**Conflict of laws: contract**

This element introduces you to key principles in determining which country's laws govern a contractual dispute.

**Introduction**

In this element, we are concerned with the question of which country's laws will apply to determine a **contractual** dispute specifically. There is a different and equivalent element which is concerned with tortious disputes.

**Relevant legislation**

Prior to Brexit, the majority of contractual disputes were governed by Regulation 593/2008 which is referred to as the Rome I Regulation ('Rome I'). At the end of the post-Brexit transition period on 31 December 2020 Rome I was adopted into English law, with minor amendments, by the Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (EU Exit) Regulations 2019 and the Jurisdiction, Judgments and Applicable Law (Amendment) (EU Exit) Regulations 2020.

Accordingly, the relevant law is, broadly, the Rome I Regulation. In this element we use the term 'Rome I' to refer to the regulation as amended and retained in the law of England and Wales, and article references are references to this amended Rome I.

Note that:

1 There are some areas of law which are excluded from Rome I (Article 1);

2 Rome I does not apply to contracts entered into before 17 December 2009;

3 There are special provisions in Rome I for contracts of carriage, consumer contracts, employment contracts and insurance contracts.

These exclusions and special provisions are not addressed in this element.

[Diagram showing key elements of determining the applicable law in a contractual scenario. The diagram is marked "we will explore the elements of this diagram on the following pages".

The diagram is as follows:

1 Have the parties chosen which law should apply?

If yes: That country's law will apply

If no then…

2 Does the contract relate to one of the cases specified in Articles 4(1)(a) to (h)?

If yes: If so, those articles apply

If no: The applicable law is that of the country where the “characteristic performer” has its habitual residence…

Whether Articles 4(1)(a) or 4(1)(h) apply or the applicable law is that of the characteristic performance, there is a final question…

3 Contract “manifestly more closely connected” with another country?]

**The parties' choice**

Firstly, the parties are free to choose which country's law will apply (Article 3). In the vast majority of cases this will be done expressly in the contract which is at stake in the dispute. This is known as a 'choice of law' clause. The choice can also be 'demonstrated by… the circumstances of the case', and the choice can be made at any time – for example, after the dispute has arisen.

**Articles 4(1)(a) to (h) – types of contract**

In the absence of choice, you must consider Articles 4(1)(a) to (h) which set out various types of contract and the laws that will apply. The most important are the following:

Sale of goods contract: applicable law is that of the seller's habitual residence\*

Provisions of services contract: applicable law is that of the service provider's habitual residence\*

Contract relating to land: applicable law is that where the land is situated

Distribution contract: applicable law is that of the distributor's habitual residence\*

\* A company's habitual residence is where its 'central administration' is. For a natural person acting in the course of business, it is where that person's principal place of business is.

**Articles 4(2) – characteristic performance**

What if there is no choice, and the contract does not fall into the categories in articles 4(1)(a) to (h) (and remember we only set out four of those on the previous slide)?

In that case, the applicable law is the law of the country where the party required to effect characteristic performance of the contract has its habitual residence. Which party is giving the performance which gives the character its character? In a contract where one party is paying the other party for something, it is generally the party doing the 'something' which is giving the contract its character, not the party making the payment.

**Articles 4(3) – manifestly more closely connected**

If the applicable law has been determined under Article 4(1) or 4(2), the court will apply a different country's law if the contract is manifestly more closely connected with that other country. It is to be expected that this provision will not be used lightly as otherwise it could introduce great uncertainty into the operation of Rome I.

**Example**

Your client is a marketing company named Vision Limited ('Vision'). Vision is incorporated in England. Its head office is in London. Vision enters into a contract with a pharmaceutical company, Dominguez S.L. ('Dominguez'). Dominguez is incorporated in Spain. Its central administration is in Madrid. Vision contracts to design (and put into effect) a European marketing campaign aimed at the Spanish market for some of Dominguez's products. Payment is to be made by Dominguez in Euros into Vision’s Spanish bank account. Vision’s services under the contract are to be sub-contracted by Vision to two freelancers, both of whom are Spanish nationals and Vision’s contracts with those freelancers are both subject to Spanish law.

There is no choice of law clause in the contract. Dominguez has recently commenced proceedings against Vision before the English courts, alleging breach of contract. The English court has accepted jurisdiction.

Which country’s laws is the English court most likely to apply to the contract?

On these facts, there is no express or implied choice of law under Article 3.

This is a contract for the provision of services under Article 4(1)(b).

The applicable law is that of the service provider's habitual residence. Vision is the service provider, it is habitually resident in England, so English law appears to apply to this contract

However, the court might apply Spanish law pursuant to Article 4(3); the contract is arguably “manifestly” more closely connected with Spain rather than England: note the Spanish bank account, services directed to Spain and Spanish freelancers governed by Spanish law.

**Summary in relation to conflict of laws: contract**

- Rome I applies to contracts entered into on or after 17 December 2009.

- There are special provisions in Rome I for contracts of carriage, consumer contracts, employment contracts and insurance contracts – not covered in this element.

- Parties are free to choose which country's laws apply to their dispute.

- In the absence of choice, there are specific provisions in Article 4 which stipulate which country's laws apply to various types of contract, including:

a. Sale of goods – law of country where seller habitually resides

b. Provision of services – law of country where service provider habitually resides

- If the contract is not one of the types of contract listed in Article 4, the applicable law is that of the country where the “characteristic performer” (usually the party getting paid) has its habitual residence.

- Conclusions reached via these routes (not by the 'choice' provisions) can be displaced if the contract is 'manifestly more closely connected' with another country.