court's interpretation of EC law was not acceptable, as it would be tantamount to rendering meaningless the principles laid down in *Köbler*. The same was true of exclusion of State liability resulting from the national court's assessment of the facts and evidence. The Court considered that this was particularly so in relation to the State aid sector, the area in which an error was alleged to have occurred in *Traghetti del Mediterraneo*. As for fault as a precondition for State liability, the Court ruled that while national law could define the criteria relating to the nature or degree of the infringement of EC law needed for State liability to be incurred, those criteria cannot be more restrictive than that of a manifest infringement of the applicable law.

3.4 Damages and reparation for private breaches of EC Law

In a move reminiscent of the State liability case-law (as well as drawing on the *Eco-Swiss ChinaTime* ruling requiring national courts to raise violations of EC competition law of their own motion) the Court has ruled that the practical effect of the prohibition on anti-competitive agreements laid down in Article 81(1) EC would be put at risk if it were not open to any individual to claim damages for the loss caused to him by a contract or by conduct liable to restrict or distort competition. In *Courage and Crehan* it ruled that as a result national law could not bar all compensation claims made by a party to a contract which violated Article 81(1) EC, although it did consider that such claims could be restricted unless that party was economically weaker and did not instigate the infringement.[52] In *Manfredi*, decided in 2006,[53] the Court ruled that the entitlement to seek compensation extends under EC law to any individual who have suffered harm caused by the infringement of Article 81 EC (the national proceedings concerned compensation claims brought by individuals against their insurance companies, which had participated in a price-fixing cartel, for the increased premiums paid as a result). In *Manfredi* the Court also ruled that while an action for compensation must allow the wronged individual to recover both actual loss but also loss of profit plus interest, EC law does not require that exemplary or punitive damages are made available, unless in domestic actions similar to actions founded on the Community competition rules such specific damages can be awarded.[54]

[52] Case C-453/99 *Courage and Crehan* [2001] ECR I-6297.
[53] Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-5177, paragraphs 63–64.
[54] Joined Cases C-295/04 to C-298/04 *Manfredi* [2006] ECR I-5177, paragraphs 92–100.

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ARTICLE

The Rome I Regulation: Communitarisation and modernisation of the Rome Convention

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Abstract The recently adopted Rome I Regulation will replace the Rome Convention on the law applicable to contractual obligations. The Regulation differs less radically from the Convention than the Commission, judging by its proposal, would have wished. It is doubtful whether it was worthwhile repealing the Convention which has been in force less than 17 years and before the European Court, which has only recently acquired jurisdiction in respect of the Convention, had been given the chance to iron out the divergences of interpretation apparent in the case law of the Contracting States.

Keywords Rome I Regulation · Rome Convention · applicable law to contractual obligations · freedom of choice · applicable law in the absence of choice · types of contracts

1. Introduction

In June 2008 the Community legislature will adopt the Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I)[1]

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This paper is based on a presentation given by the author in the framework of the conference „Rome I and Rome II – Law applicable to contractual and non-contractual obligations", organised by the Portuguese Presidency of the EU, in conjunction with the preceding German and the subsequent Slovenian Presidencies, and ERA, on 12–13 November 2007 in Lisbon. The author is member of the Legal Service of the European Commission. The views expressed in the text are personal to the author and do not necessarily reflect the opinion of the Commission.

[1] At the time of writing, the Regulation had not been published in the Official Journal.

(hereafter the Rome I Regulation). Upon its entry into application[2] the Regulation will replace the Rome Convention[3] in respect of contracts concluded after that date. The Rome Convention will apply to contracts concluded before that date and will thus continue to be relevant for a number of years to come. This contribution will concentrate on the major changes introduced by the Regulation and does not therefore comment on those elements of the Commission proposal for a regulation that advocated change but which were not accepted by the legislature.[4]

2. History

The revision of the Rome Convention and its transformation into a Community instrument has been on the agenda for nearly ten years. It was mentioned as a "priority action" in the 1998 Vienna Action Plan[5] which required the Commission to undertake some steps within two years of the entry into force of the Amsterdam Treaty. However, it was not until 2003 that the Commission finally produced a consultation paper[6] seeking views on a large number of issues relating to the revision of the Convention.

There was little controversy on whether the Convention should be converted into a Community instrument but, as was to be expected, there was a wide proliferation of views on how its substance should be changed. The Commission produced a proposal

[2] The Regulation makes a distinction between "entry into force" and "entry into application". The Regulation enters into force almost immediately after publication but its rules do not apply until a further 18 months have elapsed. Thus to all intents and purposes the date of "entry into application" means entry into force and the present author is at a loss to understand why the Community legislature persists in making this quite pointless distinction. It is not to be found for example in the Brussels I Regulation (Regulation No 44/2001 on the jurisdiction and recognition and enforcement of judgments in civil and commercial cases, OJ 2001 L/1) which simply uses the concept of entry into force.
The distinction is not merely unnecessary but is capable of giving rise to quite absurd results. For example, the Rome II Regulation (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), 2007 OJ L 199/40, (hereafter referred to as the Rome II Regulation) enters into "application" on 11 January 2009 (Article 32) but, by virtue of Article 31, applies to events occurring after its "entry into force" (20 August 2008, twenty days after its publication). The Rome II Regulation thus has a partially retroactive effect largely, it would appear, as the result of oversight. Happily, this problem was avoided in the Rome I Regulation which provides that it applies only to contracts concluded after its "date of application". Contracts concluded before that date will be governed by the Rome Convention unless they were concluded before the Convention entered into force in the forum.

[3] Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980, 2005 OJ C 334/3 (consolidated version).

[4] For example the European Commission proposed to allow the parties to choose a non-state body of law (such as the UNIDROIT principles) as applicable law (as opposed to simply incorporating it into their contract). The Council was opposed to this aspect of the proposal which was therefore deleted. The only allusion to it in the Regulation is in recital 15 of the preamble thereto which recalls that the parties may incorporate by reference into their contract such a body of law (which was in any event equally the case under the regime of the Convention).

[5] The Action Plan of the Council and the Commission on how best to implement the provisions of the Treaty of Amsterdam on an area of Freedom, Security and Justice of 3 December 1998, OJ 1999 C 19/1.

[6] Green Paper of 14 January 2003 on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation, COM (2002) 654 final.

for a Regulation in 2005.[7] Negotiations proceeded fairly rapidly and there was a considerable desire on all sides to reach agreement at the stage of first reading. A political agreement was reached in April 2007 on certain aspects of the package and, in the second semester of the same year, the Portuguese Presidency pursued a high-risk, but ultimately successful, "all or nothing" approach which enabled political agreement to be reached on 6 December 2007.[8] It was however not until 31 March 2008 that the text could be finalised. For the first time, the United Kingdom did not make use of its right to opt in formally to negotiations on the proposal[9] but was nevertheless extremely active in discussions and obtained a large number of concessions. At the time of writing, the United Kingdom had not formally announced that it intended to opt in to the Regulation as finally adopted but it was hoped that the concessions obtained would be sufficient to persuade it to do so as it is entitled by virtue of Article 4 of the Protocol on the position of the United Kingdom and Ireland.[10]

3. Changes

3.1 Institutional Changes

The Rome I Regulation was adopted on the basis of Title IV of the EC Treaty and is thus subject to the peculiarities of all instruments adopted on that basis. Thus, it does not apply to Denmark[11] (which will continue to apply the Rome Convention) and only national courts of last instance will have jurisdiction to make a reference for a preliminary ruling to the ECJ on the interpretation of the Regulation.[12] Consequently, at least in the short term, the possibility offered in this respect by the Regulation is more restrictive than that offered by the Convention.[13]

3.2 Changes of substance

In its proposal for a regulation, the Commission had proposed a large number of changes to the Convention. In particular, it proposed to introduce rules on contracts concluded by an agent[14] and on statutory offsetting[15] both of which were entirely ex-

[7] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 final, referred to in the text as "the proposal" or "the Commission's proposal".

[8] See Council Document 15832/07 CODEC 1357 JUST CIV 320 of 3 December 2007.

[9] See Articles 3 of the Protocol on the position of the United Kingdom and Ireland.

[10] On 2 April 2008 the UK Ministry of Justice published a consultation paper entitled "Rome I-Should the UK opt in?", in which the Government concludes that it would be in the national interest for the UK to apply the Rome I Regulation.

[11] Protocol on the position of Denmark, Article 1.

[12] Article 68(1) of the EC Treaty provides that only courts or tribunals from whose judgments there is no appeal may make a reference for a preliminary ruling on the validity or interpretation of an act based on Title IV of the EC Treaty.

[13] Under the preliminary reference mechanism established by the First and Second Protocol on the interpretation by the ECJ of the Rome Convention, appeal courts and courts of last instance may make such a reference to the ECJ.

[14] Article 7 of the proposal.

[15] Article 16 of the proposal.

cluded from the Convention. It also proposed radical reform of Article 3 on choice by the parties of the applicable law, Article 4 concerning determination of the applicable law in the absence of choice and Article 5 on consumer contracts, as well as a number of less important technical changes.

The text as ultimately adopted by the legislature accepted some of the proposed changes but rejected others while at the same time introducing further changes that the Commission had not proposed. The overall result is that the rules contained in the Regulation differ from those in the Convention less than might originally have been expected.

4. Scope and universal application

With one or two minor exceptions, the scope of the Rome I Regulation[16] does not differ from that of the Rome Convention although the language has in certain places changed somewhat. Whereas the Rome Convention is expressed to apply to "contractual obligations in any situation involving a choice between the laws of different countries" (Article 1(1)), the Regulation applies "in situations involving a conflict of laws" to "contractual obligations in civil and commercial matters". However, the change in the wording is not significant. The additional words "in civil and commercial matters" were inserted simply to harmonise the text with that of the Rome II Regulation (a recurrent theme throughout the negotiations) and the Brussels I Regulation.[17] This policy is recalled in the wording of Recital 7 of the preamble to the Regulation. The other change in the wording of Article 1(1) – "involving a conflict of laws" etc rather than "any situation involving a choice between the laws of different countries" – is simply a quirk of the English translation – it is not mirrored in the other language versions.

The explicit exclusions from the scope of the Rome I Regulation are also unchanged. First, the addition in Article 1(1) of the exclusion of "revenue, customs or administrative matters" simply mirrors the exclusions in the Rome II Regulation[18] and Brussels I Regulation.[19] Second, the exclusions contained in Article 1(2) do not differ materially from those in the same article of the Convention.

Like the Rome Convention and the Rome II Regulation, Article 2 of the Rome I Regulation provides that any law designated by the Regulation shall apply whether or not it is the law of a Member State. This approach is in line with that adopted by all modern conflict of laws instruments but is thought by some commentators to be inconsistent with Article 65 of the EC Treaty which requires that any measures adopted in the area of judicial cooperation in civil matters must be "necessary for the proper functioning of the internal market". Thus, it is argued, Article 65 does not permit the adoption of an instrument purporting to establish, for example, rules for the determi-

[16] Article 1.
[17] Regulation No 44/2001 on the jurisdiction and recognition and enforcement of judgments in civil and commercial matters, OJ 2001 L 12/1.
[18] Cited supra, footnote 2.
[19] Cited supra, footnote 1.

nation of the law applicable to a contract concluded between a Saudi Arabian and a Korean firm relating to the carriage of goods between New York and Bahrain.

There are however good reasons for making the rules of the Regulation, like those of the Convention, of universal application. In the first place, the establishment of one set of rules for internal market cases, leaving the Member States free to apply their own rules in respect of other cases, would have led to obvious practical problems; it would have led to disputes as to the proper demarcation of the harmonised Community rules and might have led to fragmentation of the remaining rules. Furthermore, it is thought by the present writer that the decision taken can be legally justified. The fact that the rules will be applied by a court in a Community Member State may of itself represent a sufficient link with the internal market, a fortiori since the judgment of a court in which those rules are applied will itself be entitled to the benefit of the system of virtually automatic recognition and enforcement established by the Brussels I Regulation, What is more, the ECJ has held on a number of occasions that provided that the main purpose of a Community instrument is to regulate situations having links to more than one Member State, the validity and scope of the instrument is not called into question simply because certain purely internal situations may also be covered.[20] It is however regrettable that the Community legislature did not see fit to explain its decision in the recitals of the preamble to the Regulation.

5. Freedom of choice

Freedom for the parties to choose the applicable law remains the cornerstone of the system established by the Regulation and, in its final form, Article 3, which embodies that principle, has changed little from its predecessor, Article 3 of the Rome Convention.[21]

The first change relates to the degree of certainty necessary to permit the court to infer a tacit choice when the parties have not expressly selected the governing law. A change was necessary in order to reconcile discrepancies in the different language versions (for example "mit hinreichender Sicherheit" and "with reasonable certainty" as opposed to "de façon certaine"). The final form of words chosen is "the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case".

During the phase preceding the adoption of the proposal, the Commission became preoccupied by the issue of jurisdiction agreements operating as tacit choice of law clauses.[22] The approach taken in England and Germany is that if the parties have

[20] See for example Case C-281/02 *Owusu v Jackson* ECR I-1383, paragraph 34.
[21] One change, important in principle, but of less significance in practice, is that under the scheme of the Convention the parties could choose any law for any type of contract, whereas, under the Regulation, the parties' choice is restricted both in the case of insurance contracts where the risk is situated in a Member State and in the case of contracts for the carriage of passengers. The change in relation to insurance contracts is more apparent than real (see below under Insurance Contracts). Finally, both the Regulation and the Convention establish special regimes to protect consumers and employees: although the parties may freely choose the applicable law, this choice is without prejudice to the mandatory rules of the "objective" applicable law (see below under Consumer Contracts).
[22] See Green Paper, 23–25.

inserted an exclusive jurisdiction clause in their contract, it can be assumed, in the absence of any indication to the contrary, that they thereby intended to select the domestic law of that country as the governing law.[23] This approach is supported by some commentators[24] but disavowed by others.[25] In its Green Paper, the Commission seemed more inclined to hold that the existence of a jurisdiction clause without any corroborating factors should not be sufficient to infer a tacit choice of the law of the country designated but it was apparently convinced by the responses to the Green Paper to modify its view. In the Proposal, the Commission proposed to insert a presumption that the conferment of jurisdiction on the courts of a Member State raised a presumption that the parties thereby intended to choose the law of that state. This aspect of the proposal was not accepted by the Council and Parliament, but it was none the less agreed to insert a recital providing that "an agreement to confer exclusive jurisdiction on one or more courts or tribunals of a Member State to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law was clearly demonstrated." Thus, whilst this approach certainly legitimates the position taken by the English and German courts, it nevertheless still leaves scope for divergent interpretation.

Article 3(3) of the Rome Convention deals with the problem of "fraude à la loi" by providing that, where all elements of a situation are connected with country A, the choice by the parties of country B is without prejudice to the mandatory rules, i.e. the rules which parties may not contract out of, of country A. This provision is replicated without any change of substance in Article 3(3) of the Regulation.

The limitations of the scope of Article 3(3) of the Rome Convention were demonstrated in the second generation of Gran Canaria cases[26], where the elements of the situation are connected with two Community Member States but the parties have chosen the law of a third country[27], Article 3(3) does not bite, even if the mandatory rules of the Member States in question are in substance identical and have their origin in a Community law instrument.[28] To solve this particular problem, the legislature inserted an additional provision (Article 3(4)) in the Rome I Regulation. It is however thought that this particular provision is unlikely to be applied very often in practice since it is posited on the existence of a category of Community law rules which are mandatory in the domestic sense but which are not overriding, i.e. applicable irrespective of the applicable law.[29] However, it is only in relation to early directives (such as the Doorstep Selling Directive) that the question can arise[30] because, since the early 1990's all mandatory rules of Community law origin contain a provision

[23] See *Plender/Wilderspin* [5], p. 95.
[24] *Plender/Wilderspin* [5], loc. cit.
[25] *Lagarde* [4].
[26] For a résumé of the issues in these cases, see *Plender/Wilderspin* [5], pp. 153 ff. and, for a thorough discussion, see 'Das IPR der Gran-Canaria Fälle' in *Brödermann/Iversen* [2].
[27] In casu, the Member States involved were Germany and Spain and the law chosen that of the Isle of Man.
[28] The cases involved the right of a consumer to withdraw from a contract concluded outside business premises conferred by the Doorstep Selling Directive (Directive 85/577), which had been properly transposed in both Member States but which had no equivalent in the law of the Isle of Man.
[29] To use German terminology, "zwingende Normen", but not "international zwingende Normen".
[30] In the Gran Canaria cases, the Bundesgerichtshof held that the rules contained in the directive did fall into this category. It did not however refer the question to the ECJ.

defining their spatial application and specifying that they are to be applied even if the applicable law is that of a third country.[31]

6. Applicable law in the absence of choice

The revision of Article 4, which determines the applicable law in the absence of choice by the parties, represents one of the major changes to the system established by the Rome Convention. Under that system, the contract was governed by the law of the country with which it was most closely connected (Article 4(1)). The subsequent paragraphs of Article 4 contained presumptions to assist in determining the country with which the contract was most closely connected. The most important of those presumptions was contained in Article 4(2), applicable to the majority of simple contracts, according to which the contract was presumed to have the closest links with the country in which the party performing the characteristic performance had its habitual residence. Finally, Article 4(5) went on to provided first that paragraph 2 did not apply if the characteristic performance could not be determined and second that the presumptions were to be disapplied if it appeared from the circumstances as a whole that the contract was more closely connected with another country.[32]

As is well known, Article 4 of the Convention works smoothly enough in simple cases in which one party sells goods or provides services against payment. It operates less smoothly in the case of more complex contracts in which both parties undertake significant obligations (joint ventures, franchising or distribution contracts) where it may be difficult or even impossible to determine the characteristic performance. In such cases, the courts are simply required to determine the applicable law using the closest connection test unaided by any presumption.[33]

An even more acute problem relating to the operation of Article 4(2) is that the applicable law which it presumptively designates is not that of the country in which the characteristic performance was to be carried out, which would have ensured in every case a real link between the contract and the applicable law. Instead, the law designated is that of the habitual residence of the party performing that obligation. Since, in an international contract the objective links (in particular the country of performance) may point to a law other than that designated by Article 4(2), there is inevitable tension between Article 4(2) and Article 4(5). Unsurprisingly, when attempting to determine the strength of the presumptions, particularly that of Article 4(2), the approaches in the several Contracting States have differed. In some Contracting States, courts have been too ready to discard the presumption, in particular when it led to the selection of a law different from that which would have been designated by the forum's pre-existing contract rules.[34] At the other end of the spectrum, courts in other

[31] See on this point *Wilderspin/Lewis* [6]; see also Case C-381/98 *Ingmar v Eaton Leonard* [2000] ECR I-9305.
[32] The following comments concentrate on the operation of the presumption of Article 4(2) but are equally applicable, mutatis mutandis, to the application of the presumptions contained in paragraphs 3 and 4 of that Article.
[33] *Plender/Wilderspin* [5], pp. 117 ff.
[34] See examples in Plender/Wilderspin [5].

Contracting States have displayed a rigid adherence to the presumption.[35] In recent years, there has been a convergence of approaches, with courts acknowledging that the presumption should not easily be discarded and that, if it is proposed in a given case to disregard it, it must be clearly demonstrated that the contract is more clearly connected with another country[36].

Since the problem of national courts attributing different levels of force to the presumption was well on the way to being resolved and would no doubt have diminished further once the ECJ had had the opportunity to rule on the question, the best approach to the revision of Article 4 would have been to leave the structure untouched and simply to strengthen the presumption by tightening up the conditions for displacing it. This was indeed the solution cogently advocated by the Max-Planck Institute.[37] Instead, the legislature, following closely the approach advocated by the Commission's proposal, saw fit to turn the methodology on its head.

The starting point is now that paragraph 1 sets out hard and fast rules for a number of contracts. Although the notion of characteristic performance is not mentioned in that paragraph, the rules are clearly inspired by that concept and the solutions correspond in certain cases to examples given in the Giuliano-Lagarde Report. In certain cases, the solution is so obvious that it was hardly worth spelling it out. For example, by virtue of paragraph 1 (a), a contract of sale is governed by the law of the country in which the seller has his habitual residence. In other cases, paragraph 1 appears at first sight to provide some added value by providing hard and fast rules in borderline cases. For example, by virtue of point f, a distribution contract is governed by the law of the country in which the distributor has his habitual residence. This rule, which corresponds to the prevailing view of the characteristic performance of such a contract, goes some way to putting an end to the inconsistent strands of case law in the Contracting States. However, it is to be feared that a rigid rule, which takes little or no account of the range of distribution contracts, may simply have displaced rather than resolved the conflict. For example, in a borderline case, in which by virtue of a contract described as a distribution contract goods are sold to a buyer on the understanding that the buyer will sell them on, there may be dispute as to whether the contract falls under point f.(distribution contract, applicable law that of the country of habitual residence of the buyer/distributor) or, in reality, under point a (contract of sale, in which case the applicable law will that of the seller.

Paragraph 2 then goes on to provide that if the contract is not covered by paragraph 1, or falls under more than one of the separate categories of contract enumerated in that paragraph, it is be governed by the law of the country of the habitual residence of the party effecting the characteristic performance.

Paragraph 3 then goes on to provide an escape rule by providing that where it is clear from all the circumstances that the contract is manifestly more closely connected with another country, the law of that country shall apply. This possibility, which was not envisaged in the Commission's proposal but was added by the legislature, is in itself clearly a welcome addition.

[35] See for example *Société Nouvelle des Papeteries de l'Aa v BV Machinenfabriek BOA*, NJ 750, (NL).
[36] For example *Ennstone Building products v Stanger* [2002] EWCA Civ (England), *Caledonia Subsea v Microperi* (Scotland), *Danzas & Westra v Tapiola* (France).
[37] *Basedow* [1], pp. 41 ff.

Finally, paragraph 4 provides that where the applicable law cannot be determined pursuant to the rules contained in either paragraph 1 or paragraph 2, the contract is governed by the law of the country with which it is most closely connected. At first sight, paragraph 4 seems merely to duplicate paragraph 3; in reality it covers a different situation. Although the connecting factor used in both paragraphs is the same, paragraph 3 operates as a genuine escape clause (i.e. it applies when paragraphs 1 or 2 give an inappropriate solution) whereas paragraph 4 operates simply as a default rule (i.e. it applies when neither paragraph 1 nor paragraph 2 is capable of providing any solution at all).

Thus it can be seen that while the concepts of closest connection and characteristic performance continue to play an important role in the operation of Article 4, their respective rankings in the methodological hierarchy of that Article have changed considerably. In this writer's view, the new moulding of Article 4 provides no more assistance than the old in finding solutions to the really difficult cases of complex or intimately connected contracts. It certainly provides some certainty in borderline cases but this is at the price of provoking demarcation disputes. Finally, it makes it more difficult to displace the presumptively applicable rules. While this is undoubtedly a welcome development, this author shares the view of the Max-Planck Institut that it could have been achieved more economically and with less disruption by simply adding the word clearly or manifestly to paragraph 5 of Article 4 of the text of the Rome Convention.

7. Contracts of carriage

Under the scheme of the Rome Convention, the parties may freely choose the law applicable to a contract of carriage. In Article 4(4) of the Rome Convention contracts for the carriage of goods are subject to a special presumption whereby the contract is presumed to be most closely connected with the country of the principal place of business of the carrier on condition that either the place of loading, the place of discharge or the principal place of business of the consignor is in that country. Contracts for the carriage of passengers fall under the general presumption of Article 4(2).

In its proposal for a regulation, the Commission proposed to make all contracts of carriage subject to a straightforward rule: in the absence of choice by the parties, the applicable law was to be that of the country of the habitual residence of the carrier. However, in the course of negotiations, a consensus developed that contracts for the carriage of passengers should be subject to a separate regime. Thus, Article 5 of the Regulation establishes one regime for the carriage of goods and one for the carriage of passengers.

The regime for the carriage of goods is only slightly changed from the regime pertaining under the Convention, save that the presumption has been hardened into a rule which may be departed from only in exceptional circumstances.[38] However, the regime for the carriage of passengers has changed considerably. In the first place, the law which the parties may choose[39] is restricted to that of the country of the habitual

[38] Article 5(1) in conjunction with 5(3).
[39] Article 5(2), second sub-paragraph.

residence of the passenger or carrier, the place of central administration of the carrier[40], the place of departure or the place of destination. As can be seen, a fairly wide choice is offered; the aim of the provision is not so much to guarantee the passenger, as the weaker party, the benefit of his own law, but more to ensure that the parties cannot choose a law which has no objective connection with the situation. In the absence of choice, the contract is governed by the law of the country where the passenger has his habitual residence if either the place of departure or the place of destination is situated in that country. Otherwise the applicable law is that of the habitual residence of the carrier.

Finally, it should be recalled that in the field of the transport of both goods and passengers a large number of international conventions are potentially applicable.[41] In general, such conventions define their own spatial application and contain rules fixing or restricting the carrier's liability. However, they do not regulate every question which may be the subject of a dispute, and thus leave at least residual scope for the application of a national system of law. The legislature was thus quite correct in deciding not to exclude such contracts from the scope of the Rome I Regulation.

8. Consumer contracts

Contracts concluded by consumers have been the subject of a special protective regime since the entry into force of the Rome Convention (Article 5). This mirrored the protective jurisdictional regime for consumer contracts contained in the Brussels Convention (Articles 13 to 15) although its scope was not precisely the same. The essential features of the system of the Rome Convention were as follows: i) the rules were restricted to contracts for the supply of goods or services or the provision of credit for that object[42], ii) the rules applied only if the consumer had been "targeted" in his country by the seller[43], and iii) for situations falling within its scope, the rules provided that, if the parties had not chosen the applicable law, it was that of the country of the consumer's habitual residence[44] (his home country) and, if the parties had chosen the applicable law, that choice could not "have the result of depriving the consumer of the protection afforded him by the mandatory rules of the law" of his home country.[45]

[40] By virtue of Article 19, the habitual residence of a country is deemed to be the place of central administration. However, where the contract is concluded in the course of the operation of a branch, agency or any other establishment or if performance is the responsibility of such an establishment, the place of habitual residence is deemed to be the place where that establishment is situated. The purpose of giving the parties the choice between these two options is clearly to permit a company with branches in a number of different countries to submit all contracts concluded by its branches to the same law.

[41] See for example *Dicey/Morris/Collins* [3], pp. 1762 ff.

[42] Article 5(1). Thus, for example, it is likely that the provision of a mortgage loan would fall outside the scope of Article 5 since it represents the provision of credit for the supply of immovable property whereas such a contract would fall under the cognate, but differently worded, provision of the Brussels Convention. Furthermore, by virtue of paragraph 4, certain categories of contract (contracts of carriage, other than package tours and contracts for the supply of services to be supplied exclusively outside the consumer's home country) were specifically excluded from the scope of Article 5.

[43] Article 5(2).

[44] Article 5(3).

[45] Article 5(2).

In practice, Article 5 of the Rome Convention was relied upon by consumers very rarely. It can be said, in very general terms, that it was typically invoked in only two categories of cases. First, when there was a pattern of sharp practice sufficient to prompt the involvement of consumer associations[46] and second in very atypical consumer contracts where wealthy private investors were induced by brokers or financial advisers to make improvident investments or placements.[47] The reasons for the paucity of cases are open to speculation but the following explanations may be put forward: in typical cases, the amount of money at stake is unlikely to be sufficient to warrant the costs of cross-border litigation, the fact that the parties were entitled to choose the applicable law (which would in practice mean the law of the seller's country) might be enough to dissuade a consumer, who would be unlikely to be aware that such a choice, although permissible, was without prejudice to any more protective provisions of his own law, from bringing proceedings.

Thus it was that the Commission proposed quite far reaching changes to the consumer contracts regime.[48] In the first place, it proposed to extend the material scope of the regime to all contracts (subject to three specific exceptions).[49] In the second place, it proposed to refine the notion of "targeting" by aligning it on the criteria used in the Brussels I Regulation in which the regime applies if the seller has carried pursued a trade or profession in the consumer in the consumer's home country or by any means directed an activity to that country. As far as the Brussels I Regulation was concerned, this criterion was chosen so as to embrace contracts concluded through the Internet (although it was, strictly speaking unnecessary to amend the criteria used in the Rome Convention to achieve this goal since such contracts were already covered by virtue of Article 5(2), second indent, thereof[50]). Finally, any possibility of choice was to be removed; when the rules applied, the contract was to be governed by the law of the consumer' home country.

The solution proposed by the Commission proved to be controversial; although obtaining considerable support from some Member States, it was opposed by others. The final compromise (Article 6 of the Regulation) fell somewhere in between the regime under the Rome Convention and that proposed by the Commission. In the first place, the material scope of the regime was extended but further exceptions, relating to financial instruments[51], were added. The explanation for this exception is that the nature of such instruments requires them to be subject to the same law – the applicability of different laws to each of the instruments issued could change their nature and prevent their fungible trading.[52] In the second place, the conditions for the application of the regime – the notion of pursuing activities in the consumer's home country or directing them to that country – as proposed by the Commission were accepted.[53]

[46] Such as the Gran Canaria cases.

[47] See *Plender/Wilderspin* [5], p. 144 and cases cited therein.

[48] See Article 5 of the Commission's proposal.

[49] See Article 5(3) of the Commission's proposal.

[50] "If, in that country" i.e. the consumer's home country "the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising". Although the Contracting States clearly did not have the Internet in mind when drafting the Convention, the expression "advertising" is undoubtedly sufficient wide to cover advertising through a website.

[51] Article 6(4) (d) and (e).

[52] See Recital 30 of the preamble to the regulation.

[53] Article 6(1).

This was hardly controversial since there was general consensus that those conditions should be aligned on the Brussels I regime. Lastly, the legislature abandoned the Commission's plans to permit the choice by the parties of the applicable law. Thus, in the Regulation the solution pertaining under the Convention in this respect is retained.[54] It thus remains to be seen whether the changes will have achieved their stated aim of making it possible "to cut the cost of settling disputes concerning what are commonly relatively small claims".[55]

9. Insurance contracts

Under the scheme of the Rome Convention, insurance contracts were subject to a complex regime. In the case of insurance contracts where the risk was situated outside a Member State of the Community and reinsurance contracts, the normal rules of the Convention applied. If the risk was situated within a Member State, the Convention did not apply.[56] In the case of such contracts where the insurer was established within a Member State (the overwhelming majority) the contract was subjected to the special conflict of law rules contained in the Life and Non-life Insurance Directives[57] (the Insurance Directives). In the rare case of an insurance contract concerning a risk within a Member State and an insurer not established within the Community, the Contracting States were free to apply their own conflict of law rules.

In its proposal, the Commission envisaged a small-scale tidying up of the situation; it proposed merely to delete the exclusion in respect of risks situated in a Member State. This modification would have left the regime established by the Insurance Directives unchanged but would have subjected the third, intermediate category to the normal rules of the Regulation.

During the negotiations, support gathered for a more radical solution whereby the rules contained in the Insurance Directives would be incorporated in the Regulation. Two currents of opinion developed: one school of thought simply wished to bring all the rules within the same instrument while leaving their substance unchanged, while another wished to extend the regime of the Insurance Directives to risks outside the Community. The essential difference between the two approaches lay in the fact that for risks other than large risks the Insurance Directives severely limited party autonomy whereas, for risks outside the Community, the Convention made no such distinction (although, of course, contracts of insurance might in appropriate circumstances fall under the consumer contract regime which equally restricted party autonomy).

Ultimately, the first school of thought prevailed. A new Article 7, which establishes a special regime applying to large risks wherever situated and to other risks situated within a Member State, was inserted in the Regulation. In respect of risks other than large risks (other risks) situated outside a Member State and to reinsurance contracts, the general rules of the Regulation apply.

[54] Article 6(2).
[55] See the first sentence of Recital 24 of the preamble to the regulation.
[56] Article 1(3) of the Rome Convention.
[57] In the case of non-life insurance, Second Council Directive 88/357, as amended and, in the case of life insurance, Directive 2002/83.

In the case of large risks, the parties may freely choose the applicable law. If they do not do so, the contract is governed by the law of the country in which the insurer has his habitual residence.[58]

In the case of other risks situated in a Member State, party choice is severely restricted[59] and, if the parities have not made a choice of the applicable law, it is the law of the country in which the risk is situated.[60]

In the case of other risks situated outside a Member State the general rules of the Regulation apply. Thus, unless the contract is a consumer contract falling under Article 6, the parties may freely choose the applicable law in conformity with Article 3. If they do not do so, the applicable law will, by virtue of Article 4(1)(b) be that of the law of the habitual residence of the insurer.

As can be seen, the new system maintains most of the complexity of the old, albeit the entire corpus of rules is, as it were, brought under one roof. Unfortunately, any simplicity gained by this accomplishment is offset by the fact that it has not been possible simply to repeal the conflict of law rules in the Insurance Directives since, first, Denmark, which is not bound by the Regulation, will continue to apply the Rome Convention and therefore requires a corpus of rules applicable to risks situated in a Member State and second because the Insurance Directives also apply to other Member States of the European Economic Area (Norway, Iceland and Liechtenstein). At the time of writing, it was envisaged to consolidate the existing Insurance Directives in a new instrument, known as Solvency II. The legislative technique adopted to ensure that the conflict of laws rules in that instrument are in line with those in the Rome I Regulation (and that they remain so) is to require the Member States not bound by that Regulation (in reality simply Denmark) to enact into their national law, for contracts of insurance falling within the scope of the Solvency II instrument (which will be identical to that of the Insurance Directives, i. e. where the risk is situated in a Member State and the insurer is established in a Member State) the rules contained in Article 7 of the Rome I Regulation. Thus, any amendment of the rules presently contained in Article 7 of the Rome I Regulation will automatically have the effect of amending pro tanto the future Solvency II instrument. Finally, Article 23, which accords priority to any sectoral conflict of law rules contained in Community law instruments, has been amended to "carve out" Article 7, in order to allow the regime established by that Article to prevail over the existing Life Insurance Directives.

10. Overriding provisions

A further change has been made in relation to what in English are usually referred to as overriding rules, that is to say rules which apply irrespective of the law of the contract. In the Rome Convention, Article 7, which refers to such rules simply as mandatory rules[61], provides that the forum may apply its own rules "where they are

[58] Article 7(2) of the Regulation.
[59] Article 7(3), first sub-paragraph.
[60] Article 7(3), third sub-paragraph.
[61] Which should not be confused with the mandatory rules referred to in Articles 3, 5 and 6 of the Convention. That category simply refers to rules which, in a domestic context, the parties cannot contract out of, whereas the category referred to in Article 7 are those which are applicable to the situation whatever the law of the contract.

mandatory irrespective of the law otherwise applicable to the contract". More controversially, Article 7(1) also permits (but does not require the forum state) to apply the mandatory rules of a country (clearly different from the forum state and the country whose law is the applicable law) with which the contract has a close connection. Some Contracting States objected to this possibility and so provision was made to allow Contracting States to reserve the right not to apply it. Germany, Ireland, Luxembourg, the United Kingdom and Portugal availed themselves of this right.

In its proposal, the Commission envisaged leaving that Article substantially unchanged. It did however add a definition of mandatory rules as being "those rules the respect for which is regarded as crucial by a country for safeguarding its political, social or economic organisation to such that they are applicable to any situation falling within their scope". This purported definition is taken from the judgment of the ECJ in Arblade.[62] However, while it is clear that it is quite correct to define mandatory rules as rules applicable to any situation falling within their scope, it was quite unnecessary to amplify this definition by the explanation of why a country may decide to make a rule mandatory. In adding that amplification, the ECJ was clearly not intending to circumscribe the category of rules which a country could make internationally mandatory and it is not clear why the Commission took was intended to be a mere description and transform it into a definition. What is more, the proposal does not mention the main significance of the Arblade judgment, which is that the categorisation by a Member State of a rule as being applicable whatever the applicable law does not exempt that rule from having its compatibility with Community law examined and from being set aside if it is found to constitute an impediment to the free provision of goods or services.

In its final form, what is now Article 9 of the Rome I Regulation has introduced a welcome terminological clarification by terming the rules falling within its scope as "overriding mandatory provisions". On the other hand, it provides an even more restrictive definition of the rules falling within its scope as being provisions the respect for which is regarded as crucial by a country for safeguarding its public interests. This definition contains the seeds of future disputes. In the first place, by restricting the definition to rules intended to safeguard public interests, which is already the position in some but by no means all Member States, the Regulation casts doubt upon the fate of such rules enacted to preserve private interests, for example those of weaker parties such as consumers or workers, that the relevant national legislature has decided will be applicable irrespective of the applicable law. For example, in the United Kingdom, certain rules for the protection of employees are expressed by the terms of the relevant Act of Parliament, to be applicable, whenever the contract is carried out in Great Britain, irrespective of the applicable law. Since such rules are predominantly intended to safeguard private interests, can it be argued that they may no longer be applied by the forum when the lex fori is not also the lex causae? It is also ironic that the Community legislature should exclude rules safeguarding private interests from the notion of overriding rules when it has been particularly active in enacting such rules itself.[63]

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

[63] See for example Article 9 of the Time share Directive (Directive 94/47/EC, 1994 OJ L 280/83) and Article 6 of the Unfair Terms Directive (Directive 93/13/EC, 1993 OJ L 95/29).

As regards the option of applying the overriding rules of a third country, the Commission's proposal obtained some support but also stiff opposition from some Member States. A compromise was reached whereby effect may be given to such provisions of the lex loci solutionis that render the performance unlawful.

11. Assignment

Article 12 of the Rome Convention governs the issue of voluntary assignment of a right against another person. The obligations of assignor and assignee are governed by the law of the contract between them (paragraph 1) whereas other questions (assignability of the claim, the relationship between the assignee and the debtor and questions relating to the discharge of the debtor's obligations) are governed by the law of the debt (paragraph 2). However, the Convention does not deal explicitly with the question of the conditions under which the assignment can be invoked against third parties and courts in the various Contracting States had adopted different approaches to this question.[64]

In its proposal, the Commission advocated submitting this question to the law of the country of habitual residence of the assignor, which is also the approach of the 2001 UNCITRAL Convention on the assignment of receivables in international trade. While this proposal enjoyed support from some member States, it provoked fierce opposition from others who advocated that the law of the debt should govern this issue. Ultimately, a compromise solution proved impossible and thus the solution (or, rather, non-solution) adopted in the Convention was maintained, albeit Article 27 of the Regulation requires the Commission to submit a report on this question within two years after the entry into force of the Regulation. The question will no doubt thus be back on the agenda by 2010.

12. Conclusion

Like all Community instruments, the Rome I Regulation is the fruit of compromise. As already mentioned, readiness to compromise was particularly necessary as regards the application of overriding rules, consumer protection and insurance contracts. In the case of the latter two fields, it is unlikely that the changes brought about will make the relevant regimes more transparent or easy to apply. It is also a matter of regret that the legislature was unable to reach agreement (other than on the maintenance of the status quo) with respect to assignment. On the other hand, there are numerous points of where the text of the Convention has been improved. Overall, however, the overwhelming sentiment is one of doubt as to whether it was really necessary to change a Convention which, when the proposal for a Regulation was tabled, had been in force for less than 15 years and before the ECJ, which acquired jurisdiction to entertain references for a preliminary ruling on the interpretation of the Convention only in 2004, had been given the chance to iron out the divergences of interpretation apparent in the case law of the Contracting States.

[64] See the Commission's Green Paper, 39 ff.

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ARTICLE

Institutional versus Ad Hoc Arbitration: A European Perspective

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Abstract This paper discusses the main hallmarks of institutional versus ad hoc arbitration, highlighting their respective strengths and weaknesses. Essentially, the proper working of ad hoc arbitration is – even more so than institutional arbitration, which relies on various default mechanisms – entirely dependent on the full co-operation of the arbitrating parties.

Keywords Ad hoc arbitration · institutional arbitration · international arbitration

1. Introduction

At the dawn of the 21st century, international arbitration has matured into one of the leading dispute resolution mechanisms world-wide.

1.1 Arbitration v litigation & mediation

Most importantly, compared to litigation – which has dominated the scene of dispute resolution for the better part of the preceding centuries – arbitration offers almost unlimited party autonomy and procedural flexibility. Unlike mediation, arbitration delivers the certainty of a final and binding award, or – in other words – a private

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