EU Regulation no. 593/2008 (Rome I): Scope of the law governing the contract and excluded matters, particular issues

Prof. Martin Gebauer
EJTN Civil Law Project
International Contract Law
6-7 October 2016
Consent and material validity

• **Art. 10 para 1 Rome I-Regulation:**
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 Regulation if the contract or term were valid.
Consent and material validity

- **Art. 10 para 1 Rome I-Regulation:**
  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 Regulation if the contract or term were valid.
Consent and material validity

- **Art. 10 para 1 Rome I-Regulation:**
  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 Regulation if the contract or term were valid.

- **Aim of the provision:** to have all issues of a contract governed by a single legal order
  - E.g. Offer and acceptance
  - Error, mistake
  - Standard terms
Case 1

• A company from country A offers services in an email to another company from country B. After the email has been received but before the acceptance of the offer has been sent off, the company from A revokes the offer in a second email. Thirty minutes later, the company from B accepts the offer. Is there a valid contract? According to the law of A, a unilateral offer is generally binding, according to the law of B, a contract is binding, but not a unilateral offer.

• What is the answer to the question if the first email, offering services, contained the following term: “This contract shall be governed by the law of B”?
The law governing consent and material validity of the contract

Consent and material validity: Applicable law?

Law of State A

Law of State B

Party to the contract

Law governing the contract

Artt. 10 (1) Rome I
Scope of the law applicable

Art. 12 para 1 Rome I-Regulation:
The law applicable to a contract by virtue of this Regulation shall govern in particular:

(a) interpretation;

(b) performance;

(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;

(d) the various ways of extinguishing obligations, and prescription and limitation of actions;

(e) the consequences of nullity of the contract.
Formal validity

• **Art. 11 para 1 Rome I-Regulation:** A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.

• Policy of validation or “favor negotii” as the aim of the provision: seeking to avoid formal invalidity as far as possible.
Case 2

• Two judges from Italy and Germany meet on a seminar in Italy about International Contract law. In the evening, the German judge sells to the Italian judge plot of land with a house in Berlin. The contract is written on a computer, printed and signed by both judges. Back at home, the German judge is regretting the sale of his house. Is it a valid contract if German law requires the record by a notary whereas under Italian law a written contract is sufficient?
Substantive rules on formal validity

• § 311b para 1 BGB:
A contract by which one party agrees to transfer or acquire ownership of a plot of land must be recorded by a notary.

• Art. 1350 para 1 Codice civile:
Devono farsi per atto pubblico o per scrittura privata, sotto pena di nullità:

  1) i contratti che trasferiscono la proprietà di beni immobili; [...]
Formal validity (Art. 11)

Alternative application

“law which governs it in substance”  “law of the country where it is concluded”
Formal validity (Art. 11)

Alternative application

“law which governs it in substance”
Article 4 (1) c)
German law

“law of the country where it is concluded”
Italian law
Incapacity (Art. 13)

**Art. 13 Rome I-Regulation:**
In a contract concluded between persons who are in the same country, a natural person who would have capacity under the law of that country may invoke his incapacity resulting from the law of another country, only if the other party to the contract was aware of that incapacity at the time of the conclusion of the contract or was not aware thereof as a result of negligence.

- Questions involving legal capacity are in general excluded from the material scope of Rome I (Art. 1 para. 2(a)): Art. 13 as a counter-exception to that rule.
- Ratio: Protecting *bona fide* reliance
Burden of proof (Art. 18)

- **Art. 18 para 1 Rome I-Regulation:** The law governing a contractual obligation under this Regulation shall apply to the extent that, in matters of contractual obligations, it contains rules which raise presumptions of law or determine the burden of proof.

- Exception to Article 1(3) which excludes “evidence and procedure” from the material scope.
Voluntary assignment (Art. 14)
Voluntary assignment (Art. 14)

Assignment

assignor

debtor

assignee
Voluntary assignment (Art. 14)
Voluntary assignment (Art. 14)

Assignment

assignor → assignee

Underlying contract

Law governing the assigned claim

debtor
Voluntary assignment (Art. 14)

Assignment

assignor

Underlying contract

assignee

Law governing the assigned claim (Art. 14 (2))

debtor
Article 14 (2) Rome I Regulation

2. The law governing the assigned or subrogated claim shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment or subrogation can be invoked against the debtor and whether the debtor's obligations have been discharged.
1. The relationship between assignor and assignee under a voluntary assignment or contractual subrogation of a claim against another person (the debtor) shall be governed by the law that applies to the contract between the assignor and assignee under this Regulation.
Relationship between assignor and assignee (Article 14 (1))

Diagram:
- **Assignor**
- **Assignee**
- **Debtor**

Connections:
- Assignment
- Underlying contract
Relationship between assignor and assignee
(Article 14 (1))

Assignment

Art. 3 ff. Rome I; Art. 14 (1)

assignor

Underlying contract

debtor

assignee
Property aspects of an assignment (Article 14 (1))

- **Assignor**
  - Underlying contract
  - Assignment
  - Art. 3 ff. Rome I; Art. 14 (1)

- **Assignee**
  - Debtor

- **Debtor**
Property aspects of an assignment
(Article 14 (1))

Property aspects *inter partes*: Art. 14 (1)

Assignment

Art. 3 ff. Rome I; Art. 14 (1)

assignor ➔ assignee

Underlying contract

debtor
Recital 38 Rome I

In the context of voluntary assignment, the term ‘relationship’ should make it clear that Article 14(1) also applies to the property aspects of an assignment, as between assignor and assignee, in legal orders where such aspects are treated separately from the aspects under the law of obligations. [...]
Property aspects of an assignment (Article 14 (1))

Property aspects *inter partes*: Art. 14 (1)

Assignment

Art. 3 ff. Rome I; Art. 14 (1)

assignor → assignee

Underlying contract

assignor → debtor

assignee → debtor
Property aspects of an assignment  
(Article 14 (1))

Property aspects *inter partes*: Art. 14 (1)

Assignment

assignor

<table>
<thead>
<tr>
<th>Art. 3 ff. Rome I</th>
</tr>
</thead>
</table>

| Recital 38 |

assignee

Underlying contract

debtor
Property aspects of an assignment

Property aspects *erga omnes*?

Assignment

assignor  →  assignee

Underlying contract

assignor  →  debtor

assignee  →  debtor
Creditors of the assignor

Property aspects *erga omnes*?

Assignment

Underlying contract

assignor - assignee

debtor
Creditors of the assignor

Property aspects *erga omnes*?

Assignment

Underlying contract

Assignor

Assignee

Debtor
Assignment

Underlying contract

Creditors of the assignee

Property aspects *erga omnes*?
Assignment

Underlying contract

Property aspects *erga omnes*?

Creditors of the assignee
Voluntary assignment

- Possible solutions regarding the property aspects *erga omnes*
  - Law governing the assigned claim
  - Law governing the contract between assignor and assignee
  - Habitual residence of the debtor
  - Habitual residence of the assignor
Legal Subrogation (Art. 15)

Creditor

Third person
(e.g. person who bailed, guaranteed)

Debtor
Legal Subrogation (Art. 15)

Third person satisfies the creditor

Third person

Creditor

Debtor
Legal Subrogation (Art. 15)

Third person entitled to exercise creditor's rights against the debtor?
Legal Subrogation (Art. 15)

Third person entitled to exercise creditor's rights against the debtor?

Law governing the debtor's obligation towards the creditor

Law governing third person's duty
Legal subrogation

• **Art. 15 Rome I-Regulation:** Where a person (the creditor) has a contractual claim against another (the debtor) and a third person has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the third person's duty to satisfy the creditor shall determine whether and to what extent the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing their relationship.
Multiple Liability (Art. 16)

Right to claim recourse?

Creditor

Debtor 1

Debtor 2

D 1 satisfies C
Multiple Liability (Art. 16)

Creditor

D 1 satisfies C

Debtor 1

Debtor 2

Right to claim recourse?

Governed by the law which governs the obligation of debtor 1 towards the creditor
Multiple Liability (Art. 16)

D 1 satisfies C

Creditor

Debtor 1 → Debtor 2

Right to claim recourse?

Governed by the law which governs the obligation of debtor 1 towards the creditor
Multiple Liability

- **Art. 16 Rome I-Regulation:**
  If a creditor has a claim against several debtors who are liable for the same claim, and one of the debtors has already satisfied the claim in whole or in part, the law governing the debtor's obligation towards the creditor also governs the debtor's right to claim recourse from the other debtors. The other debtors may rely on the defences they had against the creditor to the extent allowed by the law governing their obligations towards the creditor.
Set-Off

• **Art. 17 Rome I-Regulation:**
  Where the right to set-off is not agreed by the parties, set-off shall be governed by the law applicable to the claim against which the right to set-off is asserted.
Set-off (Art. 17 Rome I)
Set-off (Art. 17 Rome I)

- **Principal claim**: Claim against which the right to set-off is asserted
- **Set-off claim**: Claim to be used for set-off
The law governing set-off, Art. 17

Claim against which the right to set-off is asserted

Principal claim

Set-off claim
Habitual Residence

Art. 19 Rome I-Regulation:
1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.

The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.

[...]
Exclusion of Renvoi

• Art. 20 Rome I-Regulation:
The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.
Exclusion of Renvoi

Forum’s rules of Private International Law

Reference to foreign law

Foreign rules of Private International Law

Reference back?
Public Policy of the Forum

• **Art. 21 Rome I-Regulation:**
  The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.
States with More than One Legal System (Art. 22)  

Case 3

• A company from Edinburgh/Scotland offers services and concludes a contract with a French company from Paris. A dispute arises between the parties and an action is brought before a French court. Which law will the court have to apply to the legal relationship between the parties?
States with More than One Legal System (Art. 22)

• **Art. 22 para 1 Rome I-Regulation:**
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 Regulation.