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 European Parliament adopted a report drawn up by Cristian **DUMITRESCU** (PES, RO), and 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. The Regulation will also not apply to insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of Directive 2002/83/EC concerning life assurance the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or 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 .

Choice of proper law (Article 3): Parliament 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. Parliament 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 the absence of choice (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.

Contracts of carriage (new Article 5): Parliament 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 above, 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 a country which is closely connected to the circumstances, and these are stipulated in the text.

Consumer contracts (Article 6): Parliament 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 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 concluded within the type of system falling within the scope of Article 4(1)(h) 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.)

Insurance contracts (Article 7): Parliament inserted a new clause on insurance contracts, the general rule being that 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 shall be governed by the law chosen by the parties in accordance with Article 3. It makes provision in this Article for those circumstances where the general rule does not apply.

Individual employment contracts (Article 8): 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.

Overriding mandatory provisions (Article 9): nothing in the Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. 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.

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. A contract concluded between persons who or whose agents are in different countries at the time of 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.

Habitual residence (Article 19): 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 24): 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 25): 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 5 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 include: i) a study on the law applicable to insurance contracts and an assessment of the impact of the provisions to be introduced, if any; and ii) an evaluation on the application of Article 6, in particular as regards the coherence of Community law in the field of consumer protection.

No later than 2 after the entry into force of the Regulation, the Commission shall submit 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 the Regulation and an assessment of the impact of the provisions to be introduced.

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