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SHOP UNTIL YOU DROP?

By Philippa Charles and Daniel Hart

For contracts concluded after 17 December 2009, a new regulation on the law applicable to contractual obligations – 'Rome I' – will replace the Rome Convention. It will apply in all EU states (except Denmark) and will complete the EU cross-border litigation jigsaw.

Harmonisation and consolidation of the approach of EU member states to cross-border litigation has been a key issue for many years and has taken a number of forms designed to end intra-EU 'forum shopping' – a practice regarded by the European Commission as abhorrent. The Brussels Regulation 44/2001 codified universal EU rules on jurisdiction and the recognition/enforcement of EU judgments. The Rome Convention (1980) created harmonised EU rules for determining the law applicable to contractual obligations, while the 'Rome II' Regulation (2007) did the same for non-contractual obligations. Meanwhile, other regulations unified rules on service, and obtaining foreign evidence, in EU states.

Effect of Rome I

The law governing contracts with an international element can prove critical. It can affect the parties' rights and obligations and even whether a claim is time-barred.

Rome I maintains the Rome Convention's core principles, but there are some key differences. The Rome Convention was implemented by each state individually and contained contracting-out options, so its application could vary. Rome I on the other hand is directly effective, thereby ensuring uniform application and interpretation of the rules across EU states.

Rome I also changes and refines the rules. A choice of law made by the parties is still generally upheld (A3(1)). However, additional circumstances are added when the parties' choice may be overridden by other countries' 'mandatory' laws (i.e. those which cannot be derogated from by contract).

As previously, where a contract is entirely domestic (i.e. all elements concern one country), any mandatory laws of that country are applied notwithstanding a choice of foreign law by the parties (A3(3)). Rome I adds a similar principle, as regards mandatory provisions of Community law, where a contract is entirely EU but a non-EU law was chosen (A3(4)).

In the absence of choice, the Rome Convention 'presumptions' as to the applicable law are no longer referred to as such, but instead presented as rules. That said, they remain rebuttable, although now only where the contract is manifestly more closely connected with another country (A4(3)).

Further, additional 'rules' have been introduced for particular types of contract (A4(1)). These apply instead of the default 'rule'

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(which points to the habitual residence of the 'characteristic performer' – A4(2)). However, most prescribe the obvious result of applying the default rule. They do not address more tricky scenarios where the characteristic performer is unclear. Thus the refinements are designed to increase certainty but some scope for argument remains. 'Closest connection' is still the backstop test if the rules cannot determine the applicable law (A4(4)).

Meanwhile, changes are made to the existing rules for contracts of carriage and consumer and employment contracts (A5, A6 and A8) and there are new rules for certain insurance contracts (A7) – contracts of reinsurance remain subject to the general rules.

Under A7(1) of the Rome Convention (excluded by the UK), effect could always be given to 'overriding mandatory' rules of a closely connected country other than that of the forum or the applicable law. Many suggested that the resulting uncertainty discouraged trade from outside the EU. A9(3) of Rome I, however, only gives effect to overriding mandatory rules of a third country which render performance of the contract in that country unlawful. This is a real improvement and reduces the risk that third country laws, of which the parties were unaware, might be applied unexpectedly.

An end to intra-EU forum shopping?

Since Rome I/II seek to ensure that the same law is applied irrespective of the jurisdiction in which a dispute is heard, one might suggest that, within the EU, the practice of 'forum shopping' has been curtailed and forum considerations are now unimportant. However, forum selection in fact remains a critical strategic consideration, both when drafting jurisdiction clauses and when commencing proceedings. The reasons for this include:

(1) The law of the forum governs procedural and evidential rules (Rome I/II, A1(3)). These differ markedly between states and can alter the outcome of a case. Differences include: available remedies, adversarial/inquisitorial judicial process, disclosure obligations, witness evidence, costs recovery and the effect of settlement offers. The quantification of damages also retains a procedural element at least in contract claims (Rome I, A12(1)(c) cf Rome II, A15(c)).

(2) Rome I/II sometimes envisage the application of substantive laws of the forum even when it is not the applicable law – examples include overriding mandatory rules of the forum (Rome I, A9(2); Rome II, A16) and public policy (Rome I, A21; Rome II, A26).

(3) The applicable law under Rome I/II is sometimes debateable. When faced with the option of applying either domestic or foreign law, courts tend to favour the former.

(4) Choice of EU forum might affect enforceability outside the EU.

Although there is already some suggestion that procedural rules in the EU might also be harmonised, that will be met with resistance and is unlikely to be effected in the short term. Consequently (and in any event), forum selection within the EU remains important notwithstanding the harmonisation of applicable law rules.