

ADVANCED COMMERCIAL LITIGATION

SGS 1: CONFLICT OF LAWS I (CONTRACT)

MCQs

Article 3(2)- The parties to a contract can (in theory) change the applicable law at any time. See The change will not, however, prejudice the formal validity of the contract and will not adversely affect the rights of third parties.

Your client is a company incorporated (and with its head office) in England. It specialises in making 'made-to-measure' wedding dresses. It is involved in a dispute with Fabrics Limited, a company incorporated in (and with its central administration in) Hong Kong. The dispute relates to the fitness for purpose of some silk fabric that your client purchased from Fabrics Limited. You look at the contract, which was concluded in early 2019. It is very brief. It does not contain a choice of law clause, but does contain a choice of English jurisdiction clause. Your client tells you that the contract was negotiated and signed in a hurry and the parties did not have time to consider its terms in any detail. Over the last two years, your client has entered into several contracts with Fabrics Limited and all of these contracts contain an English choice of law clause; the parties had a long discussion on this point when they first contracted with each other and they agreed that English law would suit their purposes best.

Which **ONE** of the following is **TRUE**?

- a) The English court may find that the parties have made a choice of English law because there has been a previous course of dealing between the parties under contracts containing an express choice of English law clause.
- b) The English court will infer that a choice of English jurisdiction clause is also an implied choice of English law.
- c) Because the parties have not chosen the law applicable to the contract, the English court will apply the law of the country with which the contract is most closely connected.
- d) A combination of the above.

Answer: (a) This contract will be governed by the Rome I Regulation.

a) This is correct. There has been a previous course of dealing between the parties under contracts containing an express choice of English law clause. From what your client says, it seems that the choice of English law clause has not been omitted from this contract in circumstances which indicate a deliberate change of policy by the parties – it seems that it was omitted because the contract was signed in a rush and the parties did not have time to consider its terms in any detail. Accordingly, the English court MAY find that the parties have made a choice of English law, even though it is not expressly stated in the contract. This is likely to be done if the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties. See Article 3(1) and Recital 12.

Example: Article 8

You are a banking lawyer. You work for a South African law firm that specialises in shipping finance. Your firm's principal office is in Cape Town. You are currently based in the firm's London office. You are dismissed. You are considering bringing proceedings for unfair dismissal. There is a South African choice of law clause in your contract of employment. The choice of law clause will not deprive you of the protection afforded to you by the provisions which cannot be derogated from by agreement under the law which would apply in the absence of choice. The law which would apply in the absence of choice is English law (the law of the country in which you habitually carry out your work in the performance of your contract). You will therefore have the protection of English rules of law which cannot be derogated from by agreement.

Example: Articles 9(1) and (2)

Two companies enter into a contract for the manufacture and supply of goods. Both companies are incorporated in Italy. The goods are to be made and delivered in Italy. Payment is to be made and received in Italy, in Euros. The parties expressly choose French law to govern the contract, wishing to avoid the application of an Italian statute. A dispute arises between the parties. One party commences

proceedings before the English courts on the basis that (i) it has litigated there before (ii) it perceives that the matter will reach trial sooner in England than in Italy and (iii) the defendant has some property in England which can be enforced against if it refuses to satisfy any judgment. The defendant submits to the jurisdiction of the English court.

The following laws might accordingly apply in the case:

French law, pursuant to Article 3(1);

Provisions of **Italian** law which cannot be derogated from by agreement, pursuant to Article 3(3); and

English overriding mandatory provisions, pursuant to Article 9(2).

Exam Question- 16 marks.

Students were asked to advise Mandy Kullar in relation to an issue arising out of her recent wedding celebrations. The wedding took place in December 2019 at Mandy's estate, Dylan Park, which is in Cornwall, England. Mandy wanted to choose and purchase all of the wine for the wedding herself and used a company called Masseria Spartivento ('MS'). MS's website stated that it was incorporated in Italy and had only one site, the farm in Tuscany (Italy), which is where its central administration and all other functions of the business took place. The website was in Italian (Mandy understands and can speak Italian), did not have different pages for customers from different countries, and did not offer translations of its pages, and the impression was very much that MS was a small, family business in Tuscany. There was, however, an email contact address which Mandy used to contact MS to enquire about sampling some of its products.

MS had no facility to send any of its produce to England and so Mandy sampled its wine and cheese when she was on holiday in Italy during summer 2019 and decided that MS would be the perfect supplier of wine and cheese for her wedding. She placed an order for 1,000 bottles of wine and 70kgs of cheese for 65,000 Euros which Mandy paid to MS from her Italian bank account. Mandy subsequently arranged for a specialist food and beverage courier company based nearby in Cornwall, Celtic Cargo Limited ('CCL'), to collect the items from MS's farm (in Tuscany) and bring them to Dylan Park in time to be served at the wedding reception.

Unfortunately, in November 2019 when the items were received by Mandy at Dylan Park it was apparent that the quality of the items was unsatisfactory and far inferior to that which Mandy had sampled in Tuscany. A significant amount of the wine was contaminated with a cork taint and was undrinkable. Much of the cheese seemed 'off' with excessive mould and an offensive smell. Mandy and the caterers took the view that it was too risky to serve the items to the wedding guests. Replacements for the items (which were unusable) had to be purchased at the last minute, at a cost of £78,000. Mandy contacted MS who maintained that the items supplied were of the highest quality and that some variation in the products was to be expected when using traditional methods of production. MS also suggested that, for example, the cheese in particular might have been transported and stored in such a way as to cause it to deteriorate since leaving MS's farm.

Mandy wished to issue proceedings against MS before the English courts to recover her losses. MS indicated that, should this happen, it will submit to the jurisdiction of the English court. The contract between Mandy and MS does not contain a choice of law clause or a choice of jurisdiction clause. Students were asked which country's laws the English court was most likely to apply to the dispute.

Good answers included:

1. Rome I Regulation needed to be considered.
2. The material scope and temporal scope were satisfied.
3. There was no express choice of law.
4. It was unlikely that one may be implied by the court.
5. The starting point in these circumstances, therefore, is to apply Article 4.
6. But in this particular case, this was a consumer contract under Article 6.
7. This is because Mandy is a natural person acting outside of any trade/profession contracting with a professional (Recital 24).
8. Mandy's habitual residence is England (Article 19).
9. An assessment needed to be made as to whether MS had directed its activities in England.
10. Various application points suggested that MS did not direct its activities as such: the website was merely accessible in England, it was entirely in Italian, it had a low level domain name, no international facility was available, there was no online ordering via the website, no delivery to England and payment was in Euros.
11. Article 6(3) says that the default is therefore to go to Article 3 or 4. Here it would be 4.
12. Article 4(1) (a) applies as this is a contract for the sale of goods.
13. Applicable law will be where the seller has its habitual residence and this was Italy.

14. The English court would therefore apply Italian law to the dispute.

15. Given that this is the conclusion, students should also have applied Article 9 and 21 as they might operate so that English overriding mandatory provision and/or public policy provisions displace contradictory Italian provisions.

SGS 2: CONFLICT OF LAWS II (TORT)

MCQs

(Environmental damage)

Industrial Paints Limited (“IPL”) is a company incorporated in England. It is a wholly owned subsidiary of Renaissance Paints SpA (“Renaissance Paints”), a company incorporated in Italy. IPL has a factory in Dover. In October 2019, a substantial amount of toxic waste leaked from its Dover plant. Two days later, such waste caused damage to fishing materials and products owned by Poisson GmbH (“Poisson”), a German incorporated company with a branch on the French coast, whilst such materials and products were being stored near Calais, France. Poisson commences proceedings against IPL and Renaissance Paints in England.

Which country’s laws are **MOST LIKELY** to be applied by the English court? Please choose the **ONE CORRECT** answer from the options below:

- a) French law;
- b) English law;
- c) German law; or
- d) The claimant has a choice as between some of the above countries’ laws.

The answer is (d). The Rome II Regulation will apply to this tort. This case relates to environmental damage. Article 7 will accordingly apply. See, also, Recital 24. The claimant can therefore elect to apply French law (as the law of the place where the damage occurred for the purposes of Article 4(1)) or English law (as the law of the country in which the event giving rise to the damage occurred).

Even if French law is applied to the dispute, the English court can take account of the English rules of safety and conduct pursuant to Article 17.

(Product liability)

Industrial & Commercial Jigsaws Limited (“ICJL”) is a company incorporated in England. It has its registered office and central administration in Sheffield. ICJL makes industrial metal-cutting machines. Such machines are marketed and sold throughout all the countries of the European Union. In September 2019, ICJL supplies one of its machines to a Belgian company named Gaufres SPRL (“Gaufres”). Gaufres is based in Liege, Belgium. The machine is manufactured in Sheffield and shipped to one of Gaufres’ factories in Aachen, Germany. It turns out that there is a fault with the ICJL machine. It accordingly malfunctions and causes personal injury to one of Gaufres’ employees, Isabel van den Bossche, whilst she is working in the company’s Aachen factory. Ms van den Bossche is a Dutch national, living in Maastricht, The Netherlands. Gaufres has now gone out of business due to insolvency. Mrs van den Bossche accordingly sues ICJL in England.

Which country’s laws are **MOST LIKELY** to be applied by the English court?

- a) English law;
- b) Dutch law;
- c) Belgian law; or
- d) German law.

The answer is (b). The Rome II Regulation will apply to this tort. This case relates to product liability. Given that the product (i.e. the metal cutting machine) has been marketed in the country in which Ms van den Bossche habitually resides (namely The Netherlands), Article 5(1)(a) should apply. It is not clear from the circumstances that the tort is manifestly closer connected with another country for the purposes of Article 5(2).

Further, the court will consider the relevant rules of safety and conduct in force at the place and time of “the event giving rise to the liability”; see Article 17 and Recital 34. Therefore, depending upon the court’s analysis of what went wrong and where, this is likely to include the relevant rules in place in England (where it was manufactured) and/or Germany (where it was installed and operational).

Common Law rules applied in cases of defamation

Rule of double actionability

“Double actionability”- Phillips -v- Eyre: 1) The tort is actionable under the law of the forum- give rise to a tortious action in English Courts (if this had happened in England where it is being heard)

2) The claimant must show that the tort is NOT justifiable under the law of the place of the tort- Tort does not give rise to some civil liability under the law of the place where the tort occurred

Flexibility in second limb (Boys v Chaplin) - accident in Malta, British Armed forces- road traffic accident- injuries

Head of terms which were available under English but not under Maltese law

Seen as being unfair to the claimant that certain heads of terms

Court decided second limb could be decided flexibly (could overlook that double actionability was not satisfied under the second limb)

Flexibility in first limb (Red Sea Insurance)- didn't apply the first condition

SGS 3: FORUM SHOPPING AND INTERNATIONAL ASPECTS OF LITIGATION

Factors where to issue proceedings

- Cost of commencing proceedings- includes level of fees charged by local lawyers
- The availability of conditional fee agreements;
- The availability of interim orders such as security for costs/injunctions; (English court can give an order in favour of a defendant- eg. if your client is a claimant and they don't have enough funds may apply somewhere else other than England where they don't award security of costs)
- The extent of the parties' disclosure obligations;
- The mode of trial (for example trial by jury); perception- jury may be more biased against individuals vs corporations or some nationalities maybe
- Joinder rules (i.e. joining third parties to the proceedings);
- Ability to counterclaim (in some jurisdictions may have to introduce completely new proceedings which may lead to further cost and time)
- The length of proceedings;
- The nature of the remedies available;
- The level of costs recovery ;and (client would want to get costs back if they win- England and Wales losing party pays but not the case in all countries)
- The methods of enforcement available.

Anti-suit injunctions

- an anti-suit injunction is an order preventing a party from commencing or continuing foreign proceedings.
- It is an order directed to the party, not the foreign court (so it is described in case law as operating 'in personam').
- Regardless of how a defendant chooses to dispute a foreign court's jurisdiction, it must tread a fine line between (i) not impliedly submitting to the jurisdiction and (ii) responding to the foreign proceedings in a way which would preclude a default judgment (or its equivalent) from being entered.
- Section 37 of the Senior Courts Act 1981 gives the (English) High Court the jurisdiction to grant an injunction "in all cases in which it appears to the court to be just and convenient to do so".

Example

ACL might apply to the English court for an antisuit injunction to prevent BLP from commencing proceedings in Japan. Given that anti-suit injunctions operate in personam, the English court will take into account the fact that BLP has assets / a 'presence' in the jurisdiction of the English court when deciding whether to grant any such injunction. Such a presence makes it possible to serve an anti-suit injunction on BLP. It is strongly arguable that Japanese proceedings would be oppressive or vexatious: they would be in breach of the jurisdiction agreement between the parties. Many factors connect the dispute to England, so arguably England is the natural forum for the dispute. In conclusion, based on the information above this could be an appropriate case for the court to grant an anti-suit injunction.

In **Turner v Grovit**- the ECJ confirmed that it would be contrary to **Regulation 1215/2012** to grant an anti-suit injunction restraining a respondent from bringing proceedings in a civil or commercial matter falling within the scope of Regulation 1215/2012 before the courts of another Regulation member state.

Consolidation Qn: For the purpose of this part of the question, assume that (i) the contract between Homewares and Cuccina contains an exclusive jurisdiction clause, conferring jurisdiction on the English courts and (ii) Cuccina is threatening to commence proceedings in Italy in respect of its unpaid invoice. Homewares has asked whether it can obtain an injunction from the English courts, preventing Cuccina from doing this.