Commercial relationships increasingly have an international flavour. Parties are often based in different countries or their activities take place abroad. Consequently, questions of jurisdiction and governing law have an increasing prominence during contractual negotiations and in subsequent disputes.

**Governing law**

Harmonised rules now apply throughout the EU for determining the law applicable to contractual obligations (Regulation 593/2008) (Rome I) and non-contractual obligations (Regulation 864/2007) (Rome II). Rome II introduced for the first time the idea of parties selecting the law applicable to their non-contractual obligations (see News Brief “Rome II: introducing greater clarity on governing law”, www.practicallaw.com/1-385-1030).


Rome II has been applicable in the UK since 11 January 2009 (www.practicallaw.com/9-384-7949). It took direct effect without the need for implementing legislation, although secondary legislation was passed to remove certain inconsistencies in existing primary legislation (Law Applicable to Non-Contractual Obligations (England and Wales and Northern Ireland) Regulations 2008 (SI 2008/2986)).

**Party choice of law**

A key tenet of both Rome I and II is that a choice of law made by the parties will generally be upheld (Article 3, Rome I; Article 14, Rome II).

**Contractual obligations**

It is eminently sensible for parties to select the law which will apply to their contractual obligations. Otherwise, it will be difficult for them to determine what their rights and obligations are, both when drafting and complying with the contract. Those rights and obligations will depend upon the governing law which, absent an express choice, may not be clear.

Where no choice has been made, Rome I contains mechanisms for determining the applicable law (Article 4 and Articles 5 to 8). These mechanisms are more certain than under the Rome Convention (which broadly applies to contracts concluded on or after 1 April 1991 but before 17 December 2009). However, considerable scope for debate remains. Including a choice of law clause therefore considerably reduces the potential for argument in the event of a dispute.

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Non-contractual obligations

Similar advantages are often cited in support of making a choice of law for non-contractual obligations too. However, whether such a selection should be made is less clear cut because those obligations are much more of an “unknown”. Even for contract claims it is unclear, when drafting, which party will be in breach or in what respect, but at least the relevant obligations are set out. Non-contractual obligations, however, are, by their nature, more unpredictable, otherwise the contract would provide for them expressly.

It is therefore more difficult to select an appropriate governing law for them, particularly if parties are to act in numerous countries. So, although selection has the benefit of certainty (and provides some protection against the possible application of “alien” laws), that choice may not ultimately have a sensible or desirable effect.

The issue is therefore best considered on a case by case basis, taking account of where parties are to act and which are more likely to be the subject of a claim. It will commonly be concluded that, on balance, a choice of law should be made, but that decision should not be automatic. Absent a choice, the applicable law will be determined using the mechanisms in Rome II (Articles 4 and 5 to 12).

Limitations to party choice

It is important to be aware, both when contracting and if a dispute arises later, that despite parties’ choice, other countries’ laws may still be applied in some circumstances:

- Where all elements relevant to the situation at the time of the choice concern one country, but the parties selected a different country’s law, rules of the first country which cannot be derogated from by contract will nevertheless be applied - Article 3(3), Rome I; Article 14(2), Rome II. (Examples of some such rules in English law include certain provisions in the Unfair Contract Terms Act 1977 and the Consumer Credit Act 1974). Similar rules also apply to mandatory provisions of EU law, where the parties chose a non-EU law but all elements relevant to the situation at the time of the choice are located within the EU (Article 3(4), Rome I; Article 14(3), Rome II).
- Overriding mandatory rules of the forum (i.e. of the country whose courts are hearing the dispute) will be applied irrespective of the governing law - Article 9(2), Rome I; Article 16, Rome II. (Again, provisions within the Unfair Contract Terms Act 1977 and the Consumer Credit Act 1974 provide English law examples.)
- In contractual claims, effect may be given to overriding mandatory rules of a country other than that of the forum or the governing law, which render unlawful the performance of the contract in that other country (Article 9(3), Rome I). This is much narrower in scope than the Rome Convention equivalent (to which the UK was not subject), so the governing law is now less likely to be overridden by such rules.
- There are restrictions and limitations on party choice of law in contracts for the carriage of passengers and consumer, employment and certain insurance contracts (Articles 5 to 8, Rome I).
- Laws other than the governing law can affect certain issues, such as consent and material validity (Article 10, Rome I), formal validity (Article 11, Rome I; Article 21, Rome II) and incapacity (Article 13, Rome I). In non-contractual claims, account is also taken of rules of safety and conduct in the country where the relevant event took place (Article 17, Rome II).
- The governing law may not be applied if it is manifestly incompatible with the law of the forum (Article 21, Rome I; Article 26, Rome II).
Continued importance of EU forum selection

Following the introduction of Rome I and II, the question of which court hears a dispute, and thus forum selection clauses, might appear unimportant, since all EU courts must apply the same applicable law rules in any event. However, forum selection can still significantly affect the outcome of a dispute for a number of reasons:

- Non-EU countries are not bound by Rome I and II. If non-EU courts hear the dispute, their governing law rules may result in the application of different countries’ laws.
- Rome I and II envisage the application of substantive laws of the forum (including overriding mandatory and public policy rules) even when the applicable law is that of another country. Consequently, whether such rules are applied depends upon where in the EU proceedings are commenced.
- The law of the forum generally governs procedural and evidential issues (Article 1(3), Rome I and II). Rules differ considerably between countries, including the judicial process (adversarial or inquisitorial), disclosure obligations, presentation of evidence, and the availability and suitability of remedies.

Commercial and practical considerations must also be borne in mind when selecting a forum. These include: familiarity with procedures, publicity, language, geographical convenience and recoverability of costs. Further, some EU judgments are more widely or easily enforceable than others outside the EU, where judgment debtors and their assets may be located.

Some account can be taken of these issues when drafting forum selection clauses. Such clauses might limit where in the EU parties may commence proceedings and/or seek to prevent proceedings outside the EU. Alternatively, they might provide parties with additional options.

Forum selection and governing law: critical clauses

It remains crucial to include appropriate provisions on both forum selection and governing law in contractual documentation. It is remarkable how many contracts (often erroneously) contain one and not the other. Further, when drafting suites of related documents, parties should ensure that differing clauses do not conflict and are workable.

Parties often feel uncomfortable negotiating such clauses because they do not wish to be seen to be considering the prospect of litigation at that stage. However, their importance should not be underestimated, something illustrated by the volume of reported cases on these issues last year. They are not mere boiler plate clauses which can be cut and pasted from other documents without due consideration. They are key terms going to the heart of the parties’ fundamental rights and obligations and should be treated as such.