characteristic performance:
 - Bilateral or synallagmatic contracts ⇒ Non-monetary obligation (e.g., in a sale of goods, the delivery of goods; in a provision of services, the provision of services, etc.).
 - Rest of contracts ⇒ Recital 19: *"In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its **centre of gravity**".*
- Habitual residence:

- Legal persons ⇒ Unlike under Brussels Regulation, only one place: the place of central administration [art. 19(1)].
- Natural person acting in the course of his business ⇒ Place of business [art. 19(1)].
- Natural person not acting in the course of his business ⇒ No specific rule ⇒ Domestic law of each Member State.
- Relevant point in time ⇒ Conclusion of the contract [art. 19(3)].

The exceptional clause *”Where it is (1) clear from (2) all the circumstances of the case that the contract is (3) manifestly (4) more closely connected with a country other than that indicated in paragraphs 1 or 2, (5) the law of that other country shall apply”* [art. 4(3)].

- Exceptional and qualified rule ⇒ Circumstances must clearly establish a manifest closer connection of the contract with another country.
- Court must evaluate the circumstances of the case and articulate the reasoning behind the decision to apply the clause ⇒ A contract made in England between English citizens concerning the rent of a house located in Marbella to be paid in pounds?

The closing clause *”Where the law applicable (1) cannot be determined pursuant to paragraphs 1 or 2, the contract shall be governed by (2) the law of the country with which it is most closely connected”* [art. 4(4)] ⇒ Situations where the clause could apply:

- Where it is not possible to determine the habitual residence of the party required to effect the characteristic performance of the contract at the time of concluding the contract;
- Where the characteristic performance of the contract must be rendered in different States with equal significance or connection; or,
- Where the contract does not provide for a characteristic performance (*e.g.*, Joint-Ventures, Countertrade, etc.).

1.4 Scope of the law applicable

Art. 12(1): *The law applicable to a contract by virtue of this Regulation shall govern in particular:*

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, 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”.

1.5 Overriding mandatory provisions

- As a general rule, the *lex contractus* will govern the rights and obligations of the parties to the contract.
- Since an international contract can produce effects in jurisdictions other than the one whose law governs the contract, it might be necessary to consider also the law of those jurisdictions in order to avoid a *legislative immunity*.
- **Concept** *"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"* [art. 9(1)].
- **Provisions of the *lex fori*** ⇒ Unrestricted application: *"Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum"* [art. 9(2)].
- **Provision of other jurisdictions** ⇒ Discretionary application (*"Effect **may** be given"*) of the provisions of the law of the State where **obligations arising out of the contract have to or have been performed** and provided that such provisions **render the performance of the contract unlawful** [art. 9(3)].

2 Regulation Rome II

2.1 Introduction and scope of application

1. Universal application ⇒ Art. 3: it must be applied regardless of the law resulting from the application of the rules of the Regulation.
2. Scope of application:
 - Geographical ⇒ All Member States save Denmark.
 - Temporal ⇒ Art. 31: it applies to *"events giving rise to damage which occur after its entry into force"*.
 - Substantive ⇒ Art. 1(1): it applies, in **situations involving conflict of laws**, to **non-contractual obligations in civil and commercial matters**:
 - (a) Situation involving conflict of laws ⇒ Akin to Regulation Rome I.
 - (b) 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).
 - **The relationship between the parties is not the result of the consent or agreement of the parties** ⇒ Case C-167/00, *Verein für Konsumenteninformation v Henkel* [2002] ECR 8126 or Case C-265/02, *Frahvil SA v Assitalia SpA* [2004] ECR 1546.

- (c) Civil and commercial matters \Rightarrow Akin to Brussels I Bis Regulation.
- (d) Matters excluded \Rightarrow See Art. 1(1) and (2).

2.2 System of rules

2.2.1 General rules

Choice of the parties Art. 14(1): *"The parties may agree to submit non-contractual obligations to the law of their choice: (a) by an agreement entered into after the event giving rise to the damage occurred; or (b) where all the parties are pursuing a commercial activity, also by an agreement freely negotiated before the event giving rise to the damage occurred. The choice shall be expressed or demonstrated with reasonable certainty by the circumstances of the case and shall not prejudice the rights of third parties"*.

1. The agreement must be concluded once the damages have occurred, save where the parties are pursuing a commercial activity.
2. Either express or implied choice \Rightarrow Akin to Rome I Regulation.
3. Choice shall not prejudice the rights of third parties.
4. Parties cannot agree on the law applicable to some non-contractual obligations, *e.g.*, Unfair competition and acts restricting free competition (Art. 6) or Infringement of intellectual property rights (Art. 8).
5. Subject to the same limitations as the choice of law applicable to contractual obligations \Rightarrow Art. 14(2) and (3) Rome II Regulation = Art. 3(3) and (4) of Rome I Regulation.

Lex Domicilii Communis Partium Art. 4(2): *"However, where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply"*.

1. Habitual residence of the person claimed to be liable and the person sustaining damage \Rightarrow Irrelevant the habitual residence of the person causing the damage.
2. Definition of habitual residence (Art. 23):
 - (a) Companies and other bodies, corporate or unincorporated \Rightarrow Place of central administration.
 - (b) Damages caused in the course of operation of a branch, agency or any other establishment \Rightarrow Place where the branch, agency or any other establishment is located.
 - (c) Natural person acting in the course of his or her business \Rightarrow Place of business.
 - (d) Natural person not acting in the course of his or her business \Rightarrow As under Rome I Regulation, it must be applied the domestic law of each Member State.

Lex Loci Delicti Commissi Art. 4(1): *"Unless otherwise provided for in this Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur"*.

1. Residual scope of application \Rightarrow Currently, most relevant application: traffic accidents (GARCIMARTÍN). Nevertheless, not in Spain. Here it must be applied the 1971 Hague Convention (see, e.g., J. PÉREZ FONT "Traffic accidents: jurisdiction, law applicable and interest in case of insurer's default" *Cuadernos de Derecho Transnacional* Vol. 14, Issue 1, pp. 835-852).
2. Damages in multiple places \Rightarrow Mosaic principle.

Exceptional clause Art. 4(3): *"Where it is clear from all the circumstances of the case that the tort/delict 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. A manifestly closer connection with another country might be based in particular on a preexisting relationship between the parties, such as a contract, that is closely connected with the tort/delict in question"*.

1. The proper law of the tort \Rightarrow 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.
2. Court must evaluate the circumstances of the case and articulate the reasoning behind the decision to apply the clause.

2.2.2 Special rules

1. Product liability (Art. 5).
2. Unfair competition and acts restricting free competition (Art. 6).
3. Environmental damage (Art. 7).
4. Infringement of intellectual property rights (Art. 8).
5. Industrial action (Art. 9).
6. Unjust enrichment (Art. 10).
7. *Negotiorum gestio* (Art. 11).
8. *Culpa in contrahendo* (Art. 12):
 - **Autonomous concept** \Rightarrow it extends to the breakdown of contractual negotiations and the violation of duty of disclosure (CALVO-CARAVACA & CAR-RASCOSA GONZÁLEZ).
 - Law applicable:

- (a) 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"-.
- (b) 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 (CALVO-CARAVACA & CARRASCOSA GONZÁLEZ).

2.2.3 Scope of application and overriding mandatory provisions

Scope of application (Art. 15) *"The law applicable to non-contractual obligations under this Regulation shall govern in particular: (a) the basis and extent of liability, including the determination of persons who may be held liable for acts performed by them; (b) the grounds for exemption from liability, any limitation of liability and any division of liability; (c) the existence, the nature and the assessment of damage or the remedy claimed; (d) within the limits of powers conferred on the court by its procedural law, the measures which a court may take to prevent or terminate injury or damage or to ensure the provision of compensation; (e) the question whether a right to claim damages or a remedy may be transferred, including by inheritance; (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, including rules relating to the commencement, interruption and suspension of a period of prescription or limitation".*

Overriding mandatory provisions (Art. 16) *"Nothing in this Regulation shall restrict the application of the provisions of **the law of the forum** in a situation where they are mandatory irrespective of the law otherwise applicable to the non-contractual obligation".*

3 Application to our tasks