

The law applicable to contracts

Lecture 3

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National rules, international rules, EU rules

- New conflict rules entered into force only *pro futuro*!
- National conflict rules on contracts
- 1980 Rome Convention on contractual obligations (closed treaty)
 - New MSs joined the Convention on 14 April 2005 (Brussels).
- 593/2008 (Rome I) Regulation
 - Applicable as from 17 December 2009.

Scope of Rome I Regulation

- Scope *ratione temporis*: as from 17 December 2009
 - Corrigendum: for: "This Regulation shall apply to contracts concluded after 17 December 2009.", read: "This Regulation shall apply to contracts concluded as from 17 December 2009."
- Territorial scope: EU, except Denmark
- Universal application

Excluded matters

- Article 1(2)-(3) excludes certain questions and matters from the scope of the Regulation:
 - questions relating to status or legal capacity of natural persons,
 - family law matters and civil unions, including maintenance,
 - rights in property arising out of a matrimonial relationship,
 - succession matters,
 - obligations arising under bills of exchange, cheques and promissory notes and other negotiable instruments to the extent that the obligations arise out of their negotiable character,
 - arbitration and choice-of-court agreements,
 - questions of company law,
 - questions of representation (whether an agent can bind a principal, or an organ can bind a company or partnership),
 - trusts,
 - pre-contractual liability (*culpa in contrahendo*),
 - certain insurance contracts involving non-EU insurers,
 - procedural matter as for instance evidence.

Party autonomy (1)

Article 3

Freedom of choice

1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated 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 to 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 made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.

Why are choice-of-law clauses useful?

- Tattaglia: But I must have strict assurance from Corleone. As time goes by and his position becomes stronger, will he attempt any individual vendetta?
- Barzini: Look, we are all reasonable men here. We don't have to give assurances as if we were lawyers.”
- The Godfather

Party autonomy (2)

- Theories of party autonomy

- Substantive law choice of law: the law chosen by the parties operates only within the limits of the mandatory rules (*ius cogens*) of the law that would be applicable in the absence of the parties' choice.
- Conflict law choice of law: if the parties agree in the law applicable to the contract, this law will be applicable irrespective of the law that would be applicable in the absence of the parties' choice.

- The Rome I Regulation

- in principle, grasps choice in conflict sense,
- in some cases it enables choice only in substantive law sense: domestic matters, purely EU matters, employment contracts, consumer contracts etc.

Public policy and imperative norms

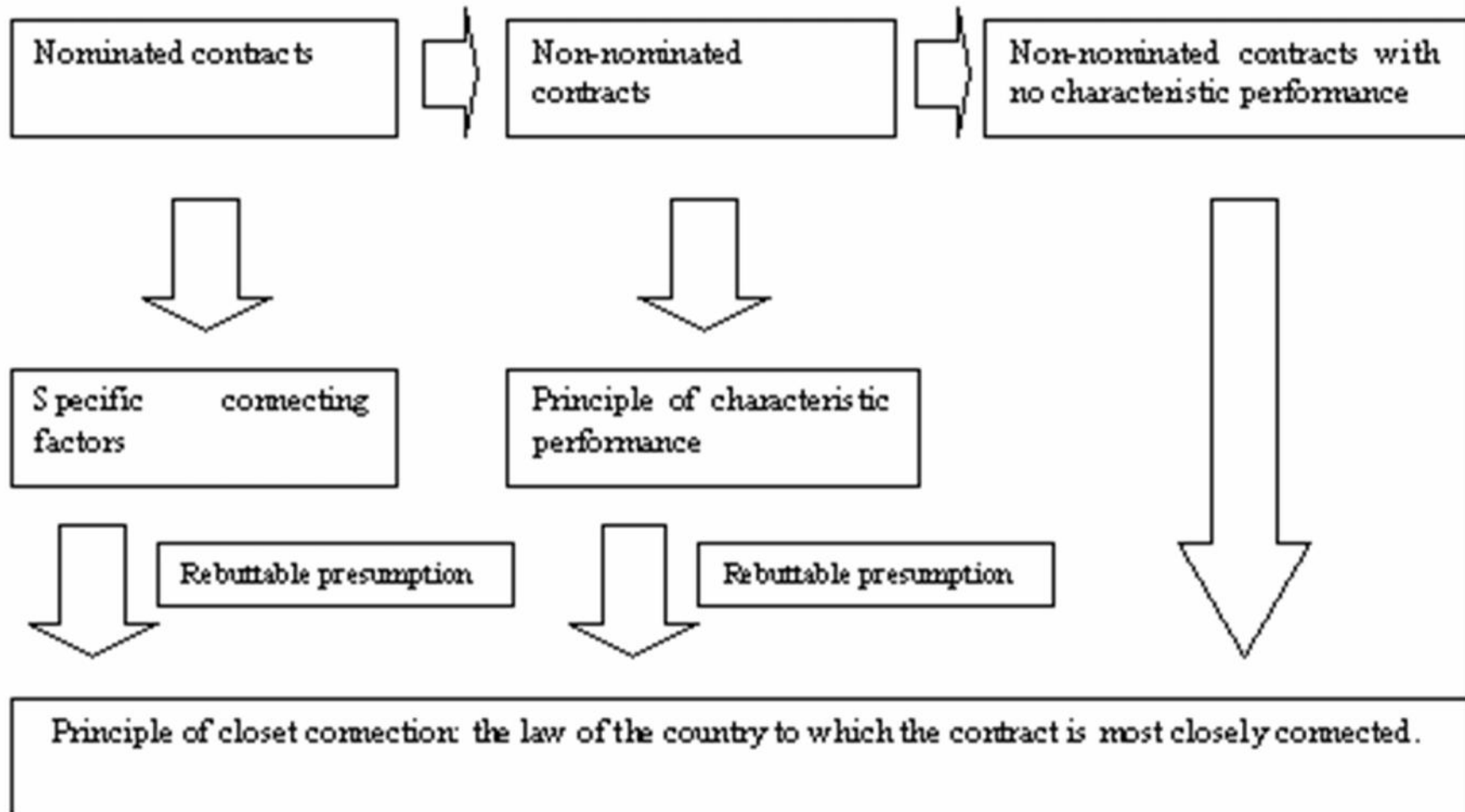
- Forum's public policy (Article 21) and overriding mandatory (imperative) rules (Article 9)
- Third country imperative rules, Article 9(3)

3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

Scope of application

- Territorial scope: EU except Denmark
- Scope *ratione materiae*:
 - civil and commercial matter,
 - excluded matters: (a) the status or legal capacity of natural persons, rights in property arising out of a matrimonial relationship, wills and succession; (b) bankruptcy, proceedings relating to the winding-up of insolvent companies or other legal persons, judicial arrangements, compositions and analogous proceedings; (c) social security; (d) arbitration.

Architecture of the conflict rules (if the parties do not choose)



Nominated contracts

Contract

Contract for the sale of goods

Contract for the provision of services

Contract relating to an *in rem* right in immovable property

tenancy of immovable property

German tourist exception (tenancy of immovable property for temporary private use for no more than six consecutive months where the landlord and the tenant (natural person) have their habitual residence in the same country)

Franchise contract

Distribution contract

Auction sale

Contracts concerning interests in financial instruments concluded in a multilateral trading system operating in accordance with non-discretionary rules and governed by a single law

Connecting factor

seller's habitual residence

service provider's habitual residence

immovable property's location

immovable property's location

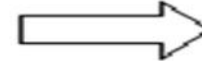
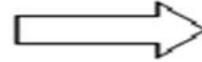
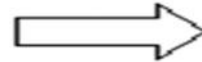
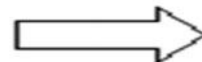
law of the landlord's habitual residence

franchisee's habitual residence

distributor's habitual residence

country where the auction takes place

the law of the multilateral trading system



Contracts involving a weaker party

- Consumer contracts (Article 6), insurance contracts (Article 7) and employment contracts (Article 8).
- Common feature: choice enabled in substantive law sense.
- The law applicable in the absence of the parties' choice:
 - Consumer contracts
 - consumer's habitual residence,
 - Not all consumer contracts are covered by the special provisions: these embrace situations where the enterprise or trader operates also in the Member State of the consumer's habitual residence or its operation relates also to this country and the consumer contract is connected to this activity.
 - Employment contracts: the employee's habitual place of work, failing that the location of the place of business through which the employee was engaged, escape clause (closest connection)

Test question (1)

- *Section 57 of the Hungarian Act on Private International Law provides that „[i]n property matters the Hungarian court has jurisdiction over a defendant not having place of living or habitual residence in Hungary, if the defendant has property in Hungary that can be the subject-matter of judicial enforcement. The defendant’s receivable (claim) is to be regarded as property situated in Hungary if the debtor’s place of living is in Hungary or it is covered by a security located in Hungary.”*
- *In principal, may a defendant domiciled in Germany be sued in Hungary in a contractual matter solely because he has a summer-house near the lake Balaton?*
- a. Yes, the real estate can be the subject-matter of judicial enforcement.
- b. No, Section 57 of the Hungarian Act on Private International Law was repealed by the Brussels I Regulation, it is no longer effective.
- c. No! Since the defendant is domicile in Germany, the applicable jurisdictional rules are established by the Brussels I Regulation, which in turn expressly excludes exorbitant jurisdiction as to EU-defendants.
- d. Yes.

Test question (2)

- *An Austrian seller and a Hungarian buyer conclude a contract. In the absence of parties' choice, Austrian law would be applicable (law of the seller). However, the parties stipulate Czech law. If a dispute emerges, does the court, on the basis of the Rome I Regulation, have to apply Austrian law in this case with the exclusion of the provisions of Czech law?*
- a. No, it does not have to apply it.
- b. The chosen law excludes only the non-mandatory (dispositive) rules of the law applicable in the absence of a choice, that is, the choice may not lead to a divergence from the provisions of Austrian law.
- c. The conditions of the choice are determined by the provisions of Austrian law.
- d. Czech law will give the answer to the above question.

Test question (3)

- *Which source of law contains the relevant jurisdictional rules, if a Hungarian plaintiff sues a Russian defendant in the Czech Republic?*
- a. Hungarian Act on Private International Law
- b. Brussels I Regulation
- c. Brussels II Regulation
- d. (Czech) Act No 97/1963 concerning private international law and the rules of procedure relating thereto

Test question (4)

- *„A” is a German company and operates a plant in Vienna. It pollutes the Danube, and as a consequence, the flowers of a Hungarian flower garden in Budapest (company „B”) perish, because the latter irrigated the flowers with water from the Danube. „B” sues for damages. Where may he sue „A”?*
- a. In Hungary, because this is the place where the damages emerged.
- b. In Germany, because according to the Brussels I Regulation the plaintiff always have to sue in the defendant’s country.
- c. In Germany, since the defendant’s seat is here, in Austria, since the damaging act was committed here and Hungary because the damages emerged here.
- d. In Germany, since the defendant’s seat is here, in Austria, since the damaging act was committed here; it is irrelevant where the damages were sustained.

Test question (5)

- *Which law is to be applied, in principle, to the question of jurisdiction, if a Mongolian plaintiff sues a Hungarian defendant in the Czech Republic in a commercial law dispute?*
- a. (Czech) Act No 97/1963 concerning private international law and the rules of procedure relating thereto
- b. Hungarian Act on Private International Law
- c. Brussels I Regulation
- d. Brussels II Regulation

Thank You for your attention!

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