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The Law of Contract under the Rome Convention

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Yfirlýsingar:

Ég lýsi því hér með yfir að ég einn er höfundur þessa verkefnis og að það er ágóði eigin rannsókna.

Undirskrift

Það staðfestist hér með að lokaverkefni þetta fullnægir að mínum dómi kröfum til B.A-prófs í félagsvísinda- og lagadeild.

Undirskrift

ABSTRACT

Each nation, territory or country possesses its own set of laws. It would be beneficial and advantageous if these laws can be harmonizing. In International business and work several harmonizing process of international laws took place. This creates few problems and complexity in international affairs. The applicability of certain laws therefore becomes the basis of a legal system and how this can be utilized in the greater complexity of certain involvements and participations. The harmonization of these different laws has been addressed through private international law or systems of conflict of laws. The need to harmonize these laws, as mentioned, can be seen in the fact that increasing globalization has led to more international transactions in which the participating parties are also protected by their respective national laws. The European Union, together with some other nations, ratified a unification system for the application of contractual obligations that would be followed for the European Economic Community and its members. Many countries of Europe signed the Rome Convention after the preparation of it. The Rome Convention, as it came to be known, is the Applicable Law to Contractual Obligations and was convened to create at least a harmonized, if not a unified, body of law within the scope of the European Union. This thesis gives insights on the challenges faced by individuals in international transactions while undertaking contracts with respect to Rome Convention.

ÚRDRÁTTUR

Hver þjóð hefur sitt eigið lagakerfi. Með aukinum alþjóðlegum viðskiptum hefur verið nauðsynlegt að setja og samræma lög sem nauðsynlegt er að fara eftir þegar aðilar eru að semja á milli landa, þ.e. hvaða lög eiga við. Það er til hagsbóta ef hægt væri að samræma þau lög sem gilda á milli landa. Ákveðin samræming laga á sviði alþjóðaviðskipta hefur átt sér stað. Það eru til staðar ákveðin flókin vandamál þegar um er að ræða alþjóðleg mál. Nýtinginn af ákveðnum lögum hafa þar af leiðandi orðið grunnur af lagakerfi sem nota má til að leysa úr ágreining um flókna aðild að málum. Samræming á þessum mismunandi lögum er á sviði alþjóðlega einkamálaréttar eða kerfi um hvaða lög eiga við. Þörfin á því að samræma þessi lög er afleiðing af aukinni hnattvæðingu sem hefur verið þess valdandi að meiri alþjóðleg viðskipti eru á milli aðila sem eru einnig undir lögum þeirra heimalands. Evrópusambandið, í samstarfi við fleiri lönd, staðfestu samræmt kerfi sem beita á samningsskuldbindingar fyrir aðila Evrópska efnahagssvæðisins. Mörg lönd innan Evrópu hafa skrifað undir Rómarsáttmálan. Rómarsáttmálinn á við um samningsskuldbindingar og var settur saman til að minnsta kosti til að samræma, eða jafnvel sameina, lög innan Evrópu. Þessi ritgerð gefur innsýn í það viðfangsefni þegar einstaklingar standa frammi fyrir því að skuldbinda sig í alþjóðlegum viðskiptum með tilliti til Rómarsáttmálans.

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CHAPTER 1 INTRODUCTION

This dissertation is divided into five chapters, viz: (1) Introduction (2) International Private Law, (3) Harmonization, (4) The Rome Convention, and (5) Article 4 and the International Business Community.

In the Introduction the paper discusses briefly the subject matter in connection with the objective of the author as well as what he intends to undertake a way of posing the question of the dissertation. In short the Introduction will give the reader an overview of the dissertation's content.

In Chapter Two the dissertation discusses the subject of international private law, whereby the author seeks to define what it really entails. We shall see how international law is utilized and enforced in the arena of international business as well as in international relations.

The main theme of Chapter Three is the need to harmonize private international laws and the challenges that are faced during the harmonizing process. This chapter further examines the essential key factors in the harmonizing process of international laws. This chapter goes beyond that and offers a discussion of the role of conventions such as the Hague Conference on Private International Law, the United Nations Convention on Contracts for International Sale of Goods and the UNIDROIT.

Chapter Four gives an account of the Rome Convention and the reason for its birth. The chapter goes on to cover in detail the scope of the Convention, expressed selection, implied selection, consumer contracts, contracts of employment, material validity, formal validity, transfer obligation, *ordre public*, composite or federal states and the final notes of the Rome Convention.

Chapter Five explores in further detail the issues raised in Article 4. In other words it will detail what the five paragraphs of Article 4 entail. It will further try to evaluate how Article 4 can be reviewed with respect to the international business community. This chapter then examines how Article 4 relates to the international private

law in an effort to show, *inter alia*, how the relationship of Article 4 and international private law can be harmonized for the benefit of individuals involved in international commerce.

It would be a real advantage to legal practitioners if the conflicts of law rules were harmonized across the EU. In particular, harmonization of the rules means that members of the EU Bar could advise clients involved in cross-border litigation with more confidence as to which Courts within the EU are likely to accept jurisdiction; and what system of law those Courts will apply to resolve their clients' disputes. This is particularly important in the field of contractual disputes – so that cross-border trade may be effected in a way making parties reasonably confident as to which legal systems govern their contractual relationship and as to which Courts will have jurisdiction to resolve a cross-border dispute.

It is therefore important to establish measures which will help promote that legal certainty. The harmonization of contractual choice of law issues are likely to result in more substantial and practical benefits to business practitioners than attempts to harmonize the domestic contractual laws by the introduction of a novel and inherently uncertain Europe-wide system of contract law. Harmonization of the contractual choice of law issues is best achieved by the adoption of a Community instrument, with the ECJ therefore having jurisdiction to interpret the instrument and ensure uniformity of application across the EU.

This dissertation will explore the issues related to choice of law in contract under the Rome Convention and particularly Article 4 as its main area of concern. The paper aims at achieving this by examining international private laws with reference to the Rome Convention, Article 4. It will further tackle the issue of harmonization whereby it will evaluate matters with respect to the Hague Conference on Private International Law and the United Nations Convention for International Sale of Goods as well as the UNIDROIT.

CHAPTER 2 INTERNATIONAL PRIVATE LAW

2.1 Introduction

The main concern of this chapter is to explore what is the essence of conflict laws, their utilization and how such laws are enforced. This chapter further discusses the purpose of international private laws and the factors that influence international private laws. Additionally, it covers the means of settling conflicts arising in the international business as well as the challenges which arises when addressing such conflicts.

2.2 International Private Law

Each nation or territory possesses its own set of laws. This therefore defines and distinguishes certain jurisdictions, especially in terms of how laws apply to certain situations and persons. These laws therefore become the basis of court cases especially when it comes to making decisions in terms of its outcomes. The applicability of certain laws therefore becomes the basis of a legal system and how this can be utilized in the greater complexity of certain involvements and participations.

Although there is indeed the application of certain laws according to jurisdiction and as to who and what the law applies to, it is important to address how certain situations can also include foreign elements. Interestingly, such cases can be deemed common especially when it comes to certain relations involving persons of different nationalities and transactions between and among foreign entities. In this case, the means to unify these potential contradictions is by means of the conflict of laws system or international private law in which the jurisdiction applied becomes the *lex causea*.¹

In this case, there is the recognition of the presence of foreign laws that may also create an impact in other national or territorial jurisdictions. What can be confusing, in this case, is the matter of the choice of law.² Hence, jurisdictional questions may arise.

¹ Follows the characterization of the foreign state which is the principal contact point; the law of the state with which the act or transaction is most closely connected.

² Collier, J.G. (2001). Conflict of Laws. Cambridge University Press, Cambridge.

The utilization of the conflict of laws or international private laws becomes a source or reference point of legal concerns, especially in terms of the working jurisdiction in a specific case. Collier describes the conflict of laws as follows:

“The conflict of laws is concerned with all of the civil and commercial law. (It is not concerned with criminal, constitutional or administrative cases.) It covers the law of obligations, contract and tort, and the law of property both immovable and movable, whether a question of title arises *inter vivos* or by way of succession. It is concerned also with family law, including marriage and divorce, and guardianship and the relations of parent and child. Recognition or enforcement of a judgment in some civil or commercial matter may be called for whether it was for breach of contract or a tort (delict) or dealt with the ownership of property or concerned status, such as a decree of divorce or nullity of marriage or a custody or adoption order.”³

The main purpose of private international law is to resolve any potential conflicts when it comes to any contradictions as to how laws may work in a certain jurisdiction. Basically, it can be said that legal systems have some universal characteristics, especially in terms of much of the Western world and its former colonies, whether the system is civil or common law. However, some jurisdictions function by religious laws such as the case in Islamic nations. Potential conflicts, in this regard, can be basically seen in the details of the system, especially in terms of how past cases have influenced certain convictions in a specific legal jurisdiction.

There are therefore a number of factors that can be influenced by conflict of laws although basically they are mainly obligatory in nature. In this regard, such cases demonstrate how certain contracts of varying nature may be deemed effective provided that each component or participating party is protected by their respective laws. In addition to this, it is also important to take note of the applicable law as to where and

3 Collier, J.G. (2001). Conflict of Laws. Cambridge University Press, Cambridge, England.

which the contract is bound. Hence, for example, a potential conflict can be found if participating parties come from different national jurisdictions although the contract is enforced in another jurisdiction.

There are a number of means to settle any conflicts which can be initiated between and among participating parties. It can be observed that these processes are common, from litigation to settlement between the parties involved.⁴ In any case, there is the intention to implement a process of settlement without having to have the court involved as much as possible given the costs that come with resolving cases in courts.

Fletcher mentions that the necessity of coming up with an effective system can be seen, from a theoretical perspective, by the presence of cross-border insolvency.⁵ According to the author, insolvency has always been a reality and a part of organized human society. Through the evolution and development of nations with the working factors of property, obligation, credit, and commercial exchange, the tendency is that these elements put humans in place when it comes to manipulating their affairs. Hence, the self-interest can be found in their stand in terms of enhancing their sum total of their material well-being. Hence, with the potential and possibility of an unenviable state of negative net worth, insolvency may arise or as what Fletcher points out to be commonly called as “balance sheet insolvency.”⁶ Since a number of factors in the modern world have been based on the valuations of total assets and liabilities, the need to resolve negativity thereby becomes a common issue in disputes.

4 Methods of dispute resolution include lawsuits, collaborative law, mediation, conciliation and a series of negotiations (“Dispute Resolution”, 2007).

5 Fletcher, I. (1999). *Insolvency in Private International Law: National and International Approaches*. Oxford University Press, Oxford.

6 Fletcher, I. (1999). *Insolvency in Private International Law: National and International Approaches*. Oxford University Press, Oxford.

Transactions can be found in the increasing activities in trade and other forms of relations across foreign entities. Contractual obligations that are transnational in nature have also reflected the increasing network of international relations at various levels and characteristics. The liberalization of these relations also reflects how globalization has been a significant source of influence. In a number of instances, the need to address these concerns has been identified. For example, one of the important issues that still need to be addressed in a definitive manner is the policing of and the laws with regard to the Internet. Although the jurisdiction in this venue is difficult considering the web of relations and transactions found in this platform, this example demonstrates how cases with international aspects have become a more frequent and common reality today.

The challenge in addressing cases with international aspects can be found in identifying an agreed system which the involved parties can be subject to. North explains the fundamental questions in examining legal issues that may involve different jurisdictions:

“First, if the issue were to involve litigation in this country, would our courts have jurisdiction to entertain the proceedings? Second, if the issue has already resulted in litigation in another jurisdiction will the decision of the foreign court be recognized and enforced in this country? Both these questions have an interesting, and narrowing, characteristic. They are concerned with matters which have reached the point of breakdown, i.e. of litigation and judicial decision-making. The third issue is really very different. It is concerned with the law to be applied to a civil legal issue whose circumstances involve factors connected with more than one jurisdiction.”⁷

North further observes that in these circumstances, the issue of the choice of law can be raised although there is still the concern in terms of the legality and effectiveness of future conduct. For example, the author raised a concern on whether, given that parties

7 North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford. (171).

may have the option to choose the best dispute resolution process for their situation, if there is a freedom for the parties to choose the law to govern their transnational affairs⁸. In this regard, the acting principle behind the choice of law can be found in the following thesis:

“The principle of party autonomy can be justified entirely by reference to the freedom of disposition the parties enjoy in the corresponding substantive (forum) law.”⁹

This implies freedom of choice in all areas in which, in principle, the parties are deemed to be equal partners in a legal relationship or where they are allowed, by and large, to be their own master. Generally, these are the areas of substantive law where mandatory rules are scarce as in contracts, torts, matrimonial property or succession.

Based on this statement, another important issue that can be raised is whether a certain system has room for such flexibility especially in terms of autonomy when it comes to the choice of law. An agreement among the parties in terms of the governing law can be regarded to be the simplest way, in addition to having the parties select one or more countries before whose courts any litigation is to take place. However, North observes that it would be wrong to exclude from consideration the element of choice which may be involved indirectly.¹⁰ For example, it is possible that some laws are not applicable in a certain jurisdiction and with respect to a particular judicial system, have laid down for determining the applicable law. Another instance is the issues as to the freedom to is seen choose the jurisdiction in which to proceed carries with it a determination of the law to be applied. Furthermore, there is also the case in which the choice is exercised through the rules relating to the pleading of foreign law.

8 North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford.

9 De Boer, (1990) 54 *RabelsZ*24, 37, as cited in North (1993, 172).

10 North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford.

In this case, the choice of law can be applied through an indirect or implied choice although this depends on the nature of the case.¹¹ In this situation, the parties involved are subject to a common system in which an agreement is usually unilateral. In direct choice, however, it can be observed to include more complex yet direct forms of agreement such as cases involving contracts. This is because the involved parties can initially choose the legal system that would govern its obligations, in addition to the rights of those who are involved. For example, this is clarified in the Rome Convention as follows “A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case.”¹²

However, North points out that in certain legal systems, there are still the limits to freedom of choice such as the case of the common law. In the scope of contracts, a potential problem can be found as to how law and contract can be dissociated thereby giving the parties the freedom to make the choice of law. In this regard, in regions where there are a number of transnational transactions involved, it is important to identify a harmonization process that will reconcile potential conflicts.¹³

11 Example of cases applicable is cases related to divorce, marriage and choice through pleading.

12 Contracts (Applicable Law) Act 1990. 48 Article 3(1) of the Rome Convention.

13 North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford.

CHAPTER 3 HARMONIZATION

3.1 Introduction

This chapter gives an account of the need to harmonize international private international laws and the challenges that are faced during the harmonization process. Additionally it provides a discussion of the role of conventions such as the Hague Conference on Private International Law, the United Nations Convention on Contracts for International Sale of Goods and the *UNIDROIT*.

3.2 Harmonization

The harmonization of these different laws has been addressed through private international law or systems of conflict of laws. The need to harmonize these laws, as previously mentioned, can be seen in the fact that increasing globalization has led to more international transactions in which the participating parties are also protected by their respective national laws. With the reality of globalization however, it seems that cases that have foreign elements to them are unavoidable. To apply one national legal system against another however may not be a completely satisfactory approach. It might be in the parties' better interests to apply a law that has been conceived precisely with these international realities in mind. There have been various efforts made to come up with a uniform system that can be used to address such cases. Giannuzzi describes an effective set of these frameworks, through Conventions, as follows:

“In order to succeed, international commercial law must provide a level of predictability and certainty to contractual legal issues, allowing parties to structure their business transactions. Parties may successfully navigate international commercial waters when they are certain that their agreements will be legally binding and they understand how those agreements will be interpreted, if ever challenged. To apply laws in the international business community successfully, laws and rules must be consistently reliable.”¹⁴

14 Giannuzzi, K.B. (1997). The Convention on Contracts for the International Sale of Goods: temporarily out of 'service'? Journal article ; Law and Policy in International Business, Vol. 28, 1997.

However, although there are the initiatives to ensure that these legal frameworks address the current issues faced by the concerned parties, challenges arise when some disputes are hard to resolve. In addition to this, although these conventions provide a set of laws that intend to harmonize the different laws involved in a particular case (as based on the respective laws that protect the rights of the parties involved), the charter of these conventions are still subject to interpretation, in addition to the discretion of the involved parties as to which system their relationship is governed by. In the case of incidences that are not contractual in nature, some conventions were formulated that aim to address which different legal cases that demonstrate an increase dependence on international law for the purpose of finding a means to resolve.

It should be noted that similar to any law, these charters and documents are subject to interpretation. This is to say that these conventions do not hold the absolute solution to any possibility of conflict or dispute. These documents contain divisions that aim to address relevant issues which are then eventually interpreted depending on the specificities of the case. For example, Gianuzzi observes up that in CISG,¹⁵ arguments as to the differences between “services” and “goods” have been subject to debate.¹⁶ There is also the fact that some industries are governed by certain regulations, in addition to the presence of other contract-related directives which can also contribute to the legal conditions of a specific case. Means to clarify the jurisdictions of these laws are initially established as based on the agreement among contracting parties although it is still possible that these contract laws may have to overlap or even contradict with the interests of the parties involved.

It is important to establish a sense of harmonization in which not only the convention gets to protect the respective rights of the parties involved, the convention also needs to establish a venue if the contract is going to be protected as well. Hence, a

15 Convention on Contracts for the International Sale of Goods.

16 Giannuzzi, K.B. (1997). The Convention on Contracts for the International Sale of Goods: temporarily out of 'service'? Journal article ; Law and Policy in International Business, Vol. 28, 1997.

sense of flexibility and defined jurisdictions can be observed as important requirements in order to effectively enforce a legal framework where differences in the legal tradition are acknowledged and addressed. In this regard, the harmonization process is based on certain principles that can be deemed to work for all parties involved despite the presence and the degree of differences.

In the harmonization of these laws, an important point that Lowenfeld notes out is the principle of reasonableness that prevails in private international law. This presents the principles from the perspective of the expression of values as practiced in the context of sovereignty; as Lowenfeld further explains:

“The principle of reasonableness does not deny that different values are reflected in these decisions, and interests of varying strengths. What it calls for is balancing by states that are by courts and governments, of the respective values and interests of their own and other states particular interests, not abstract ‘sovereign interests’”.¹⁷

A set of agreements can be therefore seen in the attempt to harmonize possible conflicting laws, especially when it comes to creating a venue for negotiations until the participating parties are able to identify what can be deemed reasonable with respect to meeting each other’s interests.

An example pointed out by Collier when he addressed the question of the need for private international law which is becomes a basis of harmonization; he then explained this in the context of the utilization of foreign laws through private international law in English courts:

“First, a great injustice might be done to a foreigner, who is abroad and who has not agreed to submit to the English court a dispute arising from a transaction which is

17 Lowenfeld, A. (1996). *International Litigation and the Quest for Reasonableness: Essays in Private International Law*. Clarendon Press, Oxford. (230)

unconnected with England, by summoning him before that court and so placing him in the dilemma that either he has to incur the inconvenience and expense of coming here to defend his interests or he has to run the risk of a judgment being given against him in his absence and so putting in peril assets he may possess here. The second is that the assumption of jurisdiction and determination of rights might well be a waste of effort, in particular if it results in making orders affecting property abroad which the court has no means of enforcing.”¹⁸

The harmonization of these enforced laws can be found in a series of conventions that address these differences, thereby creating a common legal framework when it comes to the practice of law concerning different legal matters. Examples in addition to the Rome Convention are the Hague Conference on Private International Law, the Vienna Convention on the International Sale of Goods, and the UNIDROIT Principles of International Commercial Contracts. It should be noted that not all these conventions are mandatory; this is to say that some contracts are subject to a certain convention according to the agreement between parties; the same way international private law is not necessarily applicable to all unless certain conditions subject cases to a specific international private law.

3.3. The Hague Conference on Private International Law

The Hague Conference of Private International Law or HCCH is a global inter-governmental organization composed of 60 Member States with its work encompassing more than 120 countries. The role of this convention is to serve as a venue for “different legal traditions, it develops and services multilateral legal instruments, which respond to global needs”. The mission of the HCCH is stated as follows:

“The statutory mission of the Conference is to work for the "progressive unification" of these rules. This involves finding internationally-agreed approaches to issues such as jurisdiction of the courts, applicable law, and the

18 Collier, J.G. (2001). Conflict of Laws. Cambridge University Press, Cambridge, England. (377)

recognition and enforcement of judgments in a wide range of areas, from commercial law and banking law to international civil procedure and from child protection to matters of marriage and personal status.”¹⁹

Based on this, the extent or coverage of the HCCH is extensive. As a bridge between different legal systems, the HCCH has provided and reinforced legal certainty and security which nations and involved parties can rely on when it comes to its legal issues.

The HCCH is determined by a series of Hague Conventions which have been taking place since 1893.²⁰ These Conventions address relevant issues that would become a subject in international private law. Hence, according to the HCCH, the following areas have been mostly ratified by the conferences: ²¹

- Service of process
- Taking of evidence abroad
- Access to justice
- International child abduction
- Intercountry adoption
- Forms of testamentary dispositions
- Maintenance obligations
- Recognition of divorces

In addition to this, the HCCH has also managed to address changes brought about by time, especially in terms of the development and evolution of the society. In this case,

19 ‘Overview’. N.d. Hague Conference on International Private Law. [Online] Available at: http://www.hcch.net/index_en.php?act=text.display&tid=26

20 The Hague Conference on Private International Law .

21 ‘Overview’. N.d. Hague Conference on International Private Law. [Online] Available at: http://www.hcch.net/index_en.php?act=text.display&tid=26

the HCCH has also identified important issues that would be critical for the information society today; the organization has identified these issues as follows:²²

- electronic commerce
- conflict of jurisdictions
- applicable law and international judicial and administrative co-operation in respect of civil liability for environmental damage
- jurisdiction and recognition and enforcement of decisions in matters of succession upon death and questions of private international law relating to unmarried couples
- the law applicable to unfair competition as well as assessment and analysis of transnational legal issues relating to indirectly held securities and security interests

Based on these different issues, it is evident that the need to harmonize can be found in the increasing relations across borders. This can be also seen in the varying issues that the HCCF covers which are interestingly focused on relations that can be argued to be contractual in nature, in addition to events that may concern cross-border negotiations.

3.4 United Nations Convention on Contracts for the International Sale of Goods, 1980 (CISG)

The CISG can be considered as among the most well-known international private law as recognized by nations and organizations. As Gianuzzi explains:

“One reason many consider the CISG a hallmark in international law is its wide acceptance and ratification by countries around the world. The CISG applies to "contracts

²² ‘Overview’. N.d. Hague Conference on International Private Law. [Online] Available at: http://www.hcch.net/index_en.php?act=text.display&tid=26

of sale of goods between parties whose places of business are in different States" and governs issues involving the formation of a contract for the sale of goods and the rights and obligations arising there from. Its provisions address a multitude of issues often raised in international commercial contracts--everything from how an offer or acceptance may be made to how to resolve problems of non-conformity of goods, remedies, and damages for breaches of contracts. It is a self-executing treaty and is therefore part of the domestic law of each Contracting State. Yet, parties may choose to avoid application of the Convention or to vary from any of its provisions in their private contracts."²³

The CISG evidently represents the business and commercial interests of organizations located in different national jurisdictions. This can be considered critical given the amount of world trade that has been taking place today. The convenience in having CISG as the charter that will govern the contract among these contracting parties is due to its uniformity and global recognition. A number of potential obstacles are also tackled by the CISG charter; this is made possible through the CISG channel in which similar rules for sales contracts are created which may also give way to the removal of the barriers in trade legislations.²⁴

3.5 The UNIDROIT

The UNIDROIT²⁵ is another internationally recognized source when it comes to the principles of international contracts. This body basically offers a set of principles that aim to serve as guidance to the governance of contracts intended at the international legal and business communities. This is done through a "balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political

23 Giannuzzi, K.B. (1997). The Convention on Contracts for the International Sale of Goods: temporarily out of 'service'? Journal article ; Law and Policy in International Business, Vol. 28, 1997

24 Andersen, Camilla Baasch (2005). "The Uniform International Sales Law and the Global Jurisconsultorium". Journal of Law and Commerce. 159-179.

25 International Institute for the Unification of Private Law

conditions of the countries.”²⁶ Let us now turn to an examination of the Rome Convention.

²⁶ Principles of International Commercial Contracts, 1994 – UNIDROIT. 1993. Lex Mercatoria. [Online] Available at: <http://www.jus.uio.no/lm/unidroit.contract.principles.1994/doc.html>

CHAPTER 4 THE ROME CONVENTION

4.1 Introduction

This chapter gives an account of the Rome Convention. The chapter covers in the scope of the Convention, express selection, implied selection, consumer contracts, contracts of employment, material validity, formal validity, transfer obligation, *ordre public*, composite or federal states and the final notes of the Rome Convention.

4.2 The Rome Convention

On the 19th of June 1980 in Rome, the European Union, together with some other nations, ratified a unification system for the application of contractual obligations that would be followed for the European Economic Community and its members. The Rome Convention, as it came to be known, is the Applicable Law to Contractual Obligations and was convened to create at least a harmonized, if not a unified, body of law within the scope of the European Union. The text of the Convention has a total of 33 articles, and a preamble. Although the system was set up in 1980, it was not until 1 April 1991 that the Convention came into force.

Like other Conventions, the Rome Convention was established in order to address specific issues that involve the legal relations among organisations and other parties that are protected by different national laws. The Rome Convention can be considered as a further step in the unification process of the European Community.

4.2.1 Article 1 - Scope of the Convention

The Scope of the Convention is defined as follows:

“The Convention applies to contractual obligations that are subject to the involvement of different countries.

Contractual obligations apply to all contracts except for

- wills and succession; property rights within the context of matrimony; rights and duties based on family relationship, parentage, marriage or affinity, which can also include obligations towards illegitimate children;
- Cases that question the status or legal capacity of people

- Contracts that include obligations towards under bills of exchange, cheques and promissory notes and other negotiable instruments
- Arbitration agreements and agreements on the choice of court
- Issues on the law of companies including the creation, incorporation, and personal liability of officers
- The constitution of trusts and the relationship between settlers, trustees and beneficiaries
- Evidence and procedure, without prejudice to Article 14

The Convention does not apply to contracts of insurance and contracts of re-insurance.”²⁷

Article 1 delineates the scope of the Convention, which includes all choice of law issues that involve contractual obligations. Under Article 10, it is stated that once this is selected, the *lex causae* will then govern the following:

- “(a) The interpretation of the case and the law;
- (b) Performance, but in regard to the manner of performance and the steps that must be made in case of ineffective performance, the *lex loci* solutions (the law of the place in which performance takes place) must be taken into consideration;
- (c) Within the limits of the powers given to the forum court by its procedural law, the consequences of breach, including the assessment of damages in so far as it is governed by the law;
- (d) The various ways of extinguishing obligations, and the limitation of actions; and
- (e) The consequences of the nullity of the contract;”²⁸

²⁷ Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

²⁸ Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

Some issues with a separate characterization were excluded from the scope of the Convention. These include, among others:

- 1.) The status or capacity of natural persons. Article 11 covers the situation where two people who are physically present in one state make a contract, and both parties are capable under the *lex loci contractus*. One person cannot suddenly claim incapacity under another law unless the other party was made aware of this incapacity at the time the contract was made or was unaware of this incapacity because of negligence;²⁹
- 2.) Contractual obligations relating to succession and all rights claimed in property in a marriage or family relationship, especially where the question of entitlement of an illegitimate child is made;³⁰
- 3.) Obligations occurring under negotiable instruments including bills of exchange, cheques and promissory notes and connected to their being negotiable;³¹
- 4.) Arbitration agreements and agreements on the choice of court;³²
- 5.) Questions that are under the law of the companies and other bodies;³³
- 6.) The question whether an agent is able to bind a principal to a third party;³⁴
- 7.) The constitution of trusts and the relationship between settlers, trustees and beneficiaries;³⁵

29 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

30 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

31 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

32 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

33 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

34 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

35 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

8.) The evidence and procedures save that, under Article 14, the Applicable Law applies to the extent that it contains, in the law of the contract, rules that raise presumptions of law or determine the burden of proof.³⁶

9.) The question of whether a contract of insurance covers a risk situated in the territories of one of the Member States is determined under the municipal law of the relevant states. This does not cover contracts of reinsurance however.³⁷

Reinforcement of the Convention is an important indicator when it comes to the applicability of the relevant laws. In the *Société Bachmann c/ Kettner OHG* case,³⁸ contract formation and the reinforcement of the convention came into question especially as to whether the laws of the convention would be applied to the case. The case was about the claims to the payment of work fulfilled which was disputed between a German and a French company. Basically, although this can be regarded as a situation that can be handled by the Convention, the date of the formation of the contract (September and October 1988) does not make this a case covered by the Convention which would be only reinforced 1 April 1991. Recognition of the existence of the Rome Convention is significant. In the *Soc. Cameroun shipping line c/ Soc. Bomaco* case,³⁹ the French lower court was seen to have violated articles 3§1 and 10 of the Rome Convention since the court only applied French law exclusively in a case where the involved parties and the contract was also covered by the English law.

4.2.2 Express Selection

36 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

37 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

38 Société Bachmann c/ Kettner OHG. Cour d'appel de Paris, 1ère chambre. 1993, December 14

39 Soc. Cameroun shipping line c/ Soc. Bomaco. FRANCE, Cour de cassation - chambre commercial, 1997, May 20

Article 3 is the first uniform rule under the Rome Convention. Article 3 expresses the general rule that the parties to a contract have the freedom of choice over the Applicable Law. This can be expressed either in words or by the terms of the contract or the circumstances of the case. The choice may apply to the whole or just a part of the contract and the choice can be revoked. The article states:

“1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

3. The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called "mandatory rules".

4. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 8, 9 and 11.”⁴⁰

The important aspect of this provision is that the contracting parties can initially clarify the scope and the limitations of the contract within the context of a particular law. The presence of different contracting parties represented by different laws can somehow challenge the stability of the contract especially if the laws of contract of a particular jurisdiction are not as favourable towards the nature of the business and transaction of the

40 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

contracting parties. In this regard, through express selection, there is an initial agreement as to how the contract generally works within the legal context. The advantage in this is that both parties have established a sense of harmonization, especially when it comes to referring to a certain set of laws throughout the course of the contract.

An example of this is the case between a German company and a Dutch construction company who got into a dispute on the remaining remuneration for a project.⁴¹ In order to resolve the dispute, a solution is to identify which applicable law would serve best the interests of the contracting parties. In the end, both companies agreed to apply the German DIN rules (general standards for construction works) and the German Civil Code. According to the Rome Convention, such exercise is allowed since both parties agreed as to which jurisdiction would govern the contract and which system would resolve the conflict.

Another example is the case between N-GmbH (limited company) and a Norwegian company regarding a construction dispute.⁴² The root of the problem was defective workmanship as brought by the Norwegian construction company with the buildings built on German soil. The disputes can be seen in the two contracts: contract for the construction and the architecture contract. The choice of law was eventually expressed by the German court which deemed the international jurisdiction for German

41 See Bundesgerichtshof (BGH), 1999, January 14. The plaintiff (a Netherlands construction company) and the defendant a (German company) concluded a construction contract regard the renovation of a hotel situated in Germany. Later the plaintiff sued for the remaining remuneration.

42 N.a. Bundesgerichtshof (BGH), 2000, December 7, in 1996 the N-GmbH (limited company) concluded a contract with the defendant a Norwegian construction company for the construction of some houses in Germany. Later the N-GmbH assigned the claims to the plaintiff a German company. Because of some defective workmanship the plaintiff sued the defendant for removal of the damages and for compensation. The defendant denied first that a contract for the construction of the houses (construction contract) and second that a contract for the supervision of the construction site (architecture contract) had been concluded.

courts although the appellate court affirmed the international jurisdiction concerning the construction contract but not the architecture contract.

Based on this, the choice of law is up to the contracting parties. Although there can be some form of influence, the Convention basically demonstrates that contract cases are not automatically subject to a specific set of laws, and that the involved parties have the freedom to choose the jurisdiction that would be most applicable to the case.

4.2.3 Implied Selection

In implied selection, there is the absence of express choice and the applicable contract is then subject to the laws that are closely associated to the case. Article 4, which is the most controversial provision of the Convention, sets this out as follows:

“1. To the extent that the law applicable to the contract has not been chosen in accordance with article 3, the contract shall be governed by the law of the country with which it is most closely connected. Nevertheless, a severable part of the contract which has a closer connection with another country may by way of exception be governed by the law of that other country.

2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated

3. Notwithstanding the provisions of paragraph 2 of this Article, to the extent that the subject matter of the contract is a right in immovable property or a right to use immovable property it shall be presumed that the contract is most closely connected with the country where the immovable property is situated.

4. A contract for the carriage of goods shall not be subject to the presumption in paragraph 2. In such a contract if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the consignor is situated, it shall be presumed that the contract is most closely connected with that country. In applying this paragraph single voyage charter-parties and other contracts the main purpose of which is the carriage of goods shall be treated as contracts for the carriage of goods.

5. Paragraph 2 shall not apply if the characteristic performance cannot be determined, and the presumptions in paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.”⁴³

Since it is possible that contracts are not initially determined by a jurisdiction, the Rome Convention therefore provides provisions on instances in which cases have to identify the governing law for a particular contract. In this case, the Rome Convention also works with the different applicable laws in assessing whether the case should be referred to with respect to a particular law. This also applies if the case uses or refers to other Conventions such as the Brussels Convention.

An example is the case *Otto Kogler v. Eurogames S.r.l.*⁴⁴ The defendant argued that since his case was based on the conditions of the Italian jurisdiction, he pointed out

43 Rome Convention, available at: http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

44 *Otto Kogler v. Eurogames S.r.l.* Corte di cassazione (Cass.), 2001, June 11. Otto Kogler was ordered to pay a sum of money to its creditor (Eurogames) by an Italian judge (Tribunale di Forlì). He asked the judges to deny Italian jurisdiction, because the contract contained a clause of reference to the Austrian law. Even if it was written in art.8 (related to guaranty), it has to be referred to the whole contract. Besides this, the contract was a sale in exclusive. Following art. 4, n.1 Rome Convention (closer connection), it has to be applied Austrian law, because the characteristic performance, in general, is not the pecuniary one; so, in the commercial distribution, it is the distribution activity of the concessionary in exclusive (Kogler). Cassazione reminds that this contract is a concession of sale in exclusive, it is atypical and it is subjected to Rome Convention, which is universal and applied even it is the law of a non-contracting state (art.2). Art.3 can't be applied, because in this contract the choice of the parties seems to be Austrian law only in the case of guaranty. So art.4 has to be applied, but in this case the performance which is characteristic of the contract

that the contract also had a clause referenced to Austrian law. The decision was based on the nature of the case (paying a certain amount of money to the Italian creditor) but in the end, the case cited the Austrian clause closer to the indictment, hence, the court recognized that the clause related to the Austrian reference rather than the Italian reference.

In *Société Fort James France c/ Soc. Fabio Perini et soc. Perini International*,⁴⁵ the transaction between French and Italian companies brought about allegations of breach of contract; the case involved the selling of machines to subsidiaries in France. The lack of initial choice of law would lead the case to be tried in French courts as handled under the Brussels Convention, although upon close inspection of the contract, the court had to apply the Rome Convention. The contract then showed that in terms of performance of the contract, the case should be examined with respect to Italian law. This also works with the rules of the Brussels Convention: “the law of the country of the central administration of the party owing this performance governs the issue of the localization of the place of performance of the obligation at dispute under article 5§.”⁴⁶

is the furniture of the goods, because the distribution depended on it. The most part of this furniture happened in Italy, so Italian jurisdiction exists.

45 *Société Fort James France c/ Soc. Fabio Perini et soc. Perini International*. Cour d'appel de Colmar, ch. 1, section A, 1998, October 20. A cooperation agreement was concluded between a French company and an Italian one, under which the latter agreed to sell machines to the European subsidiaries of the former, and not to market a specific technology needed to get products made with this machine. An action was brought for breach of contract against the Italian company before the French courts. The issue of the jurisdiction of the French courts arose, and had to be handled with under Brussels convention (particularly, art. 5§1). Consequently, the court needed to localize the place of the performance of the obligation at dispute in the instant case. This place being determined in accordance with the law applicable to the contract under the conflict rule, the court had to apply the Rome convention. In the case at issue, the court held that, under article 4 of this convention, the characteristic performance of the contract is the performance owed by the Italian company as to the delivery of machines. Thereby, Italian law was to apply as the law of the country of the central administration of the party owing the characteristic performance.

46 Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>.

4.2.4 Consumer Contracts

The Rome Convention also addresses the protection and rights of the consumers. Given that cross-border transactions have increased within the region, the growing need for consumer protection became more evident. Hence, in addition to the regular contractual relations among and between organizations, consumers are also given the opportunity to utilize any applicable laws concerning relevant activities in the supply of goods and services. Article 5 of the Rome Convention addresses consumer contracts; it applies to contracts for the supply of goods or services to a consumer for a non-consumer purpose, or to a contract for the provision of credit for that object. This article also takes into consideration the provisions of Articles 3 and 4 in terms of the choice or absence of law.

“2. Notwithstanding the provisions of Article 3, a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence:

- if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all the steps necessary on his part for the conclusion of the contract, or
- if the other party or his agent received the consumer's order in that country, or
- if the contract is for the sale of goods and the consumer travelled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

3. Notwithstanding the provisions of Article 4, a contract to which this Article applies shall, in the absence of choice in accordance with Article 3, be governed by the law of the country in which the consumer has his habitual residence if

it is entered into in the circumstances described in paragraph 2 of this Article.”⁴⁷

It should be emphasised that these transactions are also addressed with respect to the previous articles on the freedom and the absence of choice. This basically establishes that the Convention also recognize that consumers can face situations in which potential contractual disputes also need to consider the appropriate jurisdiction where the case is to be tried or evaluated.

One example is the *Mme Moquin c. Deutsche Bank AG et autre*.⁴⁸ A French couple who lived in the France made transactions with "Deutsche Bank" (plaintiff) and the couple was not able to pay back the loan. The plaintiff then sued the couple in French courts. However, the court needed to determine the appropriate court that would try the case given that the couple would be also subject to the French law on consumer protection. Eventually, the French court determined the applicable law and court. Whereas the Rome Convention was not yet in force at the time of conclusion of the contract, it must be considered that the French statute on consumer credit contracts (1978) is a mandatory rule applicable to an international loan entered into by a German bank and a consumer whose residence is in France.

Another interesting case is *époux ROUSSEAU c/ Commerzbank*.⁴⁹ This time, a French couple filed a loan from a German bank, with the contract initially establishing that it would refer to German laws. However, the court decided that this situation should not utilize German laws given that the transaction took place within French jurisdiction, in addition to the fact that the consumers are subject to the French consumer law. Although it can be argued that Article 3 allows the freedom of choice in terms of the applicable law according to the Rome Convention, Article 4 actually applied because of the principle behind Article 5 in which consumers are given the right to preserve

47 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

48 *Mme Moquin c. Deutsche Bank AG et autre*. FRANCE, Cour de cassation, 1ère ch. civ., 1999, October 19.

49 *Époux ROUSSEAU c/ Commerzbank*. FRANCE, Tribunal d'Instance de Niort, 1998, July 1

consumer protection and rights which are usually found in the consumer's home country. In addition to this, the court also identified the following reasons for overturning the initially exercised right of freedom of choice:

- “1) Under article 5 of the Rome convention, French law was applicable since the offer of loan was made in France and the steps leading to the conclusion of the contract were accomplished in France, that country being the place of the consumer's habitual residence.
- 2) The choice of Germany as the effective place of signature for the loan offer was fraudulent since it intended to avoid the application of a few provisions of French consumer law.
- 3) Under article 7 of the Rome Convention, a compulsory provision of French consumer law was also applicable as a forum's imperative rule, since the real estate, the purchase of which was the purpose of the loan, was located in France.
- 4) In incorporating one of the articles of French consumer law in the provisions of the loan, the parties agreed to submit their contract to this provision.
- 5) Under article 9 of the Rome convention, French law should apply to the form of the contract as the law of the country wherein was located the consumer's habitual residence.⁵⁰”

Based on this, consumer contracts have a greater emphasis on exercising the protection of the consumers provided that the contract formulated acknowledges the applicable rules and laws on consumer protection and rights. Hence, since there is the freedom to select the law that would be applicable to the contract, based on the convention and the previously cited case, selected laws should not overlook pre-existing consumer laws.

4.2.5 Contract of Employment

50 50 Époux ROUSSEAU c/ Commerzbank. FRANCE, Tribunal d'Instance de Niort, 1998, July 1

Contracts of employment can be considered to be complicated given that the employee is going to be subject to a set of laws that are among the conditions of the employment yet at the same time there are the rights that come with the employee as protected by the national and international laws. For example, an employee may be accepted for a job in a foreign country, and in order to make the acceptance of employment less complicated, conditions of the employer may include the concession to certain laws from the jurisdiction of the employer. At the same time, the employee may also carry basic employment rights guaranteed through his citizenship and at the same time, international and regional employment laws may be applied. An example is the applicable directives from the International Labour Organization.

Under Article 6, the rights of the employees are emphasized. Again, there is the consideration with respect to Articles 3 and 4 when the selection of laws becomes an issue. Article 6 states:

“1. Notwithstanding the provisions of Article 3, in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law which would be applicable under paragraph 2 in the absence of choice.

2. Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

(a) By the law of the country in which the employee habitually carries out his work in performance of the contract, even if he is temporarily employed in another country; or

(b) if the employee does not habitually carry out his work in any one country, by the law of the country in which the place of business through which he was engaged is situated; unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in

which case the contract shall be governed by the law of that country.”⁵¹

Evidently, the provision on employment contracts in the Convention can be seen in the initiative to simplify this complex of laws, especially since the movement of labor within the European region has become more dynamic as brought by the recent expansion. There is also the similarity between this article and the provision on consumer contracts.

In *Giannantonio v. Società Imprese Industriali s.p.a.*⁵², the employment contract exercised Article 3 whereby the employer and the employee agreed on referring to Italian Law. Hence, it applies, “the fundamental rule that guarantee the workers is a mandatory law and an international public order law and it is in any way applicable, even if the relation is ruled by a foreign law.”⁵³ *Mr Tegos* in France Conseil d'Etat, section, 1999, November 19, the court exercised Art. 4 in determining the platform of the employment contract of Mr. Tegos. The supply teacher was hired by a French school operating in Greece; hence, his contract was governed by Greek law and not French rules.

4.2.6 Material validity

Article 8 states:

“1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Convention if the contract or term were valid.

2. Nevertheless a party may rely upon the law of the country in which he has his habitual residence to establish that he did not consent if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in the preceding paragraph.”⁵⁴

51 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

52 *Giannantonio v. Società Imprese Industriali s.p.a.* ITALY, Pretura di Milano (Pret. Milano), 1995, January 5.

53 art. 18 Statuto dei Lavoratori, <http://digilander.libero.it/rivoluzionecom/Supplementi/2003/232/referendum1.html>

54 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

The validity of a contract is examined in this article. This is important especially if other relevant laws have to be applied in which the applicability of the identified laws depend on the validity of the cited contract. This article was applicable to the *SA Cofermet c/ Société Gottscholl Alcuilux*⁵⁵ case in which a Luxemburger company wrote a letter to its French subsidiary promising financial support. The subsidiary would then owe another company, a French company, which would lead the latter to suing the parent company for the inability to pay credit. In this case, in order to determine the jurisdiction of the situation, the Brussels Convention was cited as a reference for the case although the effectiveness of the Convention is based on the validity of the contract between the Luxemburg Company and the French subsidiary was in fact contractual or extra contractual. Based on this, in order to determine the jurisdiction of the case, the Convention was consulted as based on the provisions of Article 4.

4.2.7 Formal Validity

Article 9, dealing with the validity of contracts between persons coming for different jurisdictions, states:

- “1. A contract concluded between persons who are in the same country is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of the country where it is concluded.
2. A contract concluded between persons who are in different countries is formally valid if it satisfies the formal requirements of the law which governs it under this Convention or of the law of one of those countries.
3. Where a contract is concluded by an agent, the country in which the agent acts is the relevant country for the purposes of paragraphs 1 and 2.
4. An act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the

⁵⁵ SA Cofermet c/ Société Gottscholl Alcuilux. FRANCE, Cour d'appel de Paris, chambre 1., 2000, October 12.

formal requirements of the law which under this Convention governs or would govern the contract or of the law of the country where the act was done.

5. The provisions of the preceding paragraphs shall not apply to a contract to which Article 5 applies, concluded in the circumstances described in paragraph 2 of Article 5. The formal validity of such a contract is governed by the law of the country in which the consumer has his habitual residence.

6. Notwithstanding paragraphs 1 to 4 of this Article, a contract the subject matter of which is a right in immovable property or a right to use immovable property shall be subject to the mandatory requirements of form of the law of the country where the property is situated if by that law those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract.”⁵⁶

Basically, this Article tackles the validity of the contract as based on the applicable jurisdictions. In *époux ROUSSEAU c/ Commerzbank*⁵⁷, for example, the court ruled, based on the Rome Convention, that the law applied is based on the habitual residence of the consumer despite the express selection as allowed by Art. 3. The importance of the validity of the contract is different than the identification of the applicable laws for certain conditions. Similar to the explanation on the previous section on the materiality of the contract, a number of factors can be said to depend on the issue of validity. This can therefore either move or cancel the case in which case a different legal route may have to be identified.

4.2.8 Transfer of Obligation

Article 12 states:

“1. The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ("the debtor") shall be governed by the law which under this

⁵⁶ Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

⁵⁷ This case was also cited in Consumer Contracts.

Convention applies to the contract between the assignor and assignee.

2. The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged.”⁵⁸

The transfer of obligation can be determined through the series of relations created depending on the series of transactions that took place. Hence, for example, the law which applies to a contract also determines the ranking of competing claimants. The transfer of obligation therefore relies on the act of voluntary assignment, which, as Banson points out, “differs from transactions that come under the law of tort or unjust enrichment.”⁵⁹

The assignment of the applicable law, in this regard, depends on how the obligation is transferred which is determined by the development of the relationship of transactions between and among the parties involved. For example, the identification of a particular set of terms and conditions, as determined by an identified set of laws (similar to Art. 3), can provide a venue for the adjustment of claims especially if both parties reach an agreement when it comes to the potential changes in the obligations among the participants of the contract.

4.2.9 “*Ordre Public*”

According to Article 16:

“The application of a rule of the law of any country specified by this Convention may be refused only if such

⁵⁸ Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm.

⁵⁹ Benson, P. (2007). Contract as a Transfer of Ownership. William and Mary Law Review. Vol. 48, no. 5, pp. 1673+.

application is manifestly incompatible with the public policy ("*ordre public*") of the forum.”⁶⁰

Based on this, although the Rome Convention is applicable to the Member States, incompatibility of the application as based on public policy may lead to the rules of the Convention being declined by a particular court. What is interesting in this is that although the Rome Convention can be regarded as an instrument of harmonization among the differences in laws among nations that have strong contractual partnerships as based on private channels, certain national policies cannot easily concede to the rules of the Rome Convention.

The relationship between the Convention and national policies can be examined in this context. Apparently, the Convention does not enforce the same amount of power and influence as compared to the national and/or local policies although the Convention plays an important point of reference in cases where intra-national contracts are concerned.

4.2.10 Composite or federated states

States with more than one legal system are the subject of Art. 19:

“1. Where a State comprises several territorial units each of which has its own rules of law in respect of contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Convention.

2. A State within which different territorial units have their own rules of law in respect of contractual obligations shall not be bound to apply this Convention to conflicts solely between the laws of such units.”⁶¹

60 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

61 Rome Convention. http://www.rome-convention.org/instruments/i_conv_orig_en.htm

The Convention addresses the existence of countries that have more than one legal system. Based on Art. 19, if a case includes situations in which different legal systems are present, the state or the collection of states will be taken as a single territorial unit in which the applicable laws are at federal level provided that the laws are also applicable to the Convention. The same is true as to the presence of any conflicts between the laws of the Convention and the policies of the state in which case, as in Art. 16, the Convention does not apply.

4.2.11 Final Notes

The Rome Convention provides a charter which serves as a legal reference for cases in which contractual obligations and relations involve parties from different national jurisdictions. Given the differences of laws, the Convention therefore provides a venue where courts find applicable laws in order to come up with means to resolve any disputes or conflicts. However, although there is a strong legal nature of the Convention as agreed by the participating nations, legal systems and courts are still left with the discretion as to how applicable laws can be utilized depending on the case at hand. This is why the Convention is not absolutely exclusive in addition to the fact that there are other applicable conventions that can be referred to.

North presents a final note as to the role of the Convention especially when it comes to its role and function in a particular regional community:

“What is also worth noting is how unfettered this freedom is. At common law, there was debate as to the limits of the freedom of choice. We were told that the choice had to be 'bona fide and legal' and not contrary to public policy. There was debate as to how far a law unconnected with the contract could be chosen; though it has been pointed out that commercial men are likely to have good reasons, which should be accepted, for such a choice. Under the Convention, there are no real limits on the freedom of choice of the applicable law, as such. However, mandatory rules of the forum will continue to be applied, and rules of the chosen law may be refused application as being contrary to the public policy of the forum. These are likely to be relatively minor limitations in practice and the Convention marks a high point in the acceptance of party autonomy an

approach to contract choice of law which has been shown to have had wide acceptance in the private international law of all the Member States of the Community and of most other countries, as well as being 'supported both by arbitration decisions and by international treaties designed to unify certain rules of conflict in relation to contracts.'⁶²

⁶² North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford.

CHAPTER 5 ARTICLE FOUR AND INTERNATIONAL BUSINESS COMMUNITY

5.1 Introduction

This chapter will examine in detail the contents of Article 4. In other words it will detail what the five paragraphs of Article 4 entail. It will further try to evaluate how article 4 can be reviewed in respect to the international business community

5.2 Article 4 - Applicable law in the absence of choice

The application of Article 4 presupposes that there is no express choice and that no implied choice can be discovered (preferably using a rather strict approach to implied choice, as indicated above). In the absence of an express or implied choice, there are usually no justice-based grounds for preferring one law to another. (The need to protect weaker parties is not a concern of Article 4, but of other provisions, such as Articles 5 and 6).

This implies that the default solution should endeavour to maximize certainty, predictability, and uniformity of results, regardless of forum. Adherence to the residence of the characteristic performer achieves this, while the concept of closest connection can mean almost anything (or nothing). If no implied choice can properly be discovered, there is simply no intelligible perspective from which the importance of the various connections (such as the residences of parties, and the places of negotiation and performance) can rationally be assessed and compared.

In the interests of certainty and convenience, it is good to simplify the definition of the residence of the characteristic performer, so as to refer to that party's business establishment whose staffs were engaged in the negotiation of the contract. That is the residence which is generally known and important to the other party.

For similar reasons it is also good to delete Article 4(4), and subject contracts for the carriage of goods to the normal presumption in favour of the carrier's residence. As regards Article 4(3), on contracts whose subject matter is a right in immovable property or a right to use immovable property, it is good to substitute a rule referring to the

country in which both parties reside, where they both reside in the same country, and if they do not both reside in the same country, to the country where the immovable property is situated.

It remains to consider what should be done where there is no characteristic performance; for example in the case of a contract of barter. Some scholars suggest a series of rules referring, first, to the country in which both parties reside, if such exists; and secondly, to the country in which one party resides and the most important performances are to be carried out.⁶³ If neither of those two tests enables the applicable law to be ascertained, it seems difficult to find any principled solution. In that situation the slight inclination could be to apply the law of the defendant's residence, even though that would make the result depend on which part

5.3. The *lex fori*.

In situations such as the *lex fori* a test of closest connection would help little, on almost any interpretation of that test. So Article 4 can be rewritten as follows:

"(1) To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, it shall be determined in accordance with the provisions of this Article."⁶⁴

"(2) In such cases, where there is a performance which is characteristic of the contract, the contract shall be governed by the law of the country in which the party who is to affect the said characteristic performance had its relevant residence at the time when the contract was concluded."⁶⁵

63 North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford.

64 North, P. (1993). *Essays in Private International Law*. Clarendon Press, Oxford.

65 Andersen, Camilla Baasch (2005). "The Uniform International Sales Law and the Global Jurisconsultorium". *Journal of Law and Commerce*. 159-179.

(3) The relevant residence of a party who acted in the course of a business is its business establishment whose staffs were (wholly or mainly) involved in the negotiation of the contract on its behalf. The relevant residence of a party who did not act in the course of a business is his or her habitual residence.

(4) Where the subject matter of the contract is a right in immovable property or a right to use immovable property, paragraph 2 shall not apply. Instead the contract shall be governed by the law of the country in which both parties had their relevant residences (determined in accordance with paragraph 3) at the time of its conclusion; or where they did not have their relevant residences in the same country, by the law of the country in which the immovable property is situated.⁶⁶

(5) Where the contract is of such a nature that there is no performance which is characteristic of the contract, the governing law shall be determined as follows: (a) where at the time of its conclusion both parties had their relevant residences (determined in accordance with paragraph 3) in the same country, it shall be governed by that law of that country; (b) where at the time of its conclusion both parties did not have their relevant residences (determined in accordance with paragraph 3) in the same country, it shall be governed by the law of the country in which one of the parties then had its relevant residence and in which the most important obligations under the contract had to be performed.⁶⁷

As a last resort, where for any reason the country whose law governs the contract cannot be ascertained in accordance with the foregoing provisions of Article 3 and this Article, then the law of the country in which the party who is defendant in the action presently before the court had its relevant residence at the time of the conclusion of the

⁶⁶ Andersen, Camilla Baasch (2005). "The Uniform International Sales Law and the Global Jurisconsultorium". *Journal of Law and Commerce*. 159-179.< <http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html>>.

⁶⁷ Andersen, Camilla Baasch (2005). "The Uniform International Sales Law and the Global Jurisconsultorium". *Journal of Law and Commerce*. 159-179.< <http://www.cisg.law.pace.edu/cisg/biblio/andersen3.html>>

contract shall apply; and if that country is also unascertainable, the court shall apply the law of its own country.⁶⁸

5.4. Final Notes

The article, "Choice of Law in Contract under the Rome Convention" which is written by Jonathan Hill, examines substantial body of case law in the UK on the interpretation of Articles 3 and 4 of the Rome Convention on the law applicable to contractual obligations which emerged in 2000. In this article Jonathan Hill points out that, although the cases show that the courts have had few problems in practice with Article 3, they have struggled with nearly all the difficult questions thrown up by Article 4, in particular the relationship between Article 4(2) and Article 4(5).⁶⁹ The article further tells us that, the decisions of the courts reveal certain weaknesses, but the situation is unlikely to improve until the Rome Convention is amended (in the context of its translation into an EC Regulation) and/or the Court of Justice acquires jurisdiction to interpret its provisions.⁷⁰

In the article "Choice of Law in Contract" by Simon Atrill tells us how Article 4 of the Rome Convention determines the law governing a contract in the absence of choice by the parties.⁷¹ The author points that despite its practical importance, and several a decision of the Court of Appeal, the correct construction of Article 4 remains unclear.⁷²

68 Fletcher, I. (1999). *Insolvency in Private International Law: National and International Approaches*. Oxford University Press, Oxford.

69 Hill, J. "Choice of Law in Contract under the Rome Convention", *Journal: The International and Comparative Law Quarterly Publication*: Oxford: Apr 2004. Vol. 53, Iss. 2; p. 325

70 Hill, J. "Choice of Law in Contract under the Rome Convention", *Journal: The International and Comparative Law Quarterly Publication*: Oxford: Apr 2004. Vol. 53, Iss. 2; p. 325

71 Atrill, S. "Choice of Law in Contract" Author: Simon Atrill. *Journal: The International and Comparative Law Quarterly, Publication*: Oxford: Jul 2004. Vol. 53, Iss. 3; p. 549

72 Atrill, S. "Choice of Law in Contract" Author: Simon Atrill. *Journal: The International and Comparative Law Quarterly, Publication*: Oxford: Jul 2004. Vol. 53, Iss. 3; p. 549

This paper considers the existing approaches and the Commission's proposal for reform, ventures to suggest an alternative, and analyses the recent cases in this light.⁷³

In the article by Jonathan Harris, Contractual Freedom in the Conflict of laws, examines how in the Conflict of Laws, the validity of a contract with one or more foreign law elements will be decided by reference to the so-called "proper law" of the contract.⁷⁴

The article also examines how the Contracts (Applicable Law) Act 1990 formally incorporates the Convention on the Law Applicable to Contractual Obligations the "Rome Convention" opened for signature in Rome on 19th June 1980 and signed by the United Kingdom on 7th December 1981.⁷⁵

It further explores the Convention on the Accession of the Hellenic Republic to the Rome Convention (the "Luxembourg Convention") signed by the United Kingdom in Luxembourg on 10th April 1984 (Jonathan Harris, 2000). Additionally gives insights on the first Protocol on the Interpretation of the Rome Convention by the European Court (the "Brussels Protocol") signed by the United Kingdom in Brussels on 19th December 1988.⁷⁶

From the above examination of the three articles the article which is best is the one by Author: Jonathan Hill that is "Choice of Law in Contract under the Rome Convention". This is because it gives more insights on the challenges faced by

73 Atrill, S. "Choice of Law in Contract" Author: Simon Atrill. Journal: The International and Comparative Law Quarterly, Publication: Oxford: Jul 2004. Vol. 53, Iss. 3; p. 549

74 Harris, J. "Contractual Freedom in the Conflict of Laws" Journal: Oxford Journal of Legal Studies, Publication: Oxford: 2000. Vol. 20, Iss. 2; p. 247

75 Harris, J. "Contractual Freedom in the Conflict of Laws" Journal: Oxford Journal of Legal Studies, Publication: Oxford: 2000. Vol. 20, Iss. 2; p. 247

76 Harris, J. "Contractual Freedom in the Conflict of Laws" Journal: Oxford Journal of Legal Studies, Publication: Oxford: 2000. Vol. 20, Iss. 2; p. 247

individuals in international transactions while undertaking contracts with respect to Rome Convention.

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- Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters, <http://curia.europa.eu/common/recdoc/convention/en/c-textes/brux-idx.htm>
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