

The Regulation n° 593/2008 of June 17, 2008 - known as Rome I

General presentation

The Regulation n° 593/2008 of June 17, 2008 - known as Rome I - determines the law applicable to the contract and gives important details as to the field of application of this law.

It is intended to apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. However, the Regulation does not contain a definition of "contractual obligations".

However, the following are excluded from its scope of application

- The status and legal capacity of natural persons, except in the special case of Article 13 of the Regulations
- Obligations arising from family relationships
- Obligations arising from matrimonial regimes
- Obligations arising from bills of exchange, checks, promissory bills and other negotiable instruments
- Arbitration and choice of court agreements
- Questions relating to the law of companies, associations and legal entities
- The question of the intermediary's power of representation
- The constitution of trusts and the relationships they create between settlors, trustees and beneficiaries
- Pre-contractual obligations
- Evidence and procedure subject to the application of Article 18 of the Regulation
- Some insurance contracts

The Regulation must contribute to the general objective of legal certainty in the European area of justice by providing for a high degree of predictability and legal certainty of the conflict-of-laws rules. It is also intended to facilitate judicial cooperation and the circulation of judgments.

The Regulation is directly applicable in all EU Member States with the notable exception of Denmark and the United Kingdom, which became a non-EU state with the Brexit.

Specific provisions are provided for in the event that the State comprises several territorial units with their own rules on contractual obligations.

The regulation applies to contracts entered into after December 17, 2009.

With the exception of Article 7 on insurance contracts, the Regulation does not affect the application of provisions of Community law which, in particular areas, govern conflict of laws in relation to contractual obligations.

The Regulation replaces the Rome Convention of 19 June 1980, except as regards the territories of the Member States which fall within the territorial scope of that Convention and which are excluded from this Regulation.

Choice of law

The basic principle is that **the parties are free to choose the law that will govern their contract. The regulation enshrines the principle of party autonomy.**

In the absence of a choice of law by the parties, the regulation provides for **special connections** for certain categories of contracts, namely contracts of carriage, consumer contracts, insurance contracts and individual employment contracts.

With regard to contracts of carriage, Article 5 distinguishes between the conflict rule for the contract of carriage of goods in paragraph 1 and the conflict rule for the contract of carriage of passengers in paragraph 2. Finally, paragraph 3 contains an exception clause that allows for the application of a law other than that designated in the two preceding paragraphs.

- The contract for the carriage of goods is subject to the law of the country of the carrier's habitual residence if it coincides either with the place of loading, or with the place of delivery, or with the habitual residence of the sender.
- As regards the contract of carriage of passengers, the parties may choose the law applicable to their contract, but this choice is limited. Article 5(2) (second subparagraph) lists the five laws that may be chosen: the law of the country where either the passenger or the carrier has his habitual residence, the law of the country where the carrier has its central administration, or the law of the place of departure or destination.

In the area of consumer contracts, the Rome I Regulation takes up the idea that consumer protection must be ensured. The parties may freely choose the law to which they wish to submit their contract. In the absence of such a choice, the law of the consumer's habitual residence is preferred. A consumer is someone who acts "*for a purpose which can be regarded as outside his trade or profession*". Regardless of the place of habitual residence of the consumer, the contract must be concluded between a consumer and a professional. The principle of party autonomy is limited: the choice made by the parties "*may not have the effect of depriving the consumer of the protection afforded by the mandatory provisions of the law of the country in which he has his habitual residence*".

In the case of insurance contracts, Article 7 applies whether or not the risk is situated on European territory in the case of "*large risks*" (Art. 7(1) and (2)): the parties may then choose the law of their choice to govern the insurance contract (Art. 7(2)(1)); in the absence of choice, the contract is governed by the law of the country where the

insurer has his habitual residence (Art. 7(2)(2), first sentence). Finally, an exception clause is provided for in favour of the law of a country with which the contract is "*manifestly more closely connected*" (Art. 7, § 2, para. 2, second sentence).

In the case of individual employment contracts, the law chosen by the parties may not "*result in depriving the employee of the protection afforded by the provisions which cannot be derogated from by agreement under the law which, in the absence of a choice, would have been applicable by virtue of Article 8-2, 83 or 8-4.*" In the absence of a choice, the contract is governed by the law of the country in which or, failing that, from which the employee, in performance of the contract, habitually carries out his work. If the applicable law cannot be determined on this basis, the contract shall be governed by the law of the country in which the establishment that hired the employee is located. If it appears from all the circumstances that the contract is more closely connected with a country other than that referred to in paragraph 2 or 3 of Article 8, the law of that other country shall apply.

In the absence of a choice of law by the parties and of special connections to these contracts, the Regulation seeks to give priority to predictability and legal certainty by laying down, in Article 4(1), precise rules for a whole series of contracts: these are rules and not mere presumptions. For contracts which do not belong to any of the categories provided for in paragraph 1, or on the contrary which fall into several of these categories at the same time, paragraph 2 gives jurisdiction to the **law of the country in which the debtor of the characteristic performance has his habitual residence**. Again, this is a rule and not a mere presumption. An element of flexibility is, however, maintained, since Article 4(3) admits the operation of an exception clause. This clause is, however, narrowly defined: the contract must be "*manifestly*" more closely connected with a country other than that referred to in paragraphs 1 and 2. Finally, there is the jurisdiction of the law **of the country with which the contract is most closely connected**, but only as a subsidiary conflict rule, for cases where the law cannot be determined in accordance with paragraphs 1 and 2.

The contracts listed by the Regulation and the law applicable to them in the absence of a choice (Art. 4, § 1) contain the general rule that the sale of goods is governed by the law of the country of the seller's habitual residence. But two special rules must also be taken into account: one concerns the sale by auction

(Art. 4, § 1, g) and the other the sale of certain financial instruments (Art. 4, § 1, h).

Article 4(1)(c) provides that a contract relating to immovable property "*shall be governed by the law of the country in which the property is situated*". With respect to vacation rentals, Article 4(1)(d) provides that the law applicable to a lease concluded in such circumstances is **the law of the owner's habitual residence**.

In franchising, the contract is governed by the "*law of the country in which the franchisee has his or her habitual residence*".

In distribution matters, the contract "*is governed by the law of the country in which the distributor has his habitual residence.*"

Contract validity

Substantive validity of the contract and consent (Article 10)

The Regulation n° 593/2008 of June 17, 2008 - known as Rome I - also makes it possible to determine the law applicable to the existence and validity of the contract. It is the law that would be applicable under this regulation that is intended to apply if the contract or the provision were valid (Article 10-1 of the Regulation).

In matters of consent of one of the parties, the party may refer to the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of the conduct of that party on the basis of the law provided for in paragraph 1 of Article 10.

Formal validity (Article 11)

The regulation distinguishes between the case where the parties to the contract are in the same country at the time of its conclusion and the case where the parties are in different countries.

A contract concluded between persons who are in the same country at the time of its conclusion is valid as to form if it satisfies the formal requirements of the law which governs it in substance by virtue of the Regulation or the law of the country in which it was concluded.

In the case of different countries, the contract is valid as to form if it satisfies the formal requirements of the law which governs it in substance by virtue of this Regulation or of the law of one of the countries in which one or other of the parties is present at the time of its conclusion or of the law of the country in which one or other of the parties had his habitual residence at that time.

Police law (art. 9) and incapacity (Article 13)

Police laws such as incapacity can interfere with the application of the law of contract.

Article 9 of the Regulation defines *overriding mandatory rules* as "*mandatory provisions, compliance with which is considered by a country to be so crucial for the protection of its public interests, such as its political, social or economic organisation, as to require their application to any situation falling within their scope, whatever the law otherwise applicable to the contract under this Regulation*". The judge is required to apply the mandatory rules, regardless of the law applicable to the contract.

In a contract concluded between persons in the same country, a natural person who would be capable under the law of that country may invoke his incapacity under the law of another country only if, at the time of the conclusion of the contract, the other party knew of this incapacity or was unaware of it only because of carelessness.

Execution and compensation

The law of the contract governs, first of all, "*the performance of the obligations it creates*": this expression includes "*all the conditions resulting from the law or the contract according to which the performance which characterizes any obligation must be carried out*". It is also the law of the contract which governs the exception of non-performance, resolution for non-performance, liability for non-performance or bad performance.

With respect to legal set-off, Article 17 of the Regulation provides that "*in the absence of an agreement between the parties on the possibility of a set-off, the set-off shall be governed by the law applicable to the obligation against which it is invoked*".