

Jurisdiction and Governing Law Rules in the European Union

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Further information

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This note is written as a general guide only. It should not be relied upon as a substitute for specific legal advice.

Introduction

For any commercial organisation, ensuring that a dispute is tried in a forum that is both convenient and business-friendly is often critical: it can greatly increase the chance of achieving a successful outcome, and doing so in a reasonable time frame and at reasonable expense. The law governing legal obligations is also crucial, of course. Unfortunately it is not always straightforward to work out which court or courts are free (or obliged) to try a case, and what law they will apply, even where parties have taken the precaution of including a well-drafted dispute resolution clause in any agreement they have entered into. The rules that courts apply to these questions are particularly technical in the European Union. To help litigants navigate those rules and avoid missing tactical opportunities at an early stage in a dispute, this note summarises three European Union Regulations:

- **'Recast' Brussels** (EU 1215/2012) - jurisdiction and enforcement
- **Rome I** (EC 593/2008) - governing law of contractual obligations
- **Rome II** (EC 864/2007) - governing law of non-contractual obligations

These Regulations contain the core jurisdiction and governing law rules currently applied by courts in all Member States of the European Union other than Denmark (the 'EU'). Although they are written in plain language, the hierarchy of provisions within each Regulation is not always obvious, and in some cases has had to be clarified by the courts. Yet without a clear understanding of which rules take priority over which others rule, it is impossible to be certain which provision is engaged in any given situation.

This note contains three flow charts showing the order in which each Regulation's rules should be considered. Each chart is introduced with a few words explaining

how the rules work, and giving details of key provisions. To help practitioners spot similarities and differences between the Regulations, which dovetail with each other, rules are grouped by colour according to their subject matter. So, for example, rules governing the scope of a Regulation appear in dark green boxes; those dealing with party choice appear in blue boxes; and 'escape' clauses (a prominent feature of the Rome Regulations) are shown in white boxes.

The charts are, of course, a starting point only. They are not a substitute for consulting the relevant authorities, commentary or background EU documentation, or indeed the text of the Regulations themselves. As well as setting out the rules in full, the Regulations contain special provisions concerning multiple parties, parallel litigation in different jurisdictions, overriding principles of public policy, and other factors requiring an exception to be made to a general rule. The main provisions of this kind are listed at the end of this note.

Chapter III of the Recast Brussels Regulation contains the EU's rules on the recognition and enforcement of judgments across its internal borders. Those rules are outside the scope of this note, as are the rules on jurisdiction and enforcement applied in Iceland, Norway and Switzerland (three of the four Member States of the European Free Trade Association) or in disputes straddling any of those jurisdictions and the EU. They are to be found in the Lugano Convention 2007, which follows closely the rules contained in the original Brussels Regulation (EC 44/2001). Denmark is not automatically subject to the Recast Brussels Regulation, but has agreed to be so. The Rome Regulations are not applied by courts in Denmark or any Member State of the European Free Trade Association. Courts in Denmark do, however, apply the Rome Convention 1980, on which the Rome I Regulation is based.

Recast Brussels Regulation (EU 1215/2012) - Which court has jurisdiction?

On 10 January 2015 courts in the EU began to apply revised rules on jurisdiction and enforcement to cases instituted on or after that date. The new rules can be found in the Recast Brussels Regulation (EU 1215/2012). Although they do not differ radically from those contained in the Regulation it replaces (the Brussels I Regulation, EC 44/2001), some significant changes have been made. In particular:

- the scope of the Recast Regulation is somewhat clearer - see Recital 12, which explains the arbitration exception in Article 1(2)(d);
- courts in the EU are now free in some circumstances to decline jurisdiction over disputes already being litigated outside the EU (Articles 33 and 34), thus avoiding parallel litigation and the risk of conflicting judgments being enforced across borders at the same time; and
- the parties' chosen court is now free to try a dispute without delay, whether or not proceedings have already commenced elsewhere in the EU (Article 31(2)). Previously it had to wait until the 'court first seised' declined jurisdiction.

The flow chart opposite deals first with the scope of the Recast Regulation (green boxes), and then with provisions that override most others in the Recast Regulation. One of these is Article 24, which gives courts 'exclusive jurisdiction' over certain categories of dispute which should be tried in only one jurisdiction, regardless of what the parties have agreed. They are disputes concerning, for example, rights *in rem* in real property, and the validity or decisions taken by a company organ. Because they override the rule respecting parties' choice (Art 25), as well as other provisions that would normally apply, the courts define these categories narrowly.

The basic, or 'default', provisions in the Recast Regulation appear at the bottom of the chart (in orange boxes), reflecting the fact that they apply only if other,

overriding provisions are not engaged. Just above them are key provisions (in grey boxes) concerning the 'domicile' of a party and 'special jurisdiction'. Each of those provisions requires explanation:

Domicile

One might assume that a party has just a single domicile. However, for the purposes of the Recast Regulation a company can be domiciled in up to three EU Member States simultaneously, or have domiciles both within the EU and outside it. Article 63(1) provides that "a company or other legal person or association of natural or legal persons is domiciled at the place where it has its: (a) statutory seat, (b) central administration; or (c) principal place of business." This gives the Claimant flexibility, in particular when a court can only accept jurisdiction on the basis of Article 4.

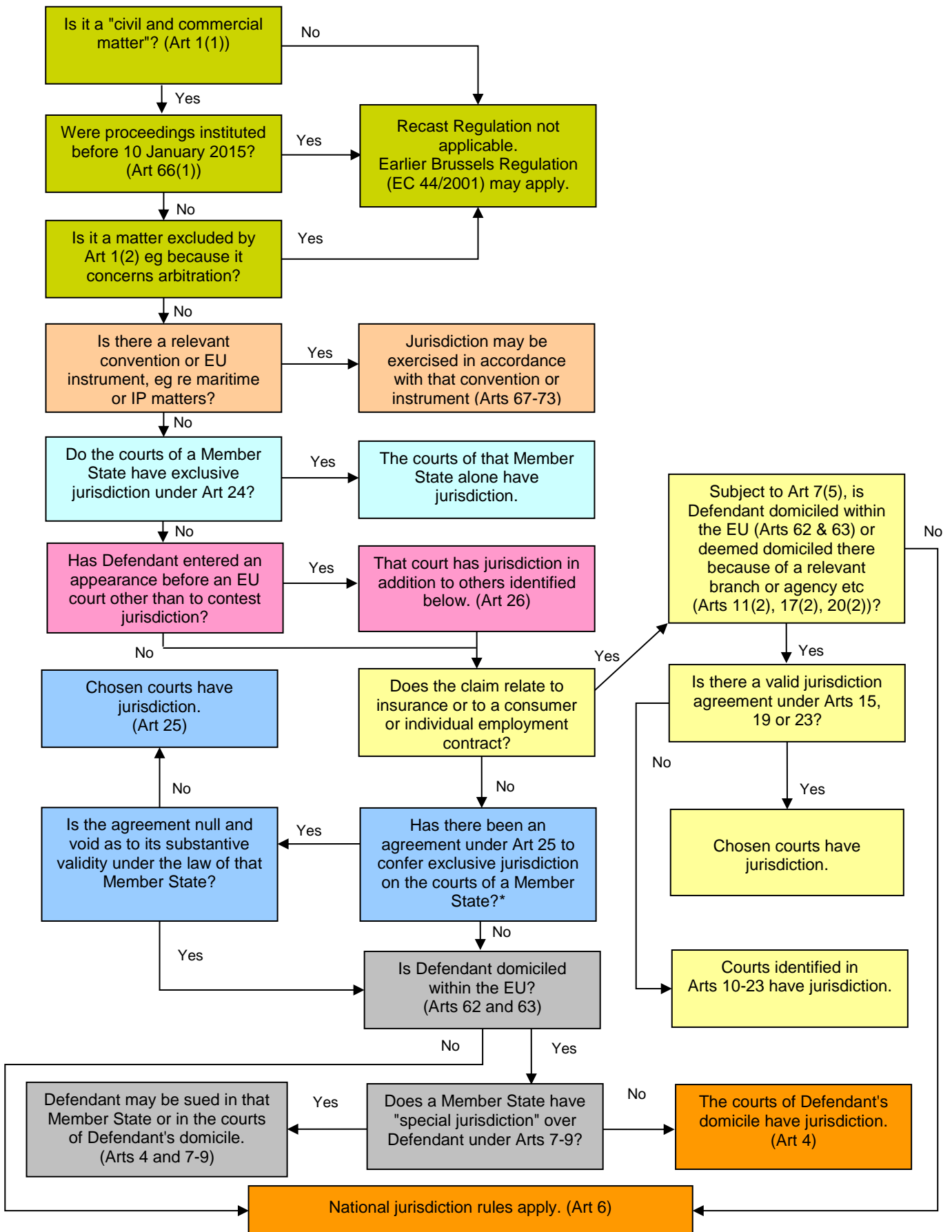
Special jurisdiction

In many commercial disputes the Claimant has the option of litigating not only in the Member State(s) where the Defendant is domiciled, but also in one connected to the subject matter of the dispute. Articles 7 – 9, headed 'special jurisdiction', provide among other things that a contractual claim may be tried in the courts of the place of performance of the obligation(s) in question (Art 7(1)); and disputes relating to negligence or other torts may be tried where the harmful event occurred or may occur (Art 7(2)).

Hague Convention on Choice of Court Agreements

The Hague Convention on Choice of Court Agreements 2005 has been signed by a number of countries, but at the time of writing has been ratified only by Mexico and the EU and therefore affects jurisdiction issues as between only those two entities for the time being - see p 8 for details. However, as more countries ratify the Convention, it will have a broader impact on cross-border disputes.

Recast Brussels Regulation (EU 1215/2012) - Which court has jurisdiction?



* In England, at any rate, it may not matter in practice where the chosen court is located - see Dicey, Morris & Collins: The Conflict of Laws, 15th edition, Chapter 12, paragraph 124.

Rome I (EC 593/2008) - Which law applies to contractual obligations?

The Rome I Regulation is based on the Rome Convention 1980 and, like the Recast Brussels Regulation, does not depart radically from its predecessor. The hierarchy of its key provisions is simpler than that of the other Regulations. It starts with rules concerning the scope of Rome I (green boxes), and then sets out special rules aimed at protecting vulnerable litigants such as consumers (yellow boxes). Agreements on governing law are covered next (blue boxes), and where agreement is absent, default rules come into play (orange boxes at bottom of page).

Despite its simple structure, Rome I contains much important detail, including a string of provisions in Article 4(1) (first orange box), which are designed to cover most categories of contract that do not concern vulnerable litigants such as consumers (yellow boxes). The categories are as follows:

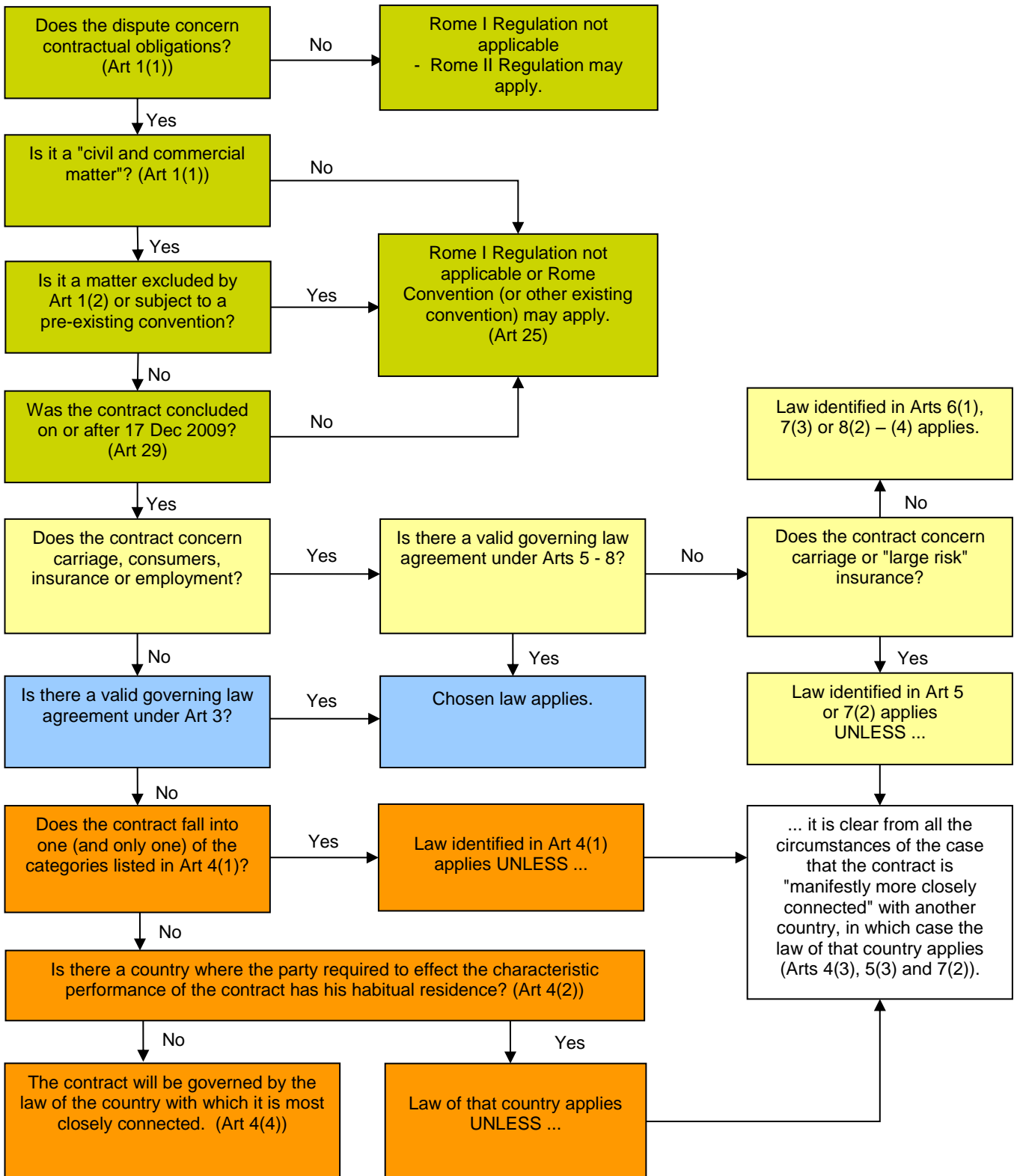
- (a) sale of goods - governed by law of country where seller has his habitual residence
- (b) provision for services - governed by law of country where service provider has his habitual residence
- (c) relating to right *in rem* in (or tenancy of) immovable property - governed by law of country where property is situated
- (d) tenancy of immovable property concluded for temporary private use for no more than six consecutive months - governed by law of country where landlord has his habitual residence, provided tenant is a natural person and has his habitual residence in same country (where there is a conflict, this overrides (c) above)
- (e) franchise - governed by law of country where franchisee has his habitual residence
- (f) distribution - governed by law of country where distributor has his habitual residence

- (g) sale of goods by auction - governed by law of country where action takes place (if such a place can be determined)
- (h) contract concluded within a multilateral system which brings together (or facilitates the bringing together) of multiple third-party buying and selling interests in financial instruments, as defined in Art 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law - governed by that law.

Like the Rome II Regulation, Rome I contains a number of 'escape' clauses designed to prevent the courts having to apply the governing law of one country when the contract is "manifestly more closely connected" with another (white box). The main provisions of both Rome Regulations are subject to a number of exceptions, the most important of which are explained briefly at the end of this note.

A basic principle of the Rome Regulations is that the law specified by them shall be applied whether or not it is the law of a Member State (Rome I, Article 2 and Rome II, Article 3).

Rome I (EC 593/2008) - Which law applies to contractual obligations?



Rome II (EC 864/2007) - Which law applies to non-contractual obligations?

Unlike the other Regulations, the Rome II Regulation is not a revision of existing EU legislation, but is essentially new. Nevertheless, it shares certain legal and terminological concepts with the Rome I Regulation and that Regulation's predecessor, the Rome Convention 1980, so there is an existing body of case law clarifying some aspects of Rome II.

Rome II is structurally the most complex of the three Regulations, and this is reflected in the flow chart opposite. However, most commercial disputes are not affected by the bulk of its rules. So if a dispute falls within the scope of Rome II (green boxes at top of chart), and the parties have not reached a valid agreement on the law applicable to their non-contractual obligations (blue boxes), the likelihood is that the only provisions in Rome II directly relevant to the dispute will be the default ones shown at the bottom of the chart. Before referring to these, however, practitioners should check that the obligations in question do not concern competition, IP or environmental law. If they do, the special rules referred to in the middle of the chart may be engaged. These rules are shown separately, since the way they interact with the rule on party choice, for example, and the 'escape' rule (white box), is different in each case.

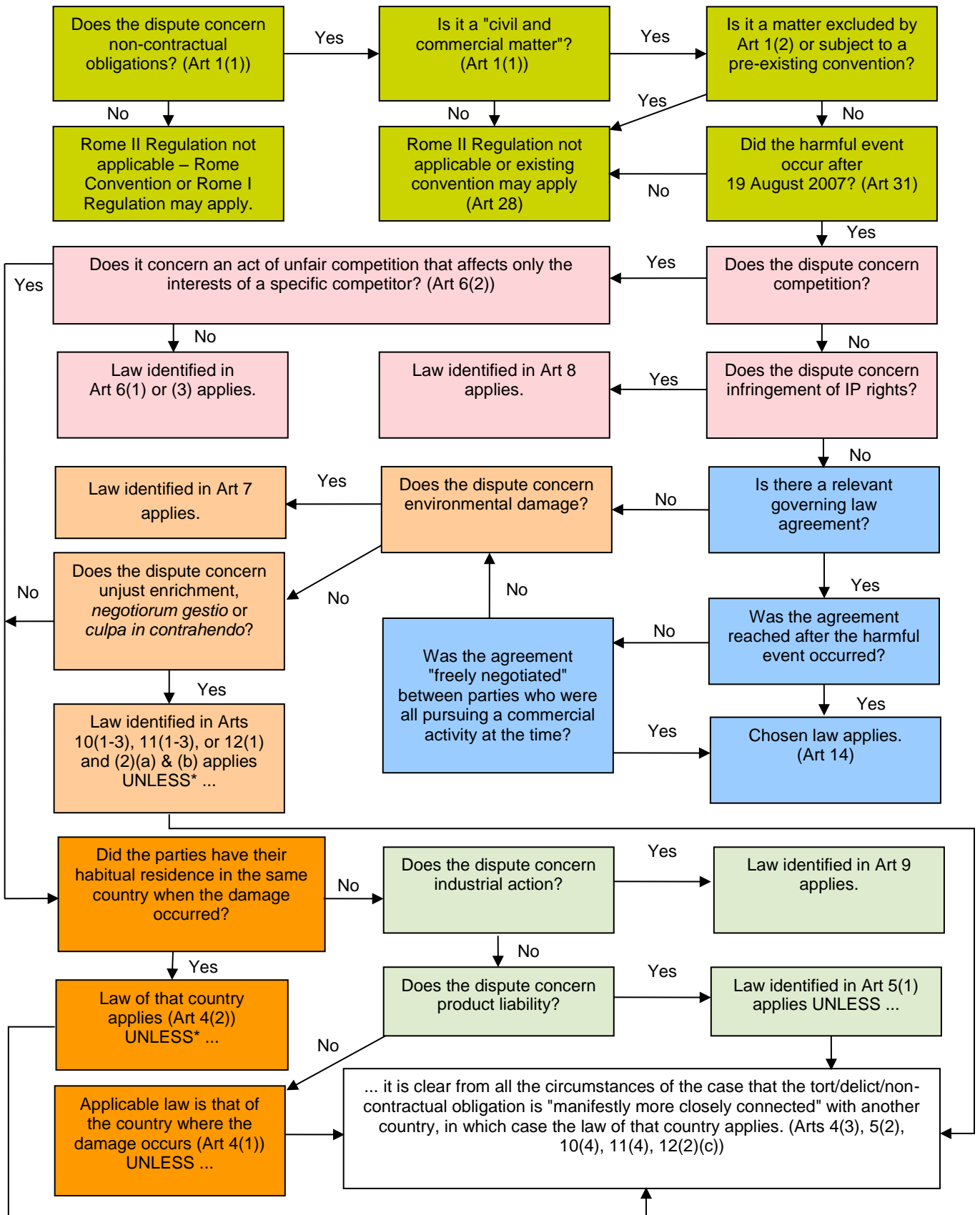
A particular feature of Rome II is the freedom it gives parties to choose the law governing their non-contractual obligations. This is a novel principle in some EU jurisdictions. The freedom of choice is circumscribed, however, and any prior agreement on governing law must be 'freely negotiated' between parties who were all pursuing a commercial activity at the time (Article 14(1)).

Following its sister Regulation, Rome II contains a number of 'escape' clauses designed to prevent the courts having to apply the governing law of one country when the obligation in question is "manifestly more

closely connected" with another (white box). The main provisions of both Rome Regulations are subject to a number of exceptions, the most important of which are listed at the end of this note.

A basic principle of the Rome Regulations is that the law specified by them shall be applied whether or not it is the law of a Member State (Rome I, Article 2 and Rome II, Article 3).

Rome II (EC 864/2007) - Which law applies to non-contractual obligations?



* Art 4(3) exception to Art 4(2) does not apply in industrial action and product liability cases; Art 12(2)(c) exception applies only to Art 12(2)(a)&(b).

Main exceptions

Jurisdiction

Whichever jurisdiction is identified by the Recast Brussels Regulation as appropriate for a particular dispute (see flow chart):

Article 8 a dispute may sometimes be tried in another EU jurisdiction where the wider context demands this - for example, where there are multiple defendants domiciled in different EU member states and the claims are best tried together

Article 25 where the parties agree that jurisdiction shall not be exclusive, the provisions of Article 25 supplement, but do not override, those of Articles 4 – 9

Articles 29-34 proceedings in an EU Member State may be stayed if identical or related proceedings are already underway in another Member State, unless the former has been given exclusive jurisdiction by the parties (or has exclusive jurisdiction by virtue of Article 24)

Hague Convention the Hague Convention on Choice of Court Agreements may override the Recast Brussels Regulation where an exclusive jurisdiction agreement favours a court in an EU Member State and one of the parties has its habitual residence in Mexico - see Article 26(1) and (6) of the Convention.

Governing law - contractual obligations

Whichever law is generally applicable under the Rome I Regulation (see flow chart), it may be overridden by elements of other legal systems:

Article 3(3) to give effect to national laws which cannot be derogated from by agreement

Article 3(4) to give effect to EU laws which cannot be derogated from by agreement

Article 6(2) to prevent parties contracting out of consumer protection measures

Article 8(1) to prevent parties contracting out of employment protection measures

Article 9 to give effect to mandatory rules of a country in which the dispute is tried and/or the contractual obligations performed

Article 21 where the generally applicable law is "manifestly incompatible" with the public policy of the country in which the dispute is tried

Governing law - non-contractual obligations

Whichever law is generally applicable under the Rome II Regulation (see flow chart), it may be overridden by elements of other legal systems:

Article 14(2) to give effect to national laws which cannot be derogated from by agreement

Article 14(3) to give effect to EU laws which cannot be derogated from by agreement

Article 16 to give effect to mandatory rules of the country in which the dispute is tried

Article 26 where the generally applicable law is "manifestly incompatible" with the public policy of the country in which the dispute is tried

CPD Points

CPD points are available for reading this note if it is relevant to your practice. If you would like any live training on this subject, we would be happy to give you a presentation or organise a seminar, webinar or whatever is most convenient to you.

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