It is increasingly common for commercial contracts to have an international aspect, in that parties are located in different countries or their obligations are to be performed abroad.

The law which governs such contracts is a crucial issue. It can affect what the obligations of the parties are and the circumstances in which the contract may be terminated. It can even determine whether a claim can be made for breach, since limitation periods differ under the laws of different countries.

Governing law in contract claims – Rome I

For contracts concluded after 17 December 2009, the rules for determining the law applicable to contractual obligations will be found in a new Regulation No. 593/2008 (known as “Rome I”). It replaces the Rome Convention of 1980.

Rome I generally mirrors the main principles of the Rome Convention. However, it does make some additions and alterations. The key changes are noted below.

Choice of law made by the parties

The key tenet of Rome I remains that a choice of law made by the parties will generally be upheld (A3(1)). However, other laws may nevertheless be applied in some circumstances. While this was also the case under the Rome Convention, Rome I has changed some of the rules.

Under the Rome Convention, one such exception concerned rules which cannot be derogated from by contract (“mandatory rules”). Where all of the elements of a contract concerned one country only, that country’s mandatory rules applied despite the fact that the parties had selected a different country’s law. That remains the case under Rome I (A3(3)). Rome I also introduces a similar rule, in respect of provisions of Community law which are mandatory, where the parties chose a non-EU law but the contract is entirely EU-connected (A3(4)).

Applicable law in the absence of choice

The Rome Convention provided that, in the absence of choice, contracts were generally governed by the law of the country with which they were most closely connected, and set out “presumptions” as to which country that would be. Save for certain types of contract, these pointed to the location of the party effecting the performance which was “characteristic” of the contract. However, if the “characteristic performance” could not be determined, or if the contract was held to be more closely connected with another country, the presumption would not apply, or would be rebutted in favour of that other country.
Rome I has restructured and refined these provisions in an effort to increase certainty. First, the “presumptions” are now presented more like rules. However, such “rules” remain rebuttable. Second, it introduces additional, more precise “rules” which prescribe the governing law of particular types of contract (A4(1)). These apply instead of the default “rule”. (That rule, which states that the governing law is that of the country of habitual residence of the “characteristic performer”, now only applies if the contract is covered by none, or more than one, of the precise rules - A4(2).) Most of the new “rules”, however, simply expressly state the obvious outcome, for those types of contract, of the application of the default “rule”. They do not address circumstances when identifying the “characteristic performer” is more difficult. If the precise and default “rules” cannot determine the applicable law, “closest connection” remains the backstop test (A4(4)).

Although deficiencies remain, certainty is increased: the “rules” are now only rebuttable where the contract is manifestly more closely connected with another country (A4(3)), and some of the new “rules” are helpful. However, scope for argument remains when seeking to identify the “characteristic performer”, when considering whether a presumption might be rebutted, and when applying the backstop “closest connection” test. This means that the courts of different EU States might still reach different conclusions – something explored further below.

“Overriding mandatory” rules

Whether the governing law is determined by party choice or otherwise, the “overriding mandatory” rules of other countries can sometimes nevertheless apply in addition or instead.

Under Article 7(2) of the Rome Convention, “overriding mandatory” rules of the forum would be applied irrespective of the governing law. This remains the case under Rome I (A9(2)).

Under A7(i) of the Rome Convention, effect could be given to “overriding mandatory” rules of a closely connected country other than that of the forum or the applicable law. This was problematic and the UK contracted out of that provision. During the Rome I negotiations, its equivalent was a key battleground - and was a principal reason for the UK’s original decision not to be party. The main concern was that the uncertainty the provision created would discourage trade with non-EU parties, which might be apprehensive about the prospect of third country laws, of which they were unaware, applying unexpectedly.

As a result, the draft provision was considerably watered down. Its final form (A9(3)) only gives effect to “overriding mandatory” third country rules which render unlawful the performance of the contract in that country. This is a real improvement. It increases certainty and also improves the prospect that the provision will be applied in a uniform way throughout the EU.

Particular types of contract – changes and additions

Rome I also makes changes to the rules applicable in respect of contracts of carriage and consumer and employment contracts (A5, A6, A8) and introduces new rules for certain insurance contracts (A7).

Cross-border litigation – the EU ideal

The introduction of Rome I, like the Rome Convention before it, is part of a drive to harmonise the approach of EU Member States to cross-border litigation. That exercise was undertaken partly in an effort to end the practice of “forum shopping” within the EU.

The idea that different EU courts might reach different conclusions on the same case conflicted with EU ideals. The European
Commission was concerned about parties continuing to pick one EU court over another in order to obtain a more favourable judgment. Worse still, proceedings might be commenced in more than one EU court and produce irreconcilable judgments.

Consequently, universal jurisdictional rules were introduced – initially by the Brussels Convention, and latterly by Regulation No. 44/2001. Their aim was to increase certainty and ensure uniformity. They also sought to ensure that each dispute would only be heard by one EU court which, where possible, would also hear related disputes. Since this minimised the risk of conflicting judgments, common rules facilitating the easy recognition/enforcement of EU judgments were also introduced (by the same legislation).

Whilst these developments would have addressed the risk of parallel proceedings and conflicting judgments, a concern remained. Although only one court would hear and rule on a particular case, the outcome might still depend on the identity of that court as a result of its determination on governing law. This would be unpalatable in circumstances in which the jurisdictional rules oblige a court only loosely connected with the dispute, but “first seised”, to hear a case.

The answer to this concern was to harmonise the rules used to determine the governing law – the idea being that the same law would be applied irrespective of the forum. Such rules were introduced by the Rome Convention (and now Rome I) in relation to contractual obligations, and by Rome II (Regulation No. 864/2007) in respect of non-contractual obligations.

One problem with the Rome Convention was that it was not directly effective. Instead, it was implemented by each EU State separately, and some of its provisions were optional. Consequently, its application and interpretation sometimes varied from State to State – contrary to the theoretical ideal. By contrast, Rome I will be directly effective and such variations in implementation will not exist.

Rome I might thus be portrayed as the final piece of the EU jigsaw puzzle. So now the puzzle is complete, does it match the picture on the box?

Theory vs reality

Some of the European Commission’s goals have, no doubt, been achieved. However, the reality is that the EU ideal was always somewhat “utopian”. In particular, the harmonisation of governing law rules within the EU could not prevent intra-EU forum selection from affecting the outcome of disputes. This is for a number of reasons.

Firstly, as mentioned above, there remains some scope for argument as to the governing law under the terms of Rome I/II. When faced with the option of ruling that either domestic law or a foreign law applies, courts tend to favour domestic law, since it is familiar and easily applied. Thus if the governing law is debatable, a party seeking to argue that the law of a particular State is applicable might be best advised to sue in that State, if possible.

Secondly, the provisions of Rome I/II permit the application of substantive laws of the forum notwithstanding the fact that the applicable law is that of another country. Thus, the question of whether certain “overriding mandatory” rules (Rome I, A9(2); Rome II, A16) and rules of public policy (Rome I, A21; Rome II, A26) will be applied will depend upon where the dispute is heard.

Thirdly, and perhaps most importantly, procedural and evidential issues are governed by the law of the forum (see Rome I/II, A1(3)) and such rules differ considerably between States. There may be attempts to harmonise such rules too in an attempt to address this issue, but any such task is unlikely to be effected in the near future, if at all. Rules of procedure and evidence can change the result of the

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proceedings. Differences currently include: the nature of the judicial process (it may be adversarial or inquisitorial), and obligations concerning disclosure and the presentation of evidence. Available remedies, and the circumstances in which they may be awarded, also vary.

Intra-EU forum selection – still crucial
These are not the only matters which affect forum choice. Other factors include commercial and practical considerations, such as: the familiarity of the parties with the respective forums, the likely effect on publicity, language differences and geographical convenience, as well as the recoverability of costs. Further, the judgment of one EU State may be more widely or easily enforceable than another in non-EU countries where defendants, or their assets, may be located. That could also be a determining factor when deciding where to sue.

Consequently, the harmonisation of applicable law rules does not render unimportant the question of where to commence proceedings. On the contrary, forum selection within the EU remains, and will always be, a crucial strategic consideration, both when drafting jurisdiction clauses and when issuing proceedings. When a claimant has options, it must make its decision quickly. Otherwise, the other party might issue first in its preferred EU jurisdiction (perhaps seeking a declaration of non-liability), and take advantage of the “court first seised” principle.