Civil and commercial judicial cooperation: converting the Rome Convention on the law applicable to contractual obligations into a Community Regulation, Rome I

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The Legal Affairs Committee adopted a report drawn up by Cristian **DUMITRESCU** (PES, RO), and amended – in the first reading of the co-decision procedure – the proposal for a regulation on the law applicable to contractual obligations (Rome I).

The main amendments were as follows:

Scope (Article 1): the regulation will not apply to the question of whether an agent is able to bind a principal or an organ to bind a company or body corporate or unincorporated, in relation to a third party; nor will they apply to obligations arising out of dealings prior to the conclusion of a contract;

Choice of proper law (Article 3): the committee stipulated that the choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case, rather than "demonstrated with reasonable certainty" as the Commission had proposed. The committee also stipulated that where all other elements relevant to the situation at the time of the choice are located in a country other than a country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. However, it deleted the Commission's concept of "mandatory rules", which is referred to later in the text as "overriding mandatory provisions." 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 that 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.

In default of a chosen law (Article 4): to the extent that the law applicable to the contract has not been chosen, Parliament made some amendments to the Commission's proposal on the law applicable. It added that:

- 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;

- 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;

- where the case in point is not covered by Article 4, the contract shall be governed by the law of the country where the party who is required to effect the performance of the contract which is characteristic of the contract has his habitual residence;

- 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 according to the above criteria, the law of that other country shall apply;

- where the law applicable cannot be determined pursuant to these criteria, the contract shall be governed by the law of the country with which it is most closely connected.

The committee deleted the following from the proposal:

- a contract of carriage shall be governed by the law of the country in which the carrier has his habitual residence;

- a contract relating to intellectual or industrial property rights shall be governed by the law of the country in which the person who transfers or assigns the rights has his habitual residence.

Contracts of carriage (new Article 4a): the Committee introduced a new clause stating that, 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 to such contracts shall be the law of the country of the 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. 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 text, 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 place where the carrier has his habitual residence shall apply. The parties may choose as the law applicable to the 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 ba) the carrier has his place of central administration; or (c) the place of departure is situated; or d) the place of destination is situated. 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 above, the law of that other country shall apply.

Consumer contracts (Article 5): the committee amended the Commission’s proposal and stated that 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 of profession ("the professional") shall be governed by the law of the country where the consumer has his or her habitual residence provided that: a) the professional pursues his commercial or professional activities in the country 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. Notwithstanding this, the parties may choose the law applicable to a contract to which this Article applies 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 such provisions that cannot be derogated from by contract by virtue of the law which, in the absence of choice, would have been applicable on the basis of the above criteria.

These general rules in Article 5 will not apply to, inter alia :

- 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 take-over bids of transferable securities and the subscription and redemption of units in collective investment undertakings in so far as these do not constitute provision of a financial service;

- a contract to subscribe for or purchase a new issue of transferable securities, as defined by Article 4(1), point (18) of Directive 2004/39/EC, or rights and obligations to subscribe for or redeem units in collective investment undertakings;

- a contract concluded within the type of system falling within the scope of Article 4(1)(hb) of the Regulation (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.)

Employment contracts (Article 6): an individual employment contract shall be governed by the law chosen by the parties. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by such provisions that cannot be derogated from by contract under the law that, in the absence of choice, would have been applicable pursuant to the Regulation. 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. Where the law applicable cannot be determined, the contract shall be governed by the law of the country where the place of business through which he was engaged is situated. Where it appears from the circumstances as a whole that the contract is more closely connected with another country, the law of that other country shall apply.

The committee **deleted Article 7 on contracts concluded by an agent**.

Validity of the contract (Article 10): Members stated that a contract concluded between persons who or whose agents are in the same country at the time of conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under the Regulation or of the law of the country where it is concluded.

Habitual residence (Article 18): the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration (and not the principal establishment as proposed by the Commission.) The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business. When determining the habitual residence the relevant point of time shall be the time of the conclusion of the contract.

Rome Convention (Article 22): the 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 the Regulation does not apply pursuant to Article 299 of the Treaty.

Relation to other international conventions (Article 23): the 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-laws rules relating to contractual obligations. However, the 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 the Regulation.

Review clause: not later than 2 years after the date of application of the Regulation, the Commission shall submit a report on the application of the Regulation. If necessary, the report shall be accompanied by proposals to adapt it. The report shall be preceded, not later than one year after entry into force of the Regulation by:

- a study on the effects of Article 5 of this Regulation which will consider certain prescribed matters, such as the effects on consumer contracts concluded by electronic means;

- a study on the promotion of ADR in the field of electronic commerce and how it might usefully be fostered and promoted by legislative and other means; that study will also consider to what extent on-line ADR schemes might be used in combination with trust marks in order to increase consumer confidence in electronic commerce and obviate the need for court proceedings;

- such proposals as the Commission may consider appropriate within the framework of the contract law project in order to introduce standard contract terms and conditions for use in particular in cross-border electronic transactions between businesses and consumers;

- a review of the provisions on applicable law contained in Community legislation on insurance.

Lastly, the report states that the Regulation will apply to contracts concluded after its date of application.