

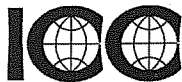
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The New (Rome I) European Regulation on the Law Applicable to Contractual Obligations: What has Changed?

By Fabrizio Marrella



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The New (Rome I) European Regulation on the Law Applicable to Contractual Obligations: What has Changed?

By *Fabrizio Marrella**

Introduction

On 17 December 2009, the 1980 Rome Convention on choice of law in contracts will be replaced by an EC Regulation ('Rome I'). This area of private international law, like other areas such as jurisdiction and the enforcement of judgments, has been unified and 'Europeanized'.¹ The change will greatly affect businesses not only in the European Union, but also in the rest of the world. The new EU conflict rules have a universal character: they will be applied by the courts of EU Member States irrespective of whether the designated law is that of a Member State or a third State.

It is highly likely that the coming months will see many new publications exploring the implications of this new and fundamental instrument of European private international law.

Meanwhile, the purpose of this essay is to highlight the main changes contained in the Rome I Regulation, with particular reference to B2B contracts. A table has been included comparing the provisions of the new Regulation with those of the Rome Convention, so as to enable the reader to see easily what has changed. In the second part of the essay, consideration will be given to the impact of the Rome I Regulation on arbitral practice. As an annex, extracts from eight awards provide illustrations of the role the Rome Convention has played in ICC arbitral proceedings.

I. The new Rome I Regulation

1. A short history of the Regulation

Since 1 April 1991, for national courts in European States, the applicable law of a contract has been determined mainly by reference to an international treaty: the 1980

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As from 11 January 2009, a new Regulation on the law application to non-contractual obligations ('Rome II') will replace the conflict-of-law rules relating to tort currently in force in Member States of the European Union. See Regulation (EC) No. 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II), OJ L 199, 31 July 2007, p. 40ff.

Rome Convention on the Law Applicable to Contractual Obligations, commonly known as the Rome Convention.²

A fresh impulse was given to the regulation of conflict of laws in contractual matters in 1998 with the Vienna Action Plan³ implementing the provisions of the Amsterdam Treaty. On 14 January 2003, the European Commission published a Green Paper on the 'conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation'.⁴ On 15 December 2005, following the consultation of experts,⁵ the Commission proposed a Regulation on the law applicable to contractual obligations.⁶ Negotiations then speeded up, with other EU bodies submitting comments and opinions (e.g. the European Parliament on 22 August 2006, 12 December 2006 and 5 March 2007 and the Economic and Social Committee on 13 September 2006).⁷ The Council presented its own view on 12 October 2006, 2 March 2007 and 19 April 2007 and the European Parliament adopted a final position on 29 November 2007, which matched the Council's political agreement of 6 December 2007. The text of the Rome I Regulation was finalized on 31 March 2008, allowing the Regulation (EC) No. 593/2008 of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I) to be adopted on 17 June 2008 and published in the *Official Journal of the European Union* on 4 July 2008 (L/177/6).⁸

2

There is abundant literature and case law on the Convention, in various languages, as can be seen at <www.rome-convention.org>. See e.g. (in English) R. Plender & M. Wilderspin, *The European Contracts Convention: the Rome Convention on the Choice of Law for Contracts*, 2d ed. (2001); Dicey, Morris, Collins, *Conflict of Laws*, 14th ed. (2006); (in Italian) C.M. Bianca, A. Giardina (a cura di), 'Convenzione sulla legge applicabile alle obbligazioni contrattuali. Commentario' in *Nuove Leggi Civili Commentate* (Padua: Cedam, 1995) at 901ff. Most textbooks on international business law are informative on the subject. See e.g. H. van Houtte, *The Law of International Trade*, 2d ed. (London: Sweet & Maxwell, 2002); *Schmitthoff's Export Trade*, 11th ed. by C. Murray, D. Holloway, D. Timson-Hunt (London: Sweet & Maxwell, 2008); F. Galgano & F. Marrella, *Diritto del commercio internazionale*, 2d ed. (Padua: Cedam, 2007); J. Jacquet, Ph. Delebecque, Courneloup, *Droit du commerce international* (Paris: Dalloz, 2007); C. Esplugues Mota, *Derecho del comercio internacional*, 2d ed. (Valencia: Tirant lo Blanch, 2006).

3

See Action Plan of the Council and Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of freedom, security and justice. Text adopted by the Justice and Home Affairs Council of 3 December 1998. OJ 1999 C 19/1.

4

COM (2002) 654 final.

5

See results at <ec.europa.eu/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm>. The comments provided by the ICC task force on jurisdiction and applicable law can be found at <www.iccwbo.org/uploadedFiles/ICC/policy/commercial_law/pages/2%20ICC%20Rome%201%20Position.pdf> (visited 22 September 2008).

6

COM (2005) 650 final. On this proposal, see especially N. Boschiero, 'Verso il rinnovamento e la trasformazione della convenzione di Roma: problemi generali' in P. Picone (a cura di), *Diritto internazionale privato e diritto comunitario* (Padua: Cedam, 2004) pp. 319–420; Picone, 'Diritto internazionale privato comunitario e pluralità dei metodi di coordinamento tra ordinamenti', *ibid.* at 485; P. Vareilles-Sommères, 'La

communautarisation du droit international privé des contrats: remarques en marge de l'uniformisation européenne du droit des contrats' in *Mélanges en l'honneur de Paul Lagarde. Le droit international privé: esprit et méthodes* (Paris: Dalloz, 2005) pp. 781–801; F. Pocar, 'La codification européenne du droit international privé: vers l'adoption des règles rigides ou flexibles vers les Etats tiers?', *ibid.* at 697ff.; T. C. Hartley, 'The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws' (2005) 54 *International & Comparative Law Quarterly* 813; P. Mankowski, 'Der Vorschlag für die Rom I-Verordnung', *IPRAX* 2006, 101; P. Lagarde, 'Remarques sur la proposition de règlement de la Commission européenne sur la loi applicable aux obligations contractuelles (Rome I)' *Rev. cri. dr. internat. privé* 2006, 331; T. Ballarino, 'La unificación de las reglas sobre la ley aplicable a las obligaciones contractuales. La transformación en reglamento del convenio de Roma' *Anuario Español de derecho internacional privado* 2006, 331; O. Lando & P.A. Nielsen, 'The Rome I Proposal' (2007) 3:1 *Journal of Private International Law* 29. See also Max Planck Institute for Foreign Private and Private International Law, *Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)* at <ec.europa.eu/justice_home/news/consulting_public/rome_i/doc/max_planck_institute_foreign_private_international_law_en.pdf> and in *Rebels Zeitschrift* 2007, 225, and the proceedings of EGPIIL at <www.gedip-egpil.eu> (visited 22 September 2008).

7

See <www.europarl.europa.eu/oeil/file.jsp?id=5301232>.

8

Available at <eur-lex.europa.eu>, © European Communities, 1998–2008. Only European Community legislation printed in the paper edition of the Official Journal (OJ) is deemed authentic.

2. Scope of the Regulation

The Rome I Regulation was adopted on the basis of Title IV of the Treaty establishing the European Community and thus does not apply automatically to the United Kingdom and Denmark. However, the United Kingdom has decided to use its opt-in right pursuant to Articles 1 and 2 of the Protocol on the position of the United Kingdom and Ireland, annexed to the Treaty on European Union and the Treaty establishing the European Community.⁹

The Regulation applies to contractual obligations in any situation involving ‘conflict of laws’ in civil and commercial matters (Article 1.1), other than those excluded under, *inter alia*, Article 1.2. The change of wording from the Rome Convention (Article 1.1) does not reflect a new conceptual paradigm but simply harmonizes the language with that of the Rome II Regulation (on the law applicable to tort) and, above all, the Brussels I Regulation.¹⁰

The list of substantive exclusions is essentially the same as in the Rome Convention. Hence, the Rome I Regulation does not apply to choice-of-court agreements and arbitration clauses.

Finally, the Rome I Regulation does away with the possibility of making reservations that was offered in the Rome Convention. Rome I is a single package of rules, binding in its entirety and directly applicable in EU Member States. Hence, restrictions will not be possible with respect to the consequences of nullity of the contract (Article 12) and overriding mandatory rules (Article 9.3).

3. Party autonomy and choice of law

The Rome I Regulation lays down rules for determining the law to be applied to contractual obligations. It will apply both to contracts containing a choice-of-law clause and to those without such a clause.

As can be seen from the comparative table below, the principle of party autonomy has been maintained, as has its breadth (Article 3).¹¹ Provided their choice is expressly made or clearly demonstrated, parties may choose any law, including even a law that lacks minimum contact with the contract and regardless of whether or not it is the law of an EU Member State. *Depeçage* is also maintained, although it is very rarely used in international contract practice.

However, the parties’ choice cannot extend beyond national law. Thus, they may not choose *lex mercatoria* or the UNIDROIT Principles of International Commercial Contracts. These may take effect only as terms of the contract incorporated by reference, but not as applicable law: in other words, they will be applied using the technique of *materiellrechtliche Verweisung* rather than *kollisionrechtliche Verweisung*.

⁹

If Denmark does not opt in, Danish courts will continue to apply the provisions of the 1980 Rome Convention.

¹⁰

M. Wilderspin, ‘The Rome I Regulation: Communitarisation and Modernization of the Rome Convention’ (2008) 9:2 *ERA Forum* 259–274 at 262.

¹¹

Its scope is broader than that of the US Restatement (Second) of Conflicts of Law, §§6, 187.

Notwithstanding the Commission's initial proposal, no attempt has in fact been made to modernize the choice-of-law process. The former approach adopted in the 1980 Rome Convention has been maintained. Hence, the Regulation adopts a neo-conservative position, which clashes not only with the realities of economic globalization¹² but also with the more open position that has already been widely adopted in modern legislation on international commercial arbitration and in arbitration rules.¹³

Finally, the Rome I Regulation confirms a number of other solutions already present in the 1980 Rome Convention such as tacit choice and *fraude à la loi* (Article 3.3).

4. Applicable law in the absence of choice

Article 4 of the Rome I Regulation contains one of the major changes vis-à-vis the Rome Convention. If the parties have not chosen the law applicable to their contract in accordance with Article 3, the contract will be governed by the law determined on the basis of rules that vary depending on the nature of the contract. The general notions of 'law of the country with which the contract is most closely connected' and 'characteristic performance' continue to underlie these rules, as they did the Rome Convention and the Giuliano-Lagarde Report. There are some situations, however, such as distribution contracts (Article 4.1 f), where the new rule has brought a definitive answer to issues widely discussed in academic circles and case law.¹⁴

Once again, no direct application of the *lex mercatoria* or the UNIDROIT Principles of International Commercial Contracts is possible, as the connecting factors point only to national law.

Some of the criticism directed at the Rome Convention on account of difficulties met in applying its rules to complex contracts such as joint ventures, barter transactions and financial contracts seems to apply equally to the Rome I Regulation.

5. Validity of the contract

The existence and material validity of the contract or of any term of the contract (e.g. choice-of-law clause) continue to be determined by the law that would govern if the contract or term were valid (Article 10).

12

See e.g. D. Carreau, *Droit international*, 9th ed. (Paris: Pedone, 2007) at 50ff.; Benedek, De Feyter, Marrella, *Economic Globalisation and Human Rights* (Cambridge, 2007) *passim*; Ch. Michalet, *Qu'est-ce que la mondialisation?* (Paris, 2004); CREDIMI, *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle. Mélanges Philippe Kahn* (Paris: Litec, 2000) *passim*.

13

See e.g. Article 1496 of the French Code of Civil Procedure, Article 187 of the Swiss Private International Law Act and § 1051 of the German Code of Civil Procedure, according to which the arbitrators shall decide the dispute 'in accordance with . . . rules of law' chosen by the parties (emphasis added). See also Article 34 of the Spanish Arbitration Act 60/2003 and section 46 of the 1996 English Arbitration Act. Abundant references can be found in the Transnational Law Digest and Bibliography, under the direction of K.-P. Berger, at <www.tldb.net>. As for arbitration rules, see e.g. Article 17 of the 1998 ICC Rules of Arbitration and Y. Derains & E.A.Schwartz, *A Guide to ICC Rules of Arbitration* (2005) at

236f.; W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration* (2000); F. Marrella, *La nuova lex mercatoria. Principi Unidroit ed usi dei contratti del commercio internazionale* (Padua: Cedam, 2003); E. Gaillard, *Aspects philosophiques du droit de l'arbitrage international* (Leiden-Boston, 2008) *passim*; compare P. Mayer, 'Le phénomène de la coordination des ordres juridiques étatiques en droit privé' in *Collected Courses of the Hague Academy of International Law*, vol. 327 (2007) at 64ff.

14

See e.g. ICC cases 11864 and 12193 below.

6. Overriding mandatory rules

The Rome I Regulation innovates here by offering a definition of overriding rules (*lois de police* in French), which clarifies the meaning of ‘mandatory rules’ in Article 7 of the Rome Convention.¹⁵ They 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 [Rome I] Regulation’. This definition clearly echoes the thinking of Franceskakis and the ECJ judgement in *Arblade*.¹⁶

A distinction has been maintained between overriding mandatory rules of the forum and those of other countries. The former prevail over the latter in the event of conflict (Article 9.2).

7. Other remarks

The provisions relating to consumer and employment contracts (respectively Articles 6 and 8) have been reformulated, and specific provisions have been added for contracts of carriage (Article 5), insurance (Article 7), multiple liability (Article 16) and set-off (Article 17), as can be seen in the comparative table below.

¹⁵ In the English version of the Rome Convention, the same expression (‘mandatory rules’) is used in Articles 3, 5 and 6, causing confusion that could be solved only by referring to the other official language versions of the Convention.

¹⁶ Cases C-396/96 and C-374/96 *Arblade* [1999] ECR I-8453.

Comparative Table¹⁷

Rome I Regulation

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)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

.....

HAVE ADOPTED THIS REGULATION:

CHAPTER I

SCOPE

Article 1 Material scope

1. *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.*

2. *The following shall be excluded from the scope of this Regulation:*

(a) questions involving the status or legal capacity of natural persons, without prejudice to *Article 13*;

(b) *obligations arising out of family relationships and relationships deemed by the law applicable to such relationships to have comparable effects, including maintenance obligations;*

(c) *obligations arising out of matrimonial property regimes, property regimes of relationships deemed by the law applicable to such relationships to have comparable effects to marriage, and wills and succession;*

(d) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(e) arbitration agreements and agreements on the choice of court;

(f) questions governed by the law of companies and other bodies, corporate or *unincorporated*, such as the creation, by registration or otherwise, legal capacity, internal organisation or winding-up of companies and other bodies, corporate or *unincorporated*, and the personal liability of officers and members as such for the obligations of the company or body;

1980 Rome Convention

Convention on the Law Applicable to Contractual Obligations opened for signature in Rome on 19 June 1980 [consolidated version publ. in OJ C 334, 30.12.2005, pp. 1–27]

THE HIGH CONTRACTING PARTIES to the Treaty establishing the European Economic Community,

.....

HAVE AGREED AS FOLLOWS:

TITLE I

SCOPE OF THE CONVENTION

Article 1 Scope of the Convention

1. The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.

2. They shall not apply to:

(a) questions involving the status or legal capacity of natural persons, without prejudice to Article 11;

(b) contractual obligations relating to:
- wills and succession,
- rights in property arising out of a matrimonial relationship,
- rights and duties arising out of a family relationship, parentage, marriage or affinity, including maintenance obligations in respect of children who are not legitimate;

(c) obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations under such other negotiable instruments arise out of their negotiable character;

(d) arbitration agreements and agreements on the choice of court;

(e) questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organisation or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body;

¹⁷

The preambles to the Rome I Regulation and the Rome Convention have been omitted, as have the final provisions of the Rome Convention.

(g) the question whether an agent is able to bind a principal, or an organ to bind a company or other body corporate or *unincorporated*, in relation to a third party;

(h) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(i) obligations arising out of dealings prior to the conclusion of a contract;

(j) insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance [14] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work.

3. This Regulation shall not apply to evidence and procedure, without prejudice to Article 18.

4. In this Regulation, the term 'Member State' shall mean Member States to which this Regulation applies. However, in Article 3(4) and Article 7 the term shall mean all the Member States.

Article 2

Universal application

Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.

CHAPTER II UNIFORM RULES

Article 3

Freedom of choice

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.

(f) the question whether an agent is able to bind a principal, or an organ to bind a company or body corporate or *unincorporate*, to a third party;

(g) the constitution of trusts and the relationship between settlors, trustees and beneficiaries;

(h) evidence and procedure, without prejudice to Article 14.

3. The rules of this Convention do not apply to contracts of insurance which cover risks situated in the territories of the Member States of the European Economic Community. In order to determine whether a risk is situated in those territories the court shall apply its internal law.

4. The preceding paragraph does not apply to contracts of re-insurance.

Article 2

Application of law of non-contracting States

Any law specified by this Convention shall be applied whether or not it is the law of a Contracting State.

TITLE II UNIFORM RULES

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty 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 a 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 under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the

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.*

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.*

5. 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.*

Article 4 **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) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;

(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) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;

(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law.

conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law at the country which cannot be derogated from by contract, hereinafter called 'mandatory rules'.

4. 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 8, 9 and 11.

Article 4 **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, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a separable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporate, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in

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.

Article 5

Contracts of carriage

1. To the extent that the law applicable to a contract for the carriage of goods has not been chosen in accordance with Article 3, the law applicable shall be the law of the country of habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

2. To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties in accordance with the second subparagraph, the law applicable shall be the law of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply.

The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where:

- (a) the passenger has his habitual residence; or
- (b) the carrier has his habitual residence; or
- (c) the carrier has his place of central administration; or
- (d) the place of departure is situated; or
- (e) the place of destination is situated.

3. Where it is clear from all the circumstances of the case that the contract, in the absence of a choice of law, 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.

Article 6

Consumer contracts

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*) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:

- (a) pursues his commercial or professional activities in the country

which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

Article 5

Certain consumer contracts

1. This Article applies to a contract the object of which is the supply of goods or services to a person ("the consumer") for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object.

*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.*

2. Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a 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 agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

3. If the requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4.

4. Paragraphs 1 and 2 shall not apply to:

(a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence;

(b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours [15];

(c) a contract relating to a right in rem in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;

(d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service;

(e) a contract concluded within the type of system falling within the scope of Article 4(1)(h).

Article 7 **Insurance contracts**

1. This Article shall apply to contracts referred to in paragraph 2, whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside the territory of the Member States. It shall not apply to reinsurance contracts.

2. An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance [16] shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.

To the extent that the applicable law has not been chosen by the

2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving 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:

- 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.*

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this Article.

4. This Article shall not apply to:

(a) a contract of carriage;

(b) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence.

5. Notwithstanding the provisions of paragraph 4, this Article shall apply to a contract which, for an inclusive price, provides for a combination of travel and accommodation.

parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply.

3. In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3:

(a) the law of any Member State where the risk is situated at the time of conclusion of the contract;

(b) the law of the country where the policy holder has his habitual residence;

(c) in the case of life assurance, the law of the Member State of which the policy holder is a national;

(d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;

(e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder. Where, in the cases set out in points (a), (b) or (e), the Member States referred to grant greater freedom of choice of the law applicable to the insurance contract, the parties may take advantage of that freedom.

To the extent that the law applicable has not been chosen by the parties in accordance with this paragraph, such a contract shall be governed by the law of the Member State in which the risk is situated at the time of conclusion of the contract.

4. The following additional rules shall apply to insurance contracts covering risks for which a Member State imposes an obligation to take out insurance:

(a) the insurance contract shall not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation. Where the law of the Member State in which the risk is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail;

(b) by way of derogation from paragraphs 2 and 3, a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance.

5. For the purposes of paragraph 3, third subparagraph, and paragraph 4, where the contract covers risks situated in more than one Member State, the contract shall be considered as constituting several contracts each relating to only one Member State.

6. For the purposes of this Article, the country in which the risk is situated shall be determined in accordance with Article 2(d) of the Second Council Directive 88/357/EEC of 22 June 1988 on the coordination of laws, regulations and administrative provisions relating to direct insurance other than life assurance and laying down provisions to facilitate the effective exercise of freedom to provide services [17] and, in the case of life assurance, the country in which the risk is situated shall be the country of the commitment within the meaning of Article 1(1)(g) of Directive 2002/83/EC.

Article 8
Individual employment contracts

1. An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2. To the extent that the law applicable to the individual employment contract has not been chosen by the parties, the contract shall be governed by the law of the country in which or, failing that, from which the employee habitually carries out his work in performance of the contract. The country where the work is habitually carried out shall not be deemed to have changed if he is temporarily employed in another country.

3. Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was engaged is situated.

4. Where it appears from the circumstances as a whole that the contract is more closely connected with a country other than that indicated in paragraphs 2 or 3, the law of that other country shall apply.

Article 9
Overriding mandatory provisions

1. 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.

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

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.

Article 6
Individual employment contracts

1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) by the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.

Article 7
Mandatory rules

1. When applying under this Convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

2. Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract.

Article 10**Consent and material validity**

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this *Regulation* if the contract or term were valid.
2. 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 11**Formal validity**

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*.
3. *A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.*
4. *Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.*
5. *Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:*
 - (a) *those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and*
 - (b) *those requirements cannot be derogated from by agreement.*

Article 8**Material validity**

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.
2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent 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 the preceding paragraph.

Article 9**Formal validity**

1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.
5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.
6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.

Article 12**Scope of the law applicable**

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.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance, regard shall be had to the law of the country in which performance takes place.

Article 13**Incapacity**

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.

Article 14**Voluntary assignment and contractual subrogation**

1. *The relationship between assignor and assignee* under a voluntary assignment or *contractual subrogation of a claim* against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee *under this Regulation*.

2. The law governing *the assigned or subrogated claim* shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or *subrogation* can be invoked against the debtor and *whether the debtor's obligations have been discharged*.

3. *The concept of assignment in this Article includes outright transfers of claims, transfers of claims by way of security and pledges or other security rights over claims.*

Article 10**Scope of applicable law**

1. The law applicable to a contract by virtue of Articles 3 to 6 and 12 of this Convention 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 breach, 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.

2. In relation to the manner of performance and the steps to be taken in the event of defective performance regard shall be had to the law of the country in which performance takes place.

Article 11**Incapacity**

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 another law only if the other party to the contract was aware of this incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

Article 12**Voluntary assignment**

1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.

Article 15**Legal subrogation**

Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.

Article 16**Multiple liability**

If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.

Article 17**Set-off**

Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.

Article 18**Burden of proof**

1. The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 11 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

Article 13**Subrogation**

1. Where a person ('the creditor') has a contractual claim upon another ('the debtor'), and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship and, if so, whether he may do so in full or only to a limited extent.

2. The same rule applies where several persons are subject to the same contractual claim and one of them has satisfied the creditor.

Article 14**Burden of proof, etc.**

1. The law governing the contract under this Convention applies to the extent that it contains, in the law of contract, rules which raise presumptions of law or determine the burden of proof.

2. A contract or an act intended to have legal effect may be proved by any mode of proof recognised by the law of the forum or by any of the laws referred to in Article 9 under which that contract or act is formally valid, provided that such mode of proof can be administered by the forum.

**CHAPTER III
OTHER PROVISIONS**

**Article 19
Habitual residence**

1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.

3. For the purposes of determining the habitual residence, the relevant point in time shall be the time of the conclusion of the contract.

**Article 20
Exclusion of renvoi**

The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.

**Article 21
Public policy of the forum**

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.

**Article 22
States with more than one legal system**

1. Where a State comprises several territorial units, each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.

2. A Member State where different territorial units have their own rules of law in respect of contractual obligations shall not be required to apply this Regulation to conflicts solely between the laws of such units.

**Article 15
Exclusion of renvoi**

The application of the law of any country specified by this Convention means the application of the rules of law in force in that country other than its rules of private international law.

**Article 16
'Ordre public'**

The application of a rule of the law of any country specified by this Convention may be refused only if such application is manifestly incompatible with the public policy ('ordre public') of the forum.

**Article 17
No retrospective effect**

.....

**Article 18
Uniform interpretation**

.....

**Article 19
States with more than one legal system**

1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of

Article 23

Relationship with other provisions of Community law

With the exception of Article 7, this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations.

Article 24

Relationship with the Rome Convention

1. This Regulation shall replace the Rome Convention in the Member States, except as regards the territories of the Member States which fall within the territorial scope of that Convention and to which this Regulation does not apply pursuant to Article 299 of the Treaty.

2. In so far as this Regulation replaces the provisions of the Rome Convention, any reference to that Convention shall be understood as a reference to this Regulation.

Article 25

Relationship with existing international conventions

1. This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations.

2. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation.

Article 26

List of Conventions

1. By 17 June 2009, Member States shall notify the Commission of the conventions referred to in Article 25(1). After that date, Member States shall notify the Commission of all denunciations of such conventions.

2. Within six months of receipt of the notifications referred to in paragraph 1, the Commission shall publish in the Official Journal of the European Union:

- (a) a list of the conventions referred to in paragraph 1;*
- (b) the denunciations referred to in paragraph 1.*

Article 27

Review clause

1. By 17 June 2013, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If

contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.

Article 20

Precedence of Community law

This Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonised in implementation of such acts.

Article 21

Relationship with other conventions

This Convention shall not prejudice the application of international conventions to which a Contracting State is, or becomes, a party.

appropriate, the report shall be accompanied by proposals to amend this Regulation. The report shall include:

(a) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and

(b) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

2. By 17 June 2010, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the question of the effectiveness of an assignment or subrogation of a claim against third parties and the priority of the assigned or subrogated claim over a right of another person. The report shall be accompanied, if appropriate, by a proposal to amend this Regulation and an assessment of the impact of the provisions to be introduced.

Article 28

Application in time

This Regulation shall apply to contracts concluded after 17 December 2009.

CHAPTER IV

FINAL PROVISIONS

Article 29

Entry into force and application

This Regulation shall enter into force on the 20th day following its publication in the Official Journal of the European Union.

It shall apply from 17 December 2009 except for Article 26 which shall apply from 17 June 2009.

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaty establishing the European Community.

Done at Strasbourg, 17 June 2008 ...

[14] OJ L 345, 19.12.2002, p. 1. Directive as last amended by Directive 2008/19/EC (OJ L 76, 19.3.2008, p. 44).

[15] OJ L 158, 23.6.1990, p. 59.

[16] OJ L 228, 16.8.1973, p. 3. Directive as last amended by Directive 2005/68/EC of the European Parliament and of the Council (OJ L 323, 9.12.2005, p. 1).

[17] OJ L 172, 4.7.1988, p. 1. Directive as last amended by Directive 2005/14/EC of the European Parliament and of the Council (OJ L 149, 11.6.2005, p. 14).

Article 22

Reservations

1. Any Contracting State may, at the time of signature, ratification, acceptance or approval, reserve the right not to apply:

(a) the provisions of Article 7(1);

(b) the provisions of Article 10(1) (e).

...

3. Any Contracting State may at any time withdraw a reservation which it has made; the reservation shall cease to have effect on the first day of the third calendar month after notification of the withdrawal.

TITLE III

FINAL PROVISIONS

[Articles 23-33]

II. Relevance for ICC arbitrators

Introduction

The question arises as to what relevance the rules contained in the Rome I Regulation and the Rome Convention have for international commercial arbitrators. The issue is described perfectly in the following statement:

Contrary to a State judge, who is bound to conform to the conflict of law rules of the State in whose name he metes out justice, the arbitrator is not bound by such rules. He must look for the common intention of the parties, and use the connecting factors generally used in doctrine and in case law and must disregard national peculiarities.¹⁸

It follows that an arbitral tribunal is basically bound by the parties' choice of law. In institutional arbitration, when such a choice is missing, the arbitrators will use the fallback choice-of-law provisions in the relevant arbitration rules.

1. Rome Convention's contribution to solving choice-of-law problems

If arbitration rules—such as the 1998 ICC Rules—allow an arbitral tribunal to apply 'the rules of law which it determines to be appropriate', then this means that, instead of national law, arbitral tribunals may apply *lex mercatoria*, the UNIDROIT Principles of International Commercial Contracts and, in particular, general principles of conflict of laws.¹⁹ There have indeed been occasions when ICC arbitral awards have made reference to the Rome Convention as an expression of general principles of conflict of laws.

In cases where no choice of applicable law has been made, the closest connection rule of Article 4 of the Rome Convention (and now the Rome I Regulation) has been relied upon by arbitrators even when they were under no obligation to apply the Rome Convention.

The author of an outstanding and highly reliable study of choice of law in international commercial arbitration²⁰ has reported that 'in many instances ICC arbitrators have observed choice-of-law methodologies detached from the place of arbitration—ICC arbitrators not being bound by any national law as their *lex fori* and even any national conflict of laws'. Hence, for example, an arbitral tribunal, in a case where no choice of

¹⁸ *Sapphire* arbitration, quoted in A. Redfern & M. Hunter with N. Blackaby & C. Partasides, *Law and Practice of International Commercial Arbitration*, 4th ed. (London: Sweet & Maxwell, 2004) at 145.

¹⁹ The legal ground on which general principles of private international law are applied is the same as that on which the *lex mercatoria* and the UNIDROIT Principles of International Commercial Contracts are applied. Paradoxically, some scholars approve the application of general principles of conflict of laws (which are rules of a-national law) but not *lex mercatoria*. See e.g. B. Goldman, 'Les conflits de lois dans l'arbitrage international de droit privé' in *Collected Courses of the Hague Academy of International Law*, vol. 109 (1963) at 347ff.; P. Lalive, 'Problèmes relatifs à l'arbitrage commercial international' in *Collected Courses of the Hague Academy of*

International Law, vol. 120 (1967) at 569; id., 'Les règles de conflit de loi appliquées au fond du litige par l'arbitre international siégeant en Suisse' *Rev. arb.* 1976, 155; E. Gaillard & J. Savage, eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* (The Hague: Kluwer Law International, 1999) 874, § 1549; Lew, Mistelis, Kroll, *Comparative International Commercial Arbitration* (2003). See also ICC case 12193 below.

²⁰ H. Grigera Naón, 'Choice of Law Problems in International Commercial Arbitration' in *Collected Courses of the Hague Academy of International Law*, vol. 289 (2001) 9 at 225. See also, but with a different view, P. Mayer, 'The Trend Towards Delocalisation in the Last 100 Years' in *The Internationalisation of International Arbitration* (London: Graham & Trotman, 1995) 37.

law had been made, was of the opinion that ‘the general principles of private international law in contractual matters apply to this case’. The arbitral tribunal went on:

the Rome Convention of 19 June 1980 on the applicable law on contractual obligations presents a dual characteristic: today it forms the common law for the rules of conflicts of laws with regard to contractual obligations in the European Union: it is a universal authority in the meaning that it also applies if the law that it designates is that of a non-contracting state.²¹

Another example of such an approach may be found in the final award in ICC case 12193,²² where arbitrators sitting in Basel, Switzerland, noted that:

It is a principle that the rules of conflict at the seat of the arbitration are not binding on the Arbitral Tribunal, and even less so substantive rules, which means that Swiss law cannot be automatically applied.

The Rome Convention has been preferred to other conventions as an expression of general principles of conflict of laws, in a decision on the law applicable to a contract of sale.²³

As for Rome I, insofar as it is an update of the Rome Convention, it can be seen as continuing to embody general principles of conflict of laws.

2. Contribution of arbitral practice to the interpretation of the Rome Convention

The discussions found in some arbitral awards help to clarify the meaning of provisions in the Rome Convention (and now the Rome I Regulation). The extracts published below include discussions on complex issues regarding contracts of licence (case 10988) and construction contracts (case 9893). Further examples can be found in the Collections of ICC Arbitral Awards²⁴ as well as in the extracts below.

In case 10137, the arbitral tribunal found it impossible to identify just one characteristic performance for the exclusivity agreement at issue. Hence, the law with which the contract was more closely connected was determined by weighing other connecting factors such as the place of performance of the distribution agreement.

In a previously published ICC award,²⁵ the parties had specified that their contract was to be interpreted according to ‘European legislation’. Here, the Rome Convention was applied to determine which national law transposing the EC Directive 86/653 of 18 December 1986 on commercial agents was applicable and which national law applied to the other aspects of the dispute. The choice was between French and Spanish law.

²¹ H. Grigera Naón, *supra* note 20 at 240.

²² Translated from the French original. See below.

²³ E.g. Hague Convention of 15 June 1955 on the law applicable to international sale of goods. See ICC case 12494 below.

²⁴ Published by Kluwer Law International and ICC. Four volumes have been published covering 1974–1985, 1986–1990, 1991–1995, 1996–2000.

²⁵ Final award in case 9032, (2001) 12:1 ICC ICArb. Bull. 123.

Conclusion

This commentary has sought to highlight the most important features of the new rules contained in the Rome I Regulation and how they will in practice affect businesses.

The new Regulation does not represent a revolution in conflict of laws, but rather the fine-tuning of provisions already existing in the 1980 Rome Convention. This lack of legal innovation is not necessarily a bad thing, since the Rome Convention has worked very well for over two decades. There was, however, a need to coordinate and clarify its norms within the framework of European private international law.

Through the application of Rome I, sophisticated business transactions will continue to be subject to a strict conflict-of-laws analysis, leading necessarily to domestic law as opposed to a-national rules such as *lex mercatoria* or the UNIDROIT Principles. This is a weak point in the Rome Convention and the Rome I Regulation. However, unlike State courts, arbitral tribunals will not be bound by the Rome I Regulation, just as they were not bound by the 1980 Rome Convention. The value of the Rome I Regulation for arbitrators will be rather to offer normative guidelines as a reflection of general principles of private international law. As for the concrete uses to which it is put, case law and literature will doubtless in due course fill in the picture.

ICC

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