Choice of Law in respect of contracts in the United Arab Emirates and the European Union; and related aspects of Private International Law in relation to the Dubai International Financial Centre

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A thesis submitted for the degree of Doctor of Philosophy in Law

School of Law

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November / 2015

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Abstract

Private international law applies to cases governed by private law which involve factual connections with several countries. A major issue governed by private international law is the question of which country's law should be applied to determine the merits of a dispute.

This thesis focuses on choice of law in respect of transnational contracts. It compares the legal principles concerning choice of law adopted by way of European harmonization with those currently utilized in the United Arab Emirates. The purpose of this comparison is to find points which are not addressed in the United Arab Emirates law under its Civil Transactions Code, or on which its provisions are unsatisfactory. In particular, the absence of any special provisions on choice of law for contracts such as consumer, insurance, and employment contracts which involved disparity of bargaining power between the parties, is considered. The thesis proposes new provisions which could usefully be adopted in the UAE by way of amendment to its Civil Transactions Code in the light of the European solutions under the Rome I Regulation.

Attention is also given to a recently established territorial enclave, the Dubai International Financial Centre (DIFC), which has its own legal system, based on an English model, and is designed to attract international businesses and investors. Thus the thesis examines choice of law under DIFC law, and (in view of the rapid development of the DIFC legal order, and the numerous issues therein which have not yet been fully resolved) also considers other areas of private international law in the DIFC (such as judicial jurisdiction, arbitration and the enforcements of judgments and awards).

Acknowledgment

I would like to express my appreciations to a number of people who without their help, support and encouragement this work would not have been achieved.

First, I would to thank my supervisor, Professor Peter Stone for his continuous support of my PhD study and research, for his patience, motivation, enthusiasm, and immense knowledge. His guidance helped me in all the time of research and writing of this thesis. I could not have imagined having a better advisor and mentor for my PhD study.

I am really grateful and thankful to the DIFC judges: HE Justice Shamlan Al Sawalehi**,** HE Justice Ali Shamis Al Madhani, and Justice Sir David Steel, for the valuable time that they gave me and for sharing and discussing matters that are related to the DIFC.

I would like also to express my thankful to Al Tamimi & Co law Firm, in particular Mr. Hassan Arab the Regional Head of Litigation for all the support and help they provided especially in the DIFC fields. I would like also to thank Ms. Sheila Shadmand from Jones Day Law Firm for her help and support during my PHD.

I would also like to thank the staff of the University of Essex including those of the School of Law for their co-operation.

My deepest gratitude is to my parents and my family for their patience and support during my study period.

Table of Abbreviations

CTC: Civil Transactions Code, enacted by Law 5/1985 of the United Arab Emirates.

DIFC: Dubai International Financial Centre.

DIFCA: Dubai International Financial Centre Authority.

DFSA: Dubai Financial Services Authority.

EC: European Community.

ECJ: European Court of Justice.

EEC: European Economic Community.

EP: European Parliament.

EU: European Union.

GDP: Gross Domestic Product.

SLC: Supreme Legislation Committee of Dubai.

SSS: Securities Settlement Systems.

UAE: United Arab Emirates.

UK: United Kingdom.

Chapter 1 – Introduction

General Introduction

The area of law identified as private international law, or the conflict of laws, is concerned mainly with three types of issues which arise in connection with legal relationships governed by private law, where the factual circumstances of the case are connected to more than one country. Principles of private international law may be referred to as conflict rules. Such issues may arise from the relations of persons, of acts or events, or of property involved. Thus, relevant connections may consist of an individual's domicile, residence, or nationality; the place of incorporation of a company, or the location of its headquarters or of a branch office; the place of conclusion or performance of a contract; the place where an accident giving rise to a tort claim occurred; or the location of property.

Private international law deals mainly with three types of issues in relation to transnational disputes: judicial jurisdiction, choice of law, and recognition and enforcement of foreign judgments. Provisions on jurisdiction serve to determine whether the courts of one country are competent to entertain proceedings involving disputes which have some connection with another country. Rules on direct jurisdiction are applicable by a court for the purpose of determining its own jurisdiction to consider proceedings before it. Provisions on foreign judgments serve to determine whether a judgment given by a court of one country is to be recognised or enforced in another country.

Provisions on choice of law select from the connected countries the one whose law will govern substantive disputes arising from the contract or other matter. Choice of law with

respect to contracts is one of the most important issues in the sphere of private international law. In addition to the obvious importance of the issue to a court or arbitral tribunal that must resolve a dispute between contracting parties, it is also important for the parties themselves, in planning the transaction and performing the contract, to know the set of rules that governs their obligations.[1] Choice of law is also important, because transnational contracts are the vehicle for international trade and give rise to numerous disputes and much litigation. By choosing the governing law of a contract, the parties can dictate the law that will govern their rights and obligations and can ascertain their rights by consulting the chosen law. In the absence of a governing law clause in the relevant contract, numerous issues can arise. In purely domestic cases, it is obvious that the courts of the country with which the contract is exclusively connected will have jurisdiction and that the internal law of that country will be applied to determine the substantive issues. But in transnational contracts, where the parties reside in different countries or the contract was wholly or partly negotiated or performed in a country other than that of their common residence, there may be great difficulty in ascertaining which courts have jurisdiction to determine disputes arising from or in connection with the contract and which law will be applied in resolving substantive issues that arise in such litigation. Since the parties to a transnational contract often fail to include a choice of law clause, the default rules, which are designed to provide a supplementary solution to the problem of what law governs the substance of a contract, are of great importance.

The character and purpose of conflict rules have usefully been explained by Lord Nichols of Birkenhead:

> Conflict of laws jurisprudence is concerned essentially with the just disposal of proceedings having a foreign element. The jurisprudence is founded on the recognition that in proceedings having connections with more than one country an

[1] See the Introduction to the Hague Principles on Choice of Law in International Commercial Contracts, available online at www.hcch.net/index_en.php?act=conventions.text&cid=135 (accessed on 21 May 2015).

> issue brought before a court in one country may be more appropriately decided by reference to the laws of another country even though those laws are different from the law of the forum court.[2]

In a conflicts scenario, the laws of two or more countries are invoked, and a significant difference in the outcome of the case may depend on which law is applied. Several factors are considered before selecting one country's law in preference to another country's law, and these will be outlined and explored below.

Determination of the law applicable to a contract without taking into account the expressed will of the parties to the contract can lead to unhelpful uncertainty because of differences between solutions from State to State. For this reason, among others, the concept of "party autonomy" in the determination of the applicable law has become very widely accepted.

Since the 19th century, the growth of international trade has led to increasing numbers of transnational commercial disputes and has also resulted in strong international movements towards harmonising the various systems of law.[3]

In the light of this background, the aim of this thesis is to examine and compare the provisions concerning choice of law in contracts which currently exist in the United Arab Emirates (UAE) under the Civil Transactions Code (CTC) and those that exist in the European Union (EU) under the Rome I Regulation, with a view to reaching conclusions concerning the possible reform of the UAE provisions so as to reflect solutions adopted by the European Union provisions. Attention will also be given to the relevant legislation in the Dubai International Financial Centre (DIFC), which is a recently created legal and financial enclave within the UAE, and in which there is a rapidly developing legal regime

[2] *Kuwait Airways Corp v Iraqi Airways Co* [2002] UKHL 19.

[3] Ramazan Zorlu, *How conflict of laws rules have developed, and may continue to develop, to accommodate the requirements of international commerce*, available online at: www.akellawfirm.com/yayinlar/HOW_CONFLICT_OF_LAWS_RULES_HAVE_DEVELOPED_AND_MAY_CONTINUE_TO_DEVELOP_TO_ACCOMMODATE_THE_REQUIREMENTS_OF_INTERNATIONAL_COMMERCE.pdf (accessed on 21 May 2015).

that differs substantially, as regards both internal and conflict rules, from that applicable in the rest of the territory of the UAE.

These legal systems have been selected because of the author's background as a UAE citizen, who has studied the CTC and discovered weaknesses in its provisions on choice of law, and because the Rome I Regulation is an important measure, both within the EU and beyond. The global influence of the EU legislation on private international law is illustrated by the fact that the Rome Convention 1980, which was the predecessor of the Rome I Regulation, has been the basis of recent legislation in Russia.

After these initial remarks, this chapter will proceed to explain the scope of the thesis in more detail and the research methodology used. Finally, it will explain the structure of the thesis and the focus of each of the subsequent chapters.

The Scope of the Study

This study will focus on the choice of law rules for contracts. It will evaluate and compare the choice of law rules on this matter laid down for the UAE by its Civil Transactions Code; for the DIFC by its own legislation; and for the EU Member States by the Rome I Regulation.

The major comparisons in this thesis will be between the choice of law provisions concerning contracts under UAE law (the CTC) and the choice of law provisions under European Union law (the Rome I Regulation). In addition, the thesis will discuss the choice of law rules applicable to this matter in the DIFC, an enclave within the UAE, where the legal order is based on a common-law model, and there is a set of courts and laws distinct from those of the rest of the territory of the UAE. The DIFC merits particular attention because of its important role in commercial litigation on both the

domestic and international levels, especially after the recent expansion in the jurisdiction of its courts.

A major reason for choosing the UAE law as part of this study is that, in the CTC, the UAE legislator has failed to provide detailed solutions for many potential issues concerning choice of law rules. Consequently, such issues are subject only to broad rules, such as those specified for contracts by Article 19, which fail to deal unambiguously with some of the problems that may arise. In contrast, the European choice of law rules for contracts under the Rome I Regulation are much more detailed.

Another reason for undertaking the comparison is that the Rome I Regulation is widely applicable internationally, since it has to be applied by the courts of 28 EU Member States, the exception being Denmark, which still applies (largely similar) provisions of the Rome Convention 1980. Thus, the rules concerning choice of law specified by the Rome I Regulation can be useful as an indication of general principles of private international law, to which any court within the UAE may have recourse under Article 23 of the CTC in order to resolve ambiguities in the choice of law provisions laid down by the CTC and to supplement the CTC by filling gaps left by incomplete provisions therein.

The research methodology

The methodology used in this thesis will be to proceed by way of scholarly, critical and comparative analysis of publicly available texts. The sources will be legislative enactments, judicial decisions and legal commentaries, published by way of printed books or journals or available from websites.

This research will conducted by way of critical examination on a comparative basis. The critical examination will focus primarily on the UAE choice of law rules, which are the main focus of this thesis. The examination of the EU rules concerning choice of law will

be undertaken to identify inadequacies in the UAE rules. Although some inadequacies in the EU rules themselves may become apparent, reform of the Rome I Regulation is not the purpose of this thesis, and solutions for such inadequacies will not be proposed.

The choice of law provisions in contract under both the European law and the UAE law will be subjected to scholarly analysis. This involves endeavouring to explain the meaning of provisions, to compare them, to identify problems, and to propose practical solutions.

A comparative method will be used in this thesis, with the aim of finding solutions to issues and of suggesting the adoption of reforming legislation designed to embody such solutions. Therefore, to discover weaknesses in the existing UAE choice of law rules, the study will compare these rules with the EU choice of law rules. Thus, the rules laid down by the Rome I Regulation and the CTC will examined and compared.

As regards the DIFC, the research will be based on official websites as well as published judicial decisions and articles written by lawyers active within the DIFC area. Due regard will be paid to the character of the DIFC as a territorial enclave that has its own legal system, which has developed rapidly in the last few years.

The structure of the thesis

This first chapter provides a brief general introduction, dealing with the subject matter and the scope and character of the thesis. Further background explanation will be offered in the next chapter, which will address the overall legal order of the main UAE (apart from the DIFC) and that of the DIFC, and will also consider the recent development of private international law by means of EU legislation.

It is in the third chapter that the core issue for the thesis, the determination of the proper law of a contract, will be examined. This will be addressed under both the EU and the

UAE law in terms of the role of choice of law clauses expressly agreed to by the contracting parties or implied from the terms and circumstances, and of the default rules applicable in the absence of any choice by the parties.

In the fourth chapter, the exceptions to the operation of the proper law under both the EU and the UAE will be examined in terms of particular types of issues (such as formalities or capacity), and of public policy and overriding mandatory rules. Then, in chapter five, choice of law for contracts involving weaker parties (such as consumers) will be analysed.

Private international law in the DIFC will be discussed separately in chapter six. In view of the special character and recent creation of the DIFC, this chapter will range beyond the choice of law for transnational contracts and address various other related issues of private international law involving the DIFC, which have so far received little attention from scholars and commentators, thus enabling the significance and usefulness of the DIFC as a reliable trading post to be better understood.

Finally, in chapter 7, the results and findings will be gathered together, and a draft will be included of a legislative proposal for the amendment of Article 19 of the CTC designed to rectify the inadequacies discovered in the existing provision.

Chapter 2 – Some Background Matters

The present chapter addresses various matters, which provide the context of the main issues examined in subsequent chapters. It is divided into two parts. The first part deals with the United Arab Emirates. The general character of the country will be described and then its judicial system and its Civil Transactions Code. After this, attention will be focused on the UAE free zones. Finally the DIFC will be introduced and its judicial and legal order will be described.

The second part of this chapter will address the general character of the European Union, and will describe the progress of harmonization at the EU level of private international law rules. Then, the chapter will examine the development of EU law in relation to choice of law in respect of contracts.

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Part 1 – The UAE

The general character of the UAE

The UAE consists of seven countries: Abu-Dhabi (the capital), Dubai, Ajman, Sharjah, Ras-Alkaima, Al-Fujairah and Umm-Alquain.[1]

The UAE constitutes a region of the Arabian Peninsula bordered by both the Arabian Gulf and the Gulf of Oman and shares international borders with Saudi Arabia and Oman. On 2 December 1971, six of those countries gathered to establish the UAE; Ras-Alkaima joined the Union later, on 11 February 1972.[2]

In spite of the small geographical area of the UAE (approximately 82,880 square kilometres), it is located in a strategically and economically important place, which has

[1] See S. C. Smith, *Britain's Revival and Fall in the Gulf*, (Routledge Curzon, London, 2004), pp.78-108.
[2] For more information about the history of the UAE, see the TEN Guide, at guide.theemiratesnetwork.com/basics/history_of_the_emirates.php (accessed on 5 May 2015).

enabled it to create one of the most successful economic models in the world. The population of the UAE in 2010 was more than 8.3 million people drawn from more than 190 different nationalities.[3] Local citizens represent just 10% of the population in the UAE; the rest of the population (90%) is made up of foreigners.[4] This diversity in the population is due to its perfect location for trading and investment.

From an economic viewpoint, the UAE is one of the largest economies in the Middle East. According to the Minister of the Economy, the Gross Domestic Product (GDP) of the UAE increased from Dhs. 6.5 billion in 1971 to 1,540 billion in 2014.[5] Furthermore, with respect to the UAE's economic activity, 70% of the UAE's GDP represents non-oil-sector businesses. These include business services, transport, real estate, communication, and storage. The UAE plays a key role in these industries as a result of giving major consideration to transportation. The UAE's critical role in transportation is anchored by the existence of the Jebel Ali Free Zone, which hosts more than 6,400 international companies from more than 120 countries[6] and by the opening of the Al Maktoum International Airport, which is capable of processing more than 120 million passengers and 12 million tons of cargo annually. The Al Maktoum International Airport is the largest passenger and cargo centre world-wide.[7] In addition, the Minister stated that the percentage of the UAE economy comprising non-oil businesses, which is currently 70 percent, should rise to 80 percent during the next 10 to 15 years.[8] In addition, the UAE government plans to derive 5 per cent of the total GDP from innovation in technology

[3] See United Arab Emirates National Bureau of Statistics, available online at www.uaestatistics.gov.ae/ReportDetailsEnglish/tabid/121/Default.aspx?ItemId=1914&PTID=104&MenuId=1 (accessed on 7 May 2015).
[4] *Ibid*.
[5] The approximate equivalent amount in UK is £ 285 million and 274 billion in October 2015.
[6] Jebel Ali Free Zone, available at www.jafza.ae/en/about-us/jafza-facts-at-a-glance.html (accessed on 7 May 2015).
[7] Dubai World Central, Al Maktoum International Airport, at www.dwc.ae/dwc.html (accessed on 7 May 2015).
[8] Ministry of Economy, available at www.economy.gov.ae/arabic/Pages/default.aspx (accessed on 7 May 2015).

and businesses activities by 2021. According to the International Monetary Fund, the growth rate is expected to increase moderately in 2015–16, from 3.3 percent in 2014 to 3.5 percent in 2015.[9]

Most importantly, in November of 2013, the UAE won the right to host the World Expo in Dubai in 2020. World Expos are the oldest continuously running mega events, having started in 1851 with the Great Exhibition in London.[10] This will be the first time that the World Expo is staged in the Middle East, North Africa and South Asia (MEASA).[11] Expo 2020 Dubai is expected to attract 25 million visitors, 70 per cent of whom will be from overseas. The Expo 2020 is expected to bring substantial benefits to the economy given Dubai's well-established status as a hub of regional tourism and well-developed relevant infrastructure.[12]

With these developments, the UAE has established a profitable and sociable environment for transportation and trade, setting the stage for a variety of contractual relations involving consumer contracts, distribution contracts, transnational contracts for the sale of goods, and contracts for the provision of services. Especially in light of the international nature of the population of the UAE, contractual issues frequently arise from these relations which involve foreign elements, such as where the negotiation and conclusion of contracts involve cross-border communications, or where one or both of the parties are foreign nationals or residents, and it is important in such cases to determine the law that governs the contract. For example, a contractual dispute could arise with respect to a transnational contract, such as a sale of goods contract, concluded between a buyer in Scotland and a seller in Dubai, or a contractual claim based on an export contract

[9] See International Monetary Fund Country Report No.15/219 available online at: www.imf.org/external/pubs/ft/scr/2015/cr15219.pdf (accessed on 7 May 2015).
[10] See Expo 2020 Dubai, available online at: expo2020dubai.ae/en/world_expos/did_you_know (accessed on 7 May 2015).
[11] Ibid.
[12] See International Monetary Fund Country Report No.14/188 available online at: www.imf.org/external/pubs/ft/scr/2015/cr15219.pdf (accessed on 7 May 2015).

concluded over the telephone between a German exporter located in the UAE and a French importer.

The judicial system in the UAE

The judicial system in the UAE is based on Article 103 of its Permanent Constitution, which provides that "each territory in the UAE should be ruled in all cases that do not fall under the supervision of the Supreme Court by the rulings of each territory's own courts. The judicial system in these territories consists of three courts: a first instance court, a court of appeal, and a court of cassation, and the ruler of each territory can order the formation of a private court or committees to resolve any lawsuits."[13]

In spite of this provision, only Dubai, Abu Dhabi and Ras-Alkaima have established a court of cassation located within their territories. The other four member territories have to refer judicial matters to the Supreme Court, which is located in Abu Dhabi, for appeals against judgments given by these courts of appeal, because there is no separate third court in these territories. However, this arrangement can sometimes lead to conflicts between the sources of legal authority; if, for example, a judgment from the Court of Cassation in Dubai differs from a judgment of the Supreme Court in a similar case.

The Court of First Instance

The First Instance Court deals with the first stage of litigation under the judicial system of the UAE. The First Instance Court has general jurisdiction over all legal disputes. Its broad and comprehensive jurisdiction includes ordinary cases, authentications, and urgent matters. Its role is to enable the people to seek vindication of their just rights with security and safety.

[13]This is the author's translation.

The Court of Appeal

The second degree of litigation is the Court of Appeal, which reconsiders the verdicts and judgments of the First Instance Court. Its appellate role extends to both criminal and civil judgments and to both minor and major cases decided by the First Instance Court.

The Court of Cassation

The third and highest degree of litigation in the judicial system in the Emirates of Dubai, Abu Dhabi and Ras-Al khaimah is the Court of Cassation of the emirate in question. The jurisdiction of this court is indicated by Articles 173-188 of the Civil Procedures Law 11/1992.

Article 173(1) specifies the cases which will be addressed by the court of cassation. These include cases in which the challenge to the judgment is based on a violation of the law or its misapplication or misinterpretation; the judgment is invalid for procedural reasons;[14] the appealed judgment was rendered contrary to the rules of jurisdiction; where the dispute had been resolved contrary to another judgment which had been given on the same subject between the same litigants and which was res judicata; the judgment lacked reasoning or its grounds were inadequate or ambiguous; or the judgment included unrequested demands or more than what was requested. But judgments issued by courts of appeal in proceedings of execution are not appealable in cassation.

[14] This can occur, for example, when the judge who renders the decision was not validly appointed, or where the document commencing the proceedings was not validly served on the defendant. Another example can be found in inheritance cases, which must be decided by a single judge, so that if three judges decide such a case, the judgment will be invalid.

The Federal Supreme Court

The Federal Supreme Court, which is located in Abu Dhabi, is the highest federal judicial authority in the country. The federal Supreme Court consists of no more than five judges, who are appointed by a decree issued by His Highness the Head of State after approval by the Supreme Council. The decisions of the federal Supreme Court are final and binding on all.

It is necessary to emphasise that any judgment from a court of cassation or the Supreme Court counts as a general precedent, upon which judges and lawyers can rely in any case. The federal Supreme Court deals with disputes between different emirates which are members of the Union and between one or more emirates and the Union government. It rules on the constitutionality of federal and other laws, on conflicts of jurisdiction between the federal judiciary and local judicial bodies, and on conflicts of jurisdiction between the judicial authorities in different emirates. It also has jurisdiction over crimes directly affecting the interests of the Union, the interpretation of the provisions of the Constitution, and the accountability of ministers and senior union officials appointed by decree regarding their actions in the performance of their official responsibilities.

The Civil Transactions Code

The Civil Transactions Code (CTC) was introduced by federal Law 5/1985 on 15 December 1985, and came into force in 1986. The CTC is the present UAE enactment that includes provisions concerning choice of law with respect to contracts and torts as well as most other matters.

IN 1973, choice of law rules for torts and contracts were laid down by the Dubai Court of Cassation, which announced that:

> …if the court does not find any laws which govern the claim in question, then it should apply Islamic law; and if it does not find any rules in Islamic law dealing with the subject in question, then it can rely on custom to find an answer to the claim in question.[15]

As a result, since there were no overarching enactments concerning choice of law issues within the UAE territories, the next reliable source of provisions to be applied to such issues was Islamic law.[16] Before the CTC came into effect in the UAE, Islamic rules were applied to choice of law matters. Under these Islamic rules on choice of law, the parties' religion served as the main element for issues concerning a foreign party; their nationality did not play a role in such issues.[17] Consequently, the application of Islamic principles in matters concerning choice of law were applicable simply in cases where both parties were Muslims. Another law would be applicable if the parties were non-Muslims.

The Civil Transactions Act 1985 consists of five chapters which contain 1,528 Articles. Many provisions are derived from or designed to respect Islamic Shari'a principles.

It must be emphasised that Articles 10- 28 of the CTC cover most of the choice of law issues under private international law, including public policy, contractual obligations, non-contractual obligations, and family matters. Article 27 of the CTA clearly declares the character of the Act, as it specifies that: "…it shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Shari'a." This makes it clear that principles of Islam have a great influence under the CTC; other rules, especially ones dealing with family matters, also make this clear.

It is also clear that existing Western law, and particularly the French legal principles, have influenced the CTC. In lieu of Islamic law, this approach has been generally

[15] Case No. 221/1973, 23 February 1973; cited in E. Al-Tamimi, *The Civil Transactions Act of the UAE* (Al-Bayan Press, Dubai, 2002), p.10.
[16] Abdulla Said A. H. Alsuboosi, *Choice of law in tort: a comparative study involving the laws of the United Arab Emirates and of other countries* (PhD thesis, University of Essex, 2009), p.57.
[17] R. Draz, *Choice of Law Rules in the Islamic Law*, (University Press, Alexandria, 2004), p.280.

accepted by Jordan and Egypt. Historically, most Egyptian rules have been derived from the French legal tradition, and on this basis many Arab countries have introduced the Egyptian provisions into their legal systems.[18] The UAE Article 19 of the CTC provides the general rules concerning choice of law in contracts. Article 19 is designed to respect an express or implied choice of law by the parties and to provide default rules that are applicable in the absence of such a choice. Article 19 of the Civil Transaction Code (CTC) provides that:

> (1) Contractual obligations, as to the form and subject matter, shall be governed by the law of the state of the joint domicile of the two contractors, if they have one domicile. However, if they have a different place of residence, the law of the state in which the contract is made shall be applicable, unless the two parties to the contract agree or if it is evident from the circumstances that another law is intended to be applied.
>
> (2) However, the law of the location of a real property shall apply to the contracts made in respect thereof.

It is clear that this Article respects the parties' choice of law, and, in absence of such a choice, the court will apply either the law of a joint domicile or the law of the place of contracting.

One of the most important UAE provisions concerning private international law is Article 23 of the CTC, which provides that:

> Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles regarding cases of conflicts of law.

UAE Free zones

Article 121 of the UAE Constitution provides that:

> Without prejudice to the provisions of the preceding Article, the Federation shall have exclusive legislative jurisdiction in the following matters:
> - labour relations and social security
> - real estate and expropriation in the public interest
> - extradition of criminals
> - banks

[18] See Alsuboosi, note 16 above, at 59-60.

- insurance of all kinds
- protection of agricultural and animal wealth
- major legislation relating to the penal law, civil and commercial transactions and company law, and procedures before the civil and criminal courts
- protection of intellectual, technical and industrial property and copyright
- printing and publishing
- import of arms and ammunitions except for use by the armed forces or the security forces belonging to any Emirate
- other aeronautic affairs that are not within the executive jurisdiction of the Federation
- delimitation of territorial waters and regulation of navigation on the high seas
– organizing the free zone areas, determining the method of creation of such zones and the scope of their exception from the implementation of the Federal laws.

Based on an amendment what was made to Article 121, each Emirati government is now allowed to create its own free zones. This law allows each Emirate of the UAE to establish its own Financial Free Zone. This right is derived from Federal Law 8/2004 concerning the Financial Free Zones in the United Arab Emirates (the Financial Free Zone Law).

Each emirate has established its own free zones. Abu Dhabi and Dubai have more free zones in comparison to the other emirates.[19]

There are many benefits that may be gained from establishing a company in a free zone, and these are designed to attract the investors to start businesses there. A company established in a free zones is permitted to have 100% foreign ownership; in contrast, companies located outside of the free zones are obliged to have a local (Emirati) sponsor, and the maximum permitted level of foreign ownership is 49%. Another benefit derived from establishing companies in the free zones is that no taxes will be imposed on each company's income and profits, and this exemption is guaranteed for a period of 50 years. Each free zone has its own particular requirements concerning minimum office or warehouse space and permitted activities. The Dubai International Finance Centre (DIFC)

[19] Dubai has 21 free zones; Abu Dhabi has 6 free zones; Sharjah has 2 free zones; Ajman has 3 free zones; Umm Al Quwain has only one free zone; Fujairah has two free zones; and Ras Al Khaimah has 3 free zones. For more information about the zones, see www.uaefreezones.com (Accessed: August 10, 2015).

is the leading free zone at the moment in the UAE, especially after the establishment of the DIFC courts, which makes it attractive to investors who may have greater trust in this legal system, since it is based on a common law model.

Free Zone companies

A free zone company will usually take one of the following three forms: a branch or representative office of a foreign company, a free zone company, or a free zone establishment. There is no minimum capital requirement for a branch or representative office, but in most free zones a free zone establishment and a free zone company are typically required to have a minimum capital of approximately AED 500,000,[20] though the precise requirements differ from one free zone to another. A free zone establishment may be owned by a single individual or company, whereas a free zone company typically requires two or more owners.[21]

The activities of a free zone company are restricted in that it is usually allowed to conduct business only within the relevant free zone and only by way of performing the activities specified in its licence. The relevant licence will be issued by the free zone authority regulating the free zone in which the company is incorporated. In particular instances, a free zone company may be able to apply for an additional licence from a UAE authority that has jurisdiction outside of the free zone (for example, the Dubai Department of Economic Development), if the free zone company is conducting certain kinds of permissible business in a certain Emirate outside of the free zone of incorporation.[22]

[20] The approximate equivalent amount in UK is £ 88,000 in October 2015.
[21] Doing Business in the United Arab Emirates, available online: www.lw.com/upload/pubContent/_pdf/pub2783_1.PDF (Accessed: September 10, 2015).
[22] There are various types of licences, such as a trading license, an industrial license, a service license, and a national industrial license. For more information about these licences, see *Doing Business in UAE*, available online: www.jurists.co.jp/en/publication/tractate/docs/110804_UAE_E.pdf (Accessed: September 10, 2015).

In order for a free zone company to engage legally in sales within the UAE (and outside of the relevant free zone), the company will generally have to retain a commercial agent or distributor. Nevertheless, free zone entities with service licences have been known to provide services outside their free zone.

> The foreign company's application to form a branch office in a Free Zone must be supported by copies of its constitutive documentation, appropriately worded board resolutions and a statement regarding the amount of capital set aside for the promotion and support of the branch office operation. The foreign entity's application to form a Free Zone Establishment or Company must be supported by copies of its constitutive documents and appropriately worded board resolutions.[23]

Since a Free Zone Establishment will be a separate corporate legal entity, further information is required concerning the proposed share capital, the number of shares, the identity of local bankers and licensed chartered accountants and the appointment of directors and secretaries. In the case of a Free Zone Company, the required documentation will depend upon the nature of the shareholders.

As regards offshore companies, such as Jebel Ali Offshore Company, an agent for the process must be registered before the Free Zone Authority is appointed and authorized, and registered with the Authority. Local law firms and accounting firms provide a registered agent usually for a fixed fee.

The Dubai International Finance Centre (DIFC)

The DIFC was established as a Financial Free Zone in the Emirate of Dubai by Federal Law 35/2004. The DIFC territory is in the centre of Dubai, and it covers an area of about 110 acres alongside Sheikh Zayed Road. Its headquarters in the "Gate" building are highly visible.

Dubai Law No 9/2004, the Law establishing the Dubai International Financial Centre, is a Dubai Law that recognises the financial and administrative independence of the DIFC.

[23] Ibid.

According to Article 3, three bodies must be established in the DIFC: the Dubai International Financial Centre Authority (DIFCA); the Dubai Financial Services Authority (DFSA); and the Dubai International Financial Centre Courts.[24]

The goals of establishing the DIFC were specified in Article 4: to be a financial centre in the Emirate based on principles of efficiency, transparency and integrity with a view to making an effective contribution to the international financial services industry; to promote the position of the Emirate as a leading international financial centre; and to expand the Emirate economy.

The DIFC Courts

The formation of the DIFC courts was established by Dubai Law 12/2004. There are two DIFC courts: the Court of First Instance and the Court of Appeal. The Chief Justice of the Courts may create any tribunals in accordance with the DIFC Laws.[25]

The Court of First Instance

From its creation, the Court of First Instance has had exclusive jurisdiction to hear and determine various matters. These include all civil and commercial claims and actions to which the DIFC or any DIFC body, DIFC establishment, or licensed DIFC establishment is a party. They also include civil or commercial claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within the DIFC or to be performed or intended to be performed within the DIFC pursuant to express or implied terms stipulated in the contract; and civil and commercial claims and claims actions arising out of or relating to any incident or transaction which has been wholly or partly performed within the DIFC and is related to

[24] This Article has been amended twice, by Dubai Law 7/2011 and then by Dubai Law 14/2011.
[25] Article 2 of Dubai Law 12/2004. The last sentence of Article 2, which concerns the establishment of the tribunals, was added by Dubai Law 16/2011.

DIFC activities. Additional cases include appeals against decisions or procedures made by the DIFC bodies where DIFC Laws and DIFC Regulations permit such appeals; and every claim or action over which the DIFC Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

As a result of an amendment made by Dubai Law 16/2011, the Court of First Instance may also hear and determine all civil or commercial claims or actions in which the parties agree in writing to file such claim or action with it, whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions. The Court of First Instance may also hear and determine all civil and commercial claims and actions falling within its jurisdiction if the parties agree in writing to submit to the jurisdiction of another court over the claim or action, but such court dismisses such claim or action for lack of jurisdiction. But the Court of First Instance may not hear or determine any civil or commercial claim or action with respect to which a final judgment has been rendered by another court.

It must be emphasised that the jurisdiction of the DIFC courts is largely confined to civil and commercial disputes. Family matters, for example, are still dealt with by the main Dubai courts, even if the parties reside in the DIFC. Also, criminal offences committed within the DIFC area do not fall under the DIFC jurisdiction and are dealt with by the main Dubai courts.

The Court of Appeal

The DIFC Court of Appeal has exclusive jurisdiction to hear and determine appeals filed against judgments and decisions made by the Court of First Instance. The Court of Appeal also deals with all requests by the Chief Justice of the Courts for the interpretation of any article of the DIFC Laws and DIFC Regulations upon an application submitted to him by any DIFC body, DIFC establishment or licensed DIFC establishment. Such an

interpretation will have the same authority as the interpreted legislation. Judgments given by the Court of Appeal are final and conclusive and are not subject to any further appeal.

The DIFC Legislation

The DIFC has its own distinct law. This legal independence derives from the federal and Dubai laws, which allow the DIFC to establish its own civil and commercial laws modelled closely on international standards and principles of common law and customised to the region's exceptional requirements.[26] Accordingly, the DIFC legal order is modelled primarily on English commercial law. Moreover, many of the judges of the DIFC courts have formerly served as judges in England, Australia or Singapore. One might describe the DIFC as an attempt to transplant the City of London into a small area within the Arabian Peninsula.

The DIFC Laws are managed by either the DFSA or the DIFCA. These laws operate only within the DIFC territory, though they are enacted by the Ruler of Dubai.

The Laws established by the DFSA, which are the essential laws on financial services and are called Administered Laws, are the following: the Regulatory Law 2004; the Markets Law 2012; the Law Regulating Islamic Financial Business 2004; the Trust Law 2005; the Collective Investment Law 2010; and the Investment Trust Law 2006.

The DFSA has also been delegated by the Registrar of Companies to deal with the following DIFC laws: the Companies Law 2009; the Limited Partnership Law 2006; the Limited Liability Partnership Law 2004; the Insolvency Law 2009; and the General Partnership Law 2004.[27]

[26]Available from: Dubai International Financial Centre, Web site: www.difc.ae/laws-regulations (Accessed: May 11, 2015)

[27] For more detail about these laws which are established by the DFSA, see www.dfsa.ae/Pages/LegalFramework/LegalFramework.aspx. regulations (Accessed: August 11, 2015).

Many DIFC laws have been adopted with respect to more general commercial matters. Thus, there are laws that lay down substantive rules with respect to contracts, employment, and insolvency. The Contracts Law is modelled partly on the Vienna Convention on the International Sale of Goods. A provision of last resort directs the DIFC courts, when no DIFC rule exists on the relevant matter, to import a rule from English law. This provision can be found in Article 8(2)(e) of DIFC Law 3/2004 on the Application of Civil and Commercial Laws in the DIFC, which allows the judge to refer to the laws of England and Wales to fill any gap existing in the DIFC law. Therefore, one could call this rule a supplementary rule that allows the judge to resolve gaps by referring to English law.

With regard to the choice of law with respect to contracts, the DIFC legislation provides that an express choice of law agreed to by the contracting parties must be respected by the DIFC courts. But, in the absence of such an express choice, the DIFC courts must apply DIFC internal law to the contract.

Part 2 – The European Union

The general character of the European Union

The fiftieth anniversary of the signing of the Treaties of Rome was marked on 25 March 2007. The Treaties of Rome created the European Economic Community (EEC) and the European Atomic Energy Community (EURATOM).

In economic terms, the EU economy is the largest worldwide; it is also the largest exporter and importer, representing 17.17% of the gross domestic product (GDP) globally.[28] The combination of the current 28 Member States[29] establishes an EU territory

[28] The Statistics Portal, www.statista.com/statistics/253512/share-of-the-eu-in-the-inflation-adjusted-global-gross-domestic-product, (accessed on 15 May 2015).

that covers the majority of Western and Central Europe and contains an area of more than four million square kilometres. A large part of Eastern Europe is also included in its geographical area. The EU population in 2014 was approximately 502,577,700 people, the world's third largest population. In contrast, the populations of the individual Member States correspond to considerably smaller proportions of the world's population.[30]

The harmonization of the European private international law rules

The interests and traditions of each of the Member States differ from those of others when harmonisation of choice of law rules is under consideration. This makes the harmonization of conflict rules a complex problem, particularly with regard to choice of law.

The harmonization of the European private international law has become an important aim of the European institutions. This goal originated from the necessity to coordinate the diverse substantive laws of the Member States. In order to accomplish this aim, European institutions have established uniform private international law rules for many matters. Although these leave the Member States' inconsistent national substantive laws untouched, they do promote international uniformity of decisions in litigation of the same dispute in courts of different Member States.

Thus, in order to create an area of freedom, security and justice in civil matters, the European Union has adopted a substantial number of legal instruments which deal with matters concerning private international law. These instruments deal with such issues as judicial jurisdiction, the reciprocal recognition and enforcement of judgments in civil and

[29] The 28 Member States are: Germany, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Austria, Greece, Slovenia, Ireland, Italy, Latvia, Luxembourg, Lithuania, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Hungary, Spain, Sweden, the United Kingdom, and Croatia.

[30] Eurostat – Tables, Graphs and Maps Interface (TGM) table, http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1 (accessed on 15 May 2015).

commercial matters, and choice of law with respect to contractual and non-contractual obligations. This harmonization of private international law has been developed by means of EU legislation in the forms of conventions, regulations, directives and case law.

Although the original treaties which ultimately gave rise to the European Union had the fundamental goals of creating a common market and harmonizing social policies,[31] private international law matters received little attention at that stage and had a low priority under the early treaties. In relation to private international law, Article 220 was the most important provision of the original the EEC Treaty.[32] It gave rise to the negotiation of various agreements, such as the 1968 Convention on Companies and Bodies Corporate[33] and the 1995 Convention on Insolvency.[34] Nevertheless, the only measure based squarely on Article 220 to enter into force was the Brussels Convention 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters.[35] The Brussels Convention had enormous effects. Nevertheless, two international conventions involving children were ratified by the EEC Member States (the Luxembourg and Hague Conventions of 1980) by harmonizing private international law rules.[36]

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[31] D. Lasok, *Law and Institutions of the European Union*, (Butterworths, London, 6th ed, 1994), p.19.

[32] Article 220 of the original EEC Treaty (which was renumbered as Article 293 by the Treaty of Amsterdam and eliminated by the Treaty of Lisbon) provided that:
"Member States shall, so far as is necessary, enter into negotiations with each other with a view to securing for the benefit of their nationals: …
- the mutual recognition of companies or firms within the meaning of the second paragraph of Article 48, the retention of legal personality in the event of transfer of their seat from one country to another, and the possibility of mergers between companies or firms governed by the laws of different countries,
- the simplification of formalities governing the reciprocal recognition and enforcement of judgments of courts or tribunals and of arbitration awards."

[33] Convention on the Mutual Recognition of Companies and Bodies Corporate of 29 February 1968; Bulletin of the European Communities, Supplement 2/1969, http://aei.pitt.edu/5610/01/002314_1.pdf (accessed on 20 May 2015).

[34] Convention on Insolvency Proceedings of 23 November 1995, (1996) 35 ILM, 1223.

[35] [1972] OJ L299/32. The Convention was replaced by the Council Regulation (EC) No 44/2001 of December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (the Brussels I Regulation), [2001] OJ L12/1. The Regulation entered into force on 1 March 2002.

[36] Both of these conventions are open to non-EU Member States.

Despite the limited direct impact of Article 220, an important measure was adopted harmonizing the choice of law rules with respect to contractual obligations: the Rome Convention on the Law Applicable to Contractual Obligations, which was signed in 1980 and came into force on 1 April 1991.[37] The Rome Convention 1980 was not based on any specific provision of the EEC Treaty but on a desire of the Member States to proceed further with the harmonisation of private international law.

Before the Treaty of Amsterdam, the Brussels and Rome Conventions were the only EC legislative measures on major elements of private international law which had entered into force. Article K of the Treaty of Maastricht on the European Union (1992) made provision (in addition to the original Article 220 EEC) for the harmonisation of private international law by conventions. Under Article K, these would be negotiated by the Member States and recommended for adoption by the EC Council. Some conventions were established under Article K, but none entered into force.

The Treaty of Amsterdam made relevant amendments to the European treaties. It was signed on 2 October 1997 and came into force on 1 May 1999.[38] The Treaty of Amsterdam introduced significant adjustments to the treaties and completely transformed the status and classification of private international law.[39] The modifications enabled the European institutions to adopt laws in the area of private international law that were essential for the operation of the internal market.[40] The Treaty of Amsterdam gave great

[37] See C.M.V. Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford University Press, 3rd edition, 2006), p.172. However, the negotiations on harmonising the law applicable to non-contractual obligations were delayed. See the Explanatory Memorandum to the EC Commission Proposal for a regulation of the European Parliament and the Council on the law applicable to non-contractual obligations of July 2003, COM (2003) 427 final, 22 July 2003.
[38] The Treaty of Amsterdam, amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts.
[39] See McEleavy, P., and Fiorini. A, *The evolution of European private international law*, (2008) Vol. 57, No. 4, International and Comparative Law Quarterly, 969.
[40] Article 65 EC (subsequently renumbered as Article 81 TFEU by the Treaty of Lisbon) provides: "Measures in the field of Judicial cooperation in civil matters having cross-border implications, to be taken

impetus to the harmonisation project. It led directly to the adoption in 2000 of the Brussels I Regulation on civil jurisdiction and judgments (replacing the Brussels Convention 1968), the Brussels II Regulation on matrimonial matters and parental responsibility, the Regulation on service of documents in Member States, and the Insolvency Regulation.

However, under the Treaty of Amsterdam, unanimous agreement in the Council remained necessary for the adoption of measures in the sphere of private international law. Thus, every member state enjoyed a veto power, even if that member state did not wish to participate.[41] The European Parliament had only a consultative role.[42] Moreover, although the new Article 68 EC, which was introduced by the Treaty of Amsterdam, granted the European Court of Justice (ECJ) jurisdiction with respect to measures in the sphere of private international law that had not existed under the earlier system, this competency of the ECJ was severely restricted. Only national courts of final appeal could refer matters to the ECJ for preliminary rulings in the sphere of private international law.[43]

Relevant amendments were made by the Treaty of Nice,[44] which eliminated the requirement of unanimity in the Council and permitted the adoption of a measure by a qualified majority voting in the Council along with approval by the Parliament. But this

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in accordance with Article 67 and in so far as necessary for the proper functioning of the internal market, shall include:
(a) improving and simplifying:
- the system for cross-border service of judicial and extrajudicial documents,
- cooperation in the taking of evidence,
- the recognition and enforcement of decisions in civil and commercial cases, including decisions in extrajudicial cases;
(b) promoting the compatibility of the rules applicable in the Members States concerning the conflict of laws and of jurisdiction;
(c) eliminating obstacles to the good functioning of civil proceedings, if necessary by promoting the compatibility of rules on civil procedure applicable in the Member States".

[41] Kaczorowska, A, *European Union Law*, (New York, Routledge-Cavendish 2009), at 34.

[42] Fiorini. A, *supra* note (31), at 974.

[43] This derogated from the usual rule under Article 234, whereby any court of a Member State, whether sitting at first instance or on appeal or on final appeal, could refer a point of European law to the European Court.

[44] This Treaty was signed on the 26 February 2001, and entered into force on 1 February 2003.

amendment did not extend to measures dealing with family matters. There was a great increase in the number of measures concerning private international law adopted at the European level.[45]

Further important developments in the field of private international law were introduced by the Treaty of Lisbon,[46] among which was the deletion of Article 68 of the EC. Consequently, normal full competence was conferred on the European Court of Justice to rule on questions referred by any court of a Member State under Article 267 TFEU, which replaced Article 234 EC.

The Treaty of Lisbon also established a special passerelle clause, contained in Article 81(3) TFEU,[47] by which the special legislative system concerning family matters, which has continued in operation for the time being, may be eliminated if all the national parliaments consent thereto.[48] This special passerelle clause, which was added by the Treaty of Lisbon, obliges the Commission to inform the national parliaments of its proposal to eliminate the special procedure for certain family matters.[49] The time limit for acceptance or refusal by the national parliaments of such a proposal from the Commission was limited to six months starting from the day of notification. Nevertheless, the Council can accept the proposal only if no objection is made.[50] Despite the need for unanimity in family matters, the Brussels IIA Regulation,[51] which deals

[45] Fiorini. A, supra fn (31), at 974.
[46] This Treaty was signed on 13 December 2007 and entered into operation on 1 December 2009. It was planned that the Treaty should have entered into force on 1 January 2009, but there was delay owing to rejection by the Irish initial referendum in 2008. The second Irish referendum in 2009 resulted in the acceptance of the Treaty of Lisbon.
[47] R.De Groot and J.-J. Kuipers, *The New Provisions on Private International Law in The Treaty of Lisbon*, (2008) 15/1 Maastricht Journal of International and Comparative Law 113.
[48] For additional details of the new amendments of the Treaty of Lisbon to the European legislative procedures, *see* A. Kaczorowska, supra fn (33),at 42-63.
[49] Groot and Kuipers, supra fn (39), at 112-113.
[50] Article 81(3) TFEU.
[51] EC Regulation No 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000, (OJ L338/1).

much more fully than its predecessor with parental responsibility for children, and the Maintenance Regulation, have been adopted and brought into force. In addition, the Rome III Regulation on choice of law with respect to the grounds for divorce has been adopted and brought into force under the enhanced co-operation procedure. The Succession Regulation, which entered into operation on 17 August 2015, was regarded as a non-family matter.

The Rome I Regulation and its predecessor

On 17 December 2009, EC Regulation 593/2008 on the Law Applicable to Contractual Obligations (the Rome I Regulation) replaced the Rome Convention 1980, except in Denmark and the French overseas territories.[52] The Convention remains applicable to contracts concluded before that date, but contracts concluded after that date fall within the scope of the Regulation.[53]

The adoption of the Rome I Regulation followed six years of political discussion and negotiation, which began with the presentation of the Commission Green Paper on the Rome Convention in January 2003.[54] The Regulation introduced various changes in EU private international law; but some of these were fundamentally derived from the prior law. Indeed, the Regulation as adopted is not very different from the Rome Convention 1980. More radical changes were contained in the EC Commission's proposal, which initiated the legislative process. The main goal of these adjustments was to update the content of the relevant conflict rules and to harmonize them with other EU measures on

[52] [2008] OJ L177/6.
[53] Article 28 of the Rome I Regulation.
[54] Commission Green Paper on the Convention of the Rome Convention of 1980 on the Law applicable to Contractual Obligations into a Community Instrument and its Modernization, COM (2002) 654 final, 14th January 2003.

private international law,[55] such as the Brussels I Regulation[56] and the Rome II Regulation.[57] However, the effect of the Regulation does not differ greatly from that of the Rome Convention.[58]

The substantive scope of the Regulation is addressed by Article 1, which specifies that the Regulation applies to contractual obligations in commercial and civil matters in situations which involve a conflict of laws.[59] Hence, non-contractual obligations, such as an obligation of restitution arising from unfair enrichment or an obligation arising from a tort, do not fall within the scope of the Regulation. Moreover, the Regulation does not apply to claims governed by public law,[60] and various matters are excluded from its scope by Article 1(2). These exclusions include obligations arising out of family relationships (including maintenance obligations); issues governed by company law; trusts; and obligations arising out of dealings prior to the conclusion of a contract. Pre-contractual obligations are governed instead by Article 12 of the Rome II Regulation. With regard to substantive scope, the Regulation differs little from the Convention.

One of the main features of the Convention is its broad territorial scope, as specified by Article 2, which has been retained by the Regulation. Article 2 establishes the universality of application of the Convention and the Regulation. The law indicated by

[55] J. Valdhans and P. Mysakova, *Rome I and Rome II Regulations – Allies or Enemies?* in *Dny práva* - Days of Law (2008), vyd. i, pp. 822-829.
[56] EC Regulation 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, OJ 2001 *C* 146/ 94.
[57] EC Regulation 864/2007 on the Law Applicable to Non-Contractual Obligations, adopted on 11 July 2007, [2007] OJ L199/40.
[58] Valdhans and Mysakova, supra fn (50), p. 824.
[59] Similarly Article 1(1) of Rome Convention provided that the Convention applied to contractual obligations in any situation involving a choice between the laws of different countries.
[60] T.C. Hartley, *International Commercial Litigation: Text, Cases and Materials on Private International Law*, (Cambridge, Cambridge University Press, 2009), pp. 571-572.

the Convention or Regulation must be applied regardless of whether it is the law of a Member State or the law of a country outside the European Union.[61]

Articles 3 and 4 of the Regulation lay down the main choice of law rules for contracts. They enable the contracting parties to choose by express or implied agreement the law to which their contract is subject, and specify default rules to be applied in the absence of such a choice. In most cases, these default rules provide for a rebuttable presumption in favour of the law of the habitual residence of the characteristic performer, and for an exception in favour of the law of the country with which it is clear that the contract is most closely connected. These provisions broadly resemble those of the Convention, but there are detailed differences. These main choice of law rules will be analysed in Chapter 3 below.

There are other general rules in the Regulation that deal with the burden of proof;[62] the exclusion of *renvoi*;[63] the public policy proviso;[64] and the position of States with more than one legal system.[65] These resemble the corresponding provisions of the Convention. In addition, the Regulation in Article 19 provides definitions of habitual residence for companies and individual traders.[66]

The Rome I Regulation lays down special rules for certain contracts in Articles 5-8. These rules are designed mainly to offer protection to certain parties who are considered to lack adequate bargaining power, as compared to the bargaining power of the other party to the contract. The Convention had established special rules for only consumer

[61] The Rome II Regulation has a similarly broad scope. In contrast, the Brussels I Regulation largely remits a court's jurisdiction over a claim against a defendant who is not domiciled within the European Union to the law of the country whose court is seised.
[62] Article 18 of the Rome I Regulation.
[63] Article 20.
[64] Article 21.
[65] Article 22.
[66] *Ibid*.

contracts by Article 5 and for the employees' contracts by Article 6.[67] In contrast, the Regulation deals with contracts for the carriage of goods or passengers in Article 5, consumer contracts in Article 6, insurance contracts in Article 7, and individual employment contracts in Article 8. The Regulation provides enhanced clarity in the case of contracts of the carriage of goods and introduced rules on the carriage of passengers that differ from those that pertain to the carriage of goods.[68]

Furthermore, nearly all insurance or reinsurance contracts fall within the scope of the Regulation. In formal terms, this is a change from the Convention, which excluded insurance contracts concerning covering risks situated in Member States,[69] but applied to insurance contracts where the risk was not located within the European Community and to all reinsurance contracts.[70] But in substance, little change has taken place, since the insurance of European risks was formerly governed by rules contained in Directives, and the relevant provisions of the Directives have been replaced by slightly simplified provisions in the Regulation. Regardless of the location of the risk, both insurance and reinsurance contracts fall within the scope of the Regulation. Accordingly, Article 7 of the Regulation deals with insurance contracts covering mass risks situated within the territory of the European Union, and with insurance contracts that cover large risks regardless of where the risk is located. Insurance contracts regarding non-European mass risks are within the Regulation but not within Article 7. Such contracts are treated in the same way as non-insurance contracts. Thus, the Regulation has brought all insurance contracts within its scope with negligible exemptions.[71]

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[67] Elizabeth Crawford, *Applicable law of contract: some changes ahead*, (2010) Scots Law Times 4 at 19-20.
[68] On carriage of goods, Article 5 contains rules revised from rules contained in the old Article 4.
[69] Article 1(3) of the Rome Convention.
[70] Article 1(4).
[71] The remaining exception is specified by Article 1(2)(j) of the Regulation, which excludes from the scope of the Regulation "insurance contracts arising out of operations carried out by organisations other than

Article 6 of the Rome I Regulation is designed to harmonize the oversight of consumer contracts that are otherwise subject to multiple European instruments. It is also designed to introduce a definition of consumer contracts similar to that used in Article 15(1)(c) of the Brussels I Regulation and to set up easier rules than those provided by the Rome Convention.[72] Both the substantive and territorial aspects of the definition of a protected consumer contract have been revised in the Rome I Regulation, as compared with the Rome Convention. The Rome I Regulation also added some exclusions. The new definition in the Rome I Regulation resembles that used in the Brussels I Regulation as opposed to the definition used in the Brussels Convention. The new definition is broader as the European Court has recognised.[73] In addition to the exclusions formerly stated in the Convention, three new categories of contracts have been excluded from the scope of Article 6 of the Regulation. The new exclusions apply to "contracts relating to a right *in rem* in immovable property or a tenancy of such property other than a contract relating to the right to use immovable properties on a timeshare basis";[74] "rights and obligations which constitute a financial instrument";[75] and "contracts concluded within a multilateral system".[76]

Article 8 of the Regulation lays down special provisions for employment contracts, which are designed to protect the employee as the weaker party. Despite some changes in wording from Article 6 of the Convention, in substance the provisions have very similar

undertakings referred to in Article 2 of Directive 2002/83/EC of the European Parliament and of the Council of 5 November 2002 concerning life assurance the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work."

[72] Crawford, see above note (58), at 20.

[73] See Case C-180/06: *Ilsinger v Dreschers* [2009] ECR I-3961.

[74] Article 6(4)(c). On the effect of the new consumer provisions in European private international law, see Paul Cachia, *Consumer contracts in European private international law: the sphere of operation of the consumer contract rules in the Brussels I and Rome I Regulations* (2009) ELRev 476.

[75] Article 6(4)(d) of the Regulation.

[76] Article 6(4)(e).

effects. The provisions designed to protect weaker parties will be analysed in Chapter 5 below.

The Regulation also lays down some exceptions to its main rules with respect to certain particular issues (such as formalities), as well as derogating from them by reference to the forum's public policy and its overriding mandatory rules. These exceptions and derogations will be examined in Chapter 4 below.

The relationship between the Rome I Regulation and Other EU Measures

Article 23 is concerned with the relationship of the Rome I Regulation with the other European Union legislation. It states that, "with the exception of Article 7,[77] this Regulation shall not prejudice the application of provisions of Community law which, in relation to particular matters, lay down conflict-of-law rules relating to contractual obligations."[78]

Recital 40 of the Rome I Regulation explains that the Regulation should not prejudice the application of other instruments laying down provisions designed to contribute to the proper functioning of the internal market in so far as they cannot be applied in conjunction with the law designated by the rules of this Regulation. Moreover, it explains that the application of provisions of the applicable law designated by the rules of the Regulation should not restrict the free movement of goods and services as regulated by Community instruments, such as Directive 2000/31 on electronic commerce.[79]

Article 3(2) of Directive 2000/31 requires every Member State to ensure that the information society services provided by a service provider established on its territory

[77] Article 7 deals with insurance contracts. It is discussed in chapter 5 below.
[78] The same approach can be found under Article 20 of the Rome Convention 1980, which provides that "this Convention shall not affect the application of provisions which, in relation to particular matters, lay down choice of law rules relating to contractual obligations and which are or will be contained in acts of the institutions of the European Communities or in national laws harmonized in implementation of such acts."
[79] [2000] OJ L178/1.

comply with the national provisions applicable in the Member State in question which fall within the coordinated field. The Member States are forbidden by Article 3(2), for reasons falling within the coordinated field, to restrict the freedom to provide information society services from another Member State. Article 1(4) specifies that the Directive does not introduce further rules on private international law. However, Recital 23 provides that provisions of the applicable law designated by rules of private international law should not restrict the freedom to provide information society services as established in the Directive.

Despite the ruling of the European Court in *eDate Advertising v X* and *Martinez v MGN*[80] that the Directive on electronic commerce can affect the operation of choice of law rules, Article 3 seems to have no effect in relation to contractual obligations in view of the exclusions specified in Article 3(3) and the related Annex. Those exclusions concern the following matters: party autonomy to choose the governing law; various provisions concerning consumer contracts; choice of law contained in EC Directives on insurance; the formal validity of contracts establishing or transferring rights in real estate, when such contracts are subject to mandatory formal requirements of the law of the Member State where the real estate is located; and the permissibility of unsolicited commercial communications by electronic mail.

Similarly, Directive 2006/123 on Services in the Internal Market[81] does not affect choice of law in relation to contracts. Article 3(2) of the Directive provides that the Directive does not concern rules of private international law, in particular rules governing the law applicable to contractual and non-contractual obligations, including those which guarantee that consumers benefit from the protection granted to them by the consumer

[80] Cases C-509/09 and C-161/10, [2011] ECR I-10269. These cases involved claims in tort for invasion of privacy.
[81] [2006] OJ L376/36.

protection rules laid down in the consumer legislation in force in their Member State. Furthermore, on freedom to provide services, Article 17(15) provides that Article 16 does not apply provisions regarding contractual and non-contractual obligations, including the form of contracts, determined pursuant to the rules of private international law. Moreover Recital 90 explains that contractual relations between the provider and the client and between an employer and employee should not be subject to this Directive and that the applicable law regarding such obligations should be determined by the rules of private international law.

The relationship between the Rome I Regulation and International Conventions

Article 25 deals with the relationship of the Rome I Regulation with international conventions. Article 25(1) provides that the Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations. Nevertheless, Article 25(2) provides that this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by the Regulation.

In contrast, the Rome Convention 1980 applied this principle even in the case where the Member State subsequently became a party to another convention.[82] But Article 25 of the Rome I Regulation is restricted to Conventions to which a Member State is already a party.

Some Member States are parties to the Hague Convention of 15 June 1955 on the Law Applicable to the International Sale of Goods, and/or the Hague Convention of 14 March

[82] Articles 21, 23 and 24.

1978 on the Law Applicable to Agency.[83] In both cases, the parties to the Convention include external countries, so that the exception specified by Article 25(2) of the Regulation does not apply. Thus, under Article 25(1) of the Rome I Regulation, these Conventions continue to operate and to derogate from the unifying force of the Regulation.

[83] The United Kingdom has not opted in both Conventions.

Chapter 3 - The Proper Law of a Contract

INTRODUCTION

The determination of the governing law (or "proper law") of a contract is of great importance, as it is the substantive rules of the law in question which will usually be applied to the issues that arise with respect to the validity, interpretation or effect of the contract. The concept of such a proper law is common to the Rome I Regulation and to the CTC. If the parties choose the applicable law, there will usually be no problem, as the chosen law will apply. However, in the absence of such a choice, the court will have to follow default rules to determine the applicable law.

This chapter will first focus on express choice of law under the Rome I Regulation and the CTC. Then, implied choice of law will be examined under the Rome I Regulation and the CTC. Finally, the last section of this chapter will deal with the default rules under the Rome I Regulation and the CTC.

EXPRESS CHOICE OF LAW

The Rome I Regulation

The parties' freedom to choose the law governing their contract is ensured by Article 3(1) of the Rome I Regulation, which specifies that: "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 a part only of the contract."

This provision reflects the traditional practice in the majority of countries worldwide with respect to the freedom of parties to choose the law that governs their contract.[1] An express choice of law clause is not subject to any formal requirement, such as writing. Therefore, if the parties involved in a contract orally agree on the law that is to govern the contract during their pre-contractual negotiations, their choice will be effective, even if it is not repeated in the subsequent written contract.[2]

The last sentence of Article 3(1) of the Regulation explains that a choice of law by the parties may apply either to the whole of a contract or to a specific part.[3] For example, if this power is construed widely, it will enable the parties to a contract of sale to agree that Spanish law will be applied to the seller's obligations relating to delivery of the goods, but to agree that other aspects of the contract will be governed by English law. The Regulation allows the parties to choose different laws for different parts of a contract. It is important to point out that scission of the proper law must be distinguished from incorporation by express reference of terms of a law from one country into a contract governed by the law of another country. Thus, in case of such an incorporation by reference, any amendment of the law the provisions of which have been incorporated in its country of origin will be ignored, and the contract will be unchanged.[4]

Accordingly, severance is possible where it appears to be coherent since the parts distinguished relate to different transactions.[5] For example, if a document contains a contract for construction of a building and for maintenance of the building, severance could be possible between the construction and the maintenance provisions. However,

[1] Giuliano and Lagarde, "Report on the Convention on the Law Applicable to Contractual Obligations," [1980] OJ L282, at pp. 15-16.
[2] Peter Stone (2010), *EU Private International Law*, 3rd edition (Edward Elgar Publishing Ltd, Cheltenham, 2014) at p. 291.
[3] This echoes the last sentence of Article 3(1) of the Rome Convention.
[4] See Dicey, Morris and Collins, at paras 32-056 to 32-058.
[5] See note (2), at p. 296.

severance should not be allowed in relation to terms or issues; for instance, between the validity of the exclusion clauses and other issues related to the contract.[6] Issues that can affect the whole contract, such as frustration, should be governed by the same law.[7]

In *Intercontainer Interfrigo v Balkenende Oosthuizen and MIC Operations,*[8] the European Court of Justice addressed the approach that should be adopted to severance in the absence of a choice of law by the parties under Article 4 of the Rome Convention. Now, under Article 4 of Rome I Regulation, severance is not allowed in the absence of a choice of law by the parties. However, the court accepted that, under Article 4 of the Convention, one law could govern a contract partly and the rest of the contract could be governed by another law. Nevertheless, it insisted that, for this to be possible, the part of the contract which is governed by a separate law must be independent with regard to the rest of the contract.

The decision of the English court in *Centrax Ltd v Citibank NA,*[9] which involved a contract for electronic services, shows how severance under a contract may be injudicious. The contract included the following choice of law clause:

> This Agreement and all documents, agreements and instruments related to this Agreement shall be governed by and interpreted according to the laws of the State of New York, United States of America, provided that any action or dispute between the parties regarding any Payment Instrument shall be governed by and interpreted according to the laws of the country or state in which the Drawee of such Payment Instrument is located.

The customer sued the bank, asserting that cheques had been forged by an employee of the customer and therefore had wrongly been debited from the customer's account. The bank was based in New York, but the cheques in question were drawn on its branch in London. The contract contained a term enabling the bank to debit the customer's account

[6] See Mayer and Heuze, *Droit International Privé,* 10th edition (Montchrestien, 2010), at para. 710.
[7] *Centrax Ltd v Citibank NA* [1999] 1 All ER (Comm) 557 (CA).
[8] Case C-133/08 [2009] ECR I-9687.
[9] [1999] 1 All ER (Comm) 557 (CA).

with respect to cheques forged by an employee of the customer, but the customer argued that this term was rendered invalid by the (English) Unfair Contract Terms Act 1977. The court applied English principles of construction to the interpretation of the choice of law clause and concluded by a majority that the issue was governed by the law of New York, since the dispute in question involved the terms of the contract and was not concerned exclusively with the payment instrument.

The parties' freedom to choose the applicable law is restricted to choosing the law of a country, in the sense of a territorial unit which has its own law, at least with regard to contractual rights and obligations. Article 22(1) provides:

> Where a State comprises several territorial units, each of which has its own rules of law with respect to contractual obligations, each territorial unit shall be considered as a country for the purposes of identifying the law applicable under this Regulation.[10]

Therefore, the parties are not allowed to choose a non-state body of law, such as Shari'a law,[11] Jewish law,[12] or the UN Convention on the International Sale of Goods. Recital 12 to the Regulation explains that the Regulation does not prohibit parties from incorporating by reference into their contract a non-state body of law. However, while such incorporation is permitted to the parties, its effect is merely to introduce the specified provisions into the contract as terms; the chosen law, which must be the law of a country, will still govern the effect and validity of the contract.[13]

If the parties choose Saudi law, which is based on Shari'a law, then the Shari'a law will be applied to the extent that it is applied by Saudi courts, along with any other rules applied by those courts. In such a case a definite judiciary (the Saudi judiciary) will exist whose interpretation of Shari'a law will be followed. The parties are not allowed to

[10] This provision is similar to Article 25(1) of the Rome II Regulation.
[11] See *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] EWCA Civ 19 at 48.
[12] See *Halpern v Halpern*, [2007] EWCA Civ 291 at 33.
[13] See Stone, note 2 above, at p. 294.

choose the Shari'a law in general, independently of its operation in any particular territory, so as to leave to an English or French court the resolution of differences of opinion by Shari'a scholars as to the "correct" interpretation.

Under Article 3(2) of the Regulation, the parties' freedom to choose the law that governs a contract is not limited to the time of negotiation or conclusion of the contract, but it is extended so as to allow the parties to choose the governing law even after the contract has been concluded. It is important to emphasise that such a choice is allowed, whether the contract had previously been subject to an earlier choice by the parties or to the default rules specified by Article 4.

According to Fawcett and Carruthers, the default rules specified by Article 4 are initially applicable where no choice of law has been made by parties until after the contact has been concluded.[14] Giving the parties the freedom to change the law that governs the contract after its conclusion might, in the absence of specific provisions, have an adverse effect on the formal validity of the contract, for example in cases where the subsequently chosen law includes formal requirements that did not exist under the previously applicable law.[15] Therefore, in order to favour the formal validity of contracts, Article 3(2) of the Regulation provides that "any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties." The last provision on the rights of third parties would, for example, prevent the obligations of a guarantor from being increased by applying a new law to an existing contract. On the other hand, subject to these savings, a subsequent choice of the applicable law by the parties should usually

[14] James Fawcett and Janeen M. Carruthers, *Cheshire, North & Fawcett Private International Law*, 14th edition (Oxford University Press, Oxford, 2008), p. 629.
[15] The Giuliano and Lagarde Report, p. 18.

have retrospective effect, because the parties usually so intend.[16] For example, if the parties chose the Italian law when they concluded the contract and later changed the applicable law to French law, French law should be applied to earlier acts, such as earlier deliveries, as the parties presumably so intended.

Exceptions under the Rome I Regulation

Article 3(3)

As a general rule, parties are permitted to choose the law that governs their contract under Article 3(1) of the Regulation. Their choice will be respected even if the contract is otherwise more closely connected with a different country, and even if they have made the choice for the purpose of avoiding inconvenient rules contained in the law most closely connected. However, an exception is provided by Article 3(3) to the general rule which to some extent restricts the parties' freedom. Article 3(3) specifies that: "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

This rule could apply in a situation in which parties resident in the same country negotiate and conclude a contract there and in which contractual performances involved in the contract are also to be effected in that country, but the law of another country is chosen by the parties as the governing law. The purpose of this article is to give effect to the mandatory rules (rules that "cannot be derogated from by contract") of the country in which all the other relevant connections are located. For example, if two French residents

[16] Mayer and Heuzé, *Droit International Privé*, 10th edition (Montchrestien, 2010), at para 716. See also Stone, note 2 above, at p. 291.

make a contract in France that is to be carried out in France, but choose English law to govern the contract, French mandatory rules will still be applied to the contract, and even an English court before which proceedings are brought must respect the mandatory rules of French law.

The application of Article 3(3) of the Regulation could be criticised, as its application may be problematic in cases in which the elements relevant to a contract are connected to a number of countries, and the laws of these countries in fact include the same mandatory rules. The application of Article 3(3) may also be narrow, as it is concerned only with mandatory rules, which means that the chosen law will still be applied in any cases not involving mandatory rules, but merely questions of interpretation, such as whether a reference in the contract to "dollars" as the currency of account is to be understood as referring to American dollars or to Canadian dollars.[17] Moreover, the mandatory rules of the chosen law will still be applicable, along with those of the otherwise connected law, in cases where Article 3(3) applies.[18]

The narrow scope of Article 3(3) was confirmed by the English High Court in *Caterpillar Financial Services v SNC Passion*,[19] which involved a contract of loan between an American lender and a French borrower, in which English law was chosen as the governing law of the contract. The court respected the choice of English law and ruled that French mandatory rules were inapplicable, as the contract had relevant connections with countries other than France. These included the United States, where the bank involved in the contract was located, and Singapore, where the transaction financed, a shipbuilding contract, was to be performed. A similar approach was adopted in

[17] See note 8 above, at p. 697.
[18] See note 2 above, at p. 292.
[19] [2004] 2 Lloyds Rep 99.

Emeraldian v Wellmix Shipping,[20] where Teare J ruled that Article 3(3) did not make Chinese mandatory rules on exchange control applicable to a guarantee by a Chinese company of the obligations of a Hong Kong charterer to a Liberian ship-owner under a charterparty governed by English law.

Article 3(4)

Article 3(4) provides: "Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement." It seems that Article 3(4) widens the scope of Article 3(3) so as to make applicable mandatory rules of European Union law in cases where all of the relevant connections are with Member States, even if they are divided between several Member States, such as, for example, where the parties are habitually resident in different Member States. No such provision is in the Rome Convention.

The UAE Civil Transactions Code

Article 19 of the CTC

Article 19 of the Civil Transactions Code (CTC) provides:

> (1) Contractual obligations, as to the form and subject matter, shall be governed by the law of the state of the joint domicile of the two contractors, if they have one domicile. However, if they have a different place of residence, the law of the state in which the contract is made shall be applicable, unless the two parties to the contract agree or if it is evident from the circumstances that another law is intended to be applied.
>
> (2) However, the law of the location of a real property shall apply to the contracts made in respect thereof.

[20] [2010] EWHC 1411 (Comm).

Thus, the freedom of parties in choosing the law that governs the contract is ensured under Article 19 of the CTC. The Article also indicates that an express choice of law clause is not subject to any formal requirement, such as being in writing. Therefore, if parties negotiate and conclude an agreement orally or via telephone, their choice of the applicable law will be effective. The court is obliged to apply the law that has been chosen by the parties. A breach of Article 19 occurs if the court does not apply the chosen law.

Despite the wording of Article 19, it is generally accepted that the parties' right to choose the governing law is possible even in the case of common domicile or residence.[21]

It is important to point out that questions concerning choice of law in most areas, such as family matters and contractual and non-contractual obligations, are dealt with by Articles 10 to 28 of the CTC. Thus, Article 19 must be interpreted in the context of these surrounding provisions.

The problem of renvoi

The problem of renvoi (reference back or on) is addressed by Article 26, which provides:

> (1) If it is decided that a foreign law is to be applied, domestic provisions thereof shall be applied only, rather than those related to the international private law.
>
> (2) However, the law of the UAE shall be applied if certain provisions of the international law which are related to the applicable law refer to its rules.

Thus, if, for example, the parties have chosen French law to govern their contract, Article 26(1) envisages the application of French internal law. However, if French private international law refers the matter to the law of the UAE (perhaps as the place of the

[21] Dr. Ahmed Alhawry, (الوجيز في القانون الدولي الخاص الاماراتي) *Emirates private international law* (Sharjah University, 2008), p. 458 (in Arabic).

characteristic performer's residence), then Article 26(2) requires that UAE internal law be applied.

In international practice, there are three basic solutions to the problem of renvoi: the internal law theory; partial renvoi; and total renvoi (or the foreign court theory).

Under the first approach, known as the internal law theory, if the forum choice of law rule refers the issue to the law of a certain country, the internal law of that country will be applied by the forum, even if the choice of law rules of the country referred to by the forum conflict rules refer the issue to the law of a third country or refer it back to the law of the forum country. This approach is adopted as the general rule in the UAE by Article 26(1) of the Civil Transactions Code.

Under the second approach, which is known as the partial renvoi, where the conflict rules of the country (country X) referred to by the forum's conflict rules refer back to the law of the forum country (country F), the forum will accept the reference back and apply its own internal law. To this extent, partial renvoi is adopted in the UAE by Article 26(2) of the Civil Transactions Code.

Under partial renvoi, if the law of country X refers to the law of a third country (country Y), and the conflict law of country Y agrees that the internal law of county Y applies, the forum too will apply the internal law of country Y and accept the reference because it accept the single renvoi, then it will apply its internal law. More complicated situations can arise, such as, for example, when the law of country X refers to the law of country Y, and the law of country Y refers to the law of country Z, and the law of country Z refers to the law of country X or country Y. But, in all cases in which the law of country X provides for transmission to a third law, the UAE will apply the internal law of country X in accordance with Article 26(1).

Under the third approach, which is known as a total renvoi or the foreign court theory and which is applied by English courts to certain issues, such as intestate succession, the forum endeavours to apply whatever law the courts of the country to which the forum conflict rules refer would apply in the circumstances of the case. This involves taking account not only of that country's primary conflict rules but also of its approach to the question of renvoi. Thus, this approach involves practical difficulties in ascertaining the approach adopted in country X to the problem of renvoi and logical difficulties when country X also utilises the total renvoi approach. It is clear that the UAE does not make any use of the total renvoi approach.

In contrast to the UAE Civil Code, the Rome I Regulation, the Rome II Regulation, and corresponding provisions of various Hague Conventions, exclude the application of renvoi (whether in partial or total form) and adhere to an internal law approach. The operation of Article 26(2) of the CTC seems clear enough, but its application to contracts seems undesirable, especially in cases of express choice, since the parties must almost certainly intend to designate directly an internal law rather than a set of conflict rules. Therefore, one could suggest that the CTC should be construed or amended so as to exclude contractual obligations from Article 26(2) in order to follow the international practice of private international law and to respect the parties' intentions.

Public policy

With regard to public policy (or ordre public), Article 27 of the CTA has clearly declared the present standing of the Act, as it specifies that: "Provisions of a law stated in the preceding clauses may not be applied, if such provisions are contrary to Islamic Shari'a law, public policy or morals observed in the UAE." The operation of this provision in relation to contracts will be addressed in Chapter 4 below.

Various doubtful issues

The brevity of Article 19 of the CTC indicates that the Emirati legislator failed to consider several important points concerning choice of law with respect to contracts. The first point is that the Article does not specify whether the parties' freedom to choose the applicable law extends to enabling them to make changes to their choice of law at any time after contracting. Another point is that the Article does not clearly state whether the parties are allowed to choose different laws for different parts of the contract. The third point is whether the Article requires a connection between the law chosen by the contracting parties and the contract. The final point is that the Article does not clearly indicate whether the parties are obliged to choose the law of a country to govern the contract rather than a religious law.

To clarify these important points that involve the parties' freedom to choose the applicable law, the legislator has directed the Emirati court to follow general principles of private international law. Article 23 of the CTC specifies that:

> Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles, regarding cases of conflict of laws.

The application of Article 23 of the CTA was confirmed and clarified by a Dubai court in Cassation Case 24/2005 on 26 June 2005. In that case, the court stated that, where the CTC has not offered an express principle on issues involving personal status, Article 23 of the CTC should be applied.

The reference to principles under Article 23 should be to principles of private international law, which are widely, but not necessarily universally, followed worldwide. For example, a principle which is applied throughout the United States but not applied

elsewhere cannot be regarded as a principle which is widely accepted. Whereas, a principle which is applied under EU laws in the EU Member States, or a principle which is applied under a Hague Convention which has a substantial number of parties, should be regarded as a widely accepted principle. Moreover, it should be recognised that, when international practice is divided, the UAE court has a choice and can select from among the rules widely followed one that the court considers most suitable to supplement the CTC provisions in light of the factual and legal circumstances of the UAE and of UAE public policy.

It seems that the application of Article 23 of the CTC is available for use in two situations. The first situation is when the UAE legislation is silent on the relevant issue. The second situation is when the provision of the CTC that is relevant to the issue is ambiguous and capable of bearing more than one meaning.

But it is difficult to disregard a clear and explicit provision of the CTC, merely because it does not accord with international practice and leads to unwelcomed results. For example, the default rules specified by Article 19(1) of the CTC make final reference to the place of contracting. This reference does not accord with principles widely applied internationally, and it gives rise to serious difficulties and troublesome results. This does not, however, appear to provide sufficient justification for the UAE courts to disregard the provision altogether and to invoke Article 23 so as to substitute a different rule (for example, in favour of the law most closely connected). The courts may, however, properly decide that this provision should be narrowly interpreted so as to confine it to cases in which all of the acts that have potentially brought about the conclusion of the contract have been carried out entirely in a single country, so that a completely unambiguous place of contracting exists; for example, when both the offer and the acceptance have been sent both from and to places in the same country. In contrast, when

the negotiations have been conducted by cross-border communications (whether by posted letter, telephone, email or fax), the place of contracting should be regarded as ambiguous, and as not-existent for the purpose of Article 19, so that a gap in the conflict rules exists which can be filled by the use of Article 23 to introduce a widely accepted principle of private international law in favour of the law which has the closest connection with the contract.

Choices made after contracting

The first point of contention is whether the parties' freedom to choose the applicable law extends to allowing them to make changes to their choice of law at any time after contracting. On this point, Article 3(1) of the Rome I Regulation enables the parties to change the applicable law at any time after the agreement. However, the application of this right is appropriately restricted insofar as it must not adversely affect the formal validity of the contract or the rights of third parties. Thus, it seems appropriate to utilise Article 23 of the CTC to import a rule based on Article 3(1) as embodying a general principle of private international law and thereby fill the gap left by the silence of Article 19 of the CTC on this issue.

Two other minor questions in relation to express choice under Article 19 of the CTC can conveniently be mentioned at this point. The first is whether it is permissible for the parties to agree to enable one of them to designate the applicable law unilaterally. For example, a clause in a contract of sale might provide that the governing law shall be fixed by a notice to be sent, after the conclusion of the contract, by the seller to the buyer. It seems that such a clause should be not be respected, as Article 19 should be understood as requiring a bilateral decision.

Secondly, there seems to be no reason why a choice of law clause that involves a contingent substitution should not be respected so long as the specified event is outside of

the control of the parties to the contract. For example, a clause in a contract of sale of goods might specify that the contract shall be governed by Russian law, but that, if (by constitutional amendment), Russia reverts to a Communist system, then the law of Finland shall apply instead.

Choice of several laws for different parts of a contract

The second point of contention is whether the parties are allowed to choose different laws for different parts of the contract. The Explanatory Memorandum of the CTC clarified this point by specifying that "contractual obligations shall be ruled by the law chosen by the parties either expressly or impliedly with consideration of the rules specified in the Article. This rule respects the autonomy of the parties and ensures the accordance of the applicable law to the contract. This accordance requires the applicable law to be applied to a contract as a whole, and this application does not include severance of contract components and the choice of an appropriate law that is in line with the nature of each of these components".[22]

Moreover, this Explanatory Memorandum of the CTC is close to the Explanatory Memorandum of the Egyptian Civil Code. Both explanatory memoranda suggest that the parties are not permitted to choose different laws to govern different parts of the contract. This approach may also be regarded as productive of certainty rather than confusion.

However, these memoranda do not accord with recent developments in comparative private international law with regard to the freedom of parties to choose different laws to govern different parts of a contract.[23] Further, an Explanatory Memorandum does not have the same binding effect as an enactment. In addition, the UAE Explanatory

[22] The Explanatory Memorandum for the Civil Transactions Code, cited in Professor Ukasha Mohammed Mustafa,(الوسيط في تنازع القوانين *) Conflict of laws* (Dubai Police Academy, 2008), p. 721 (in Arabic). This is the author's translation.
[23] Ibid, p. 723.

Memorandum states that "the language used by the legislator seems to be flexible as it has not restricted the court and allows it to follow any new development in the private international law area".[24]

The possibility of scission by choice may perhaps gain further support from Article 11 of the CTC, which specifies that:

> (1) The civil status of persons and their competence shall be governed by the law of the State to which they belong by their nationality.
>
> (2) However, foreign corporate persons, including companies, associations and corporations etc. shall be governed by the law of the state where such persons have established their actual headquarters.

This stipulation was applied by a Dubai court ruling in Cassation Case 117/2006 on 10 September 2006. The court ruled with regard to Articles 11 and 16 of the CTA that the law of a foreigner's nationality should govern his civil status. Since capacity to contract is referred to the law of the person's nationality, or in the case of a company, that of its headquarters, rather than the law governing the contract, it may be argued that there is little reason for the UAE to insist that a single law should govern all other contractual issues.

The majority of private international laws, such as the traditional English case law,[25] and European Union law under Article 3(1) of the Rome I Regulation, allow parties to choose different laws to govern different parts of a contract. However, the application of this principle is governed by the requirement that the chosen laws for different parts of the contract must be logically consistent. Furthermore, the needs of international commerce require the permissibility of splitting the law to govern different parts of a contract. For

[24] The Explanatory Memorandum for the Civil Transactions Code, ibid, p. 723. This is the author's translation.

[25] See *Hamlyn v Talisker Distillery* [1894] AC 202, 207; and *British South Africa Company v De Beers Consolidated Mines Ltd* [1910] 1 Ch 354, 383. A similar provision can be found in Article 7(1) of the Inter-American Convention on the Law Applicable to International Contracts 1994 (the Mexico Convention); and in Article 7(1) of the Hague Convention 1986 on the Law Applicable to Contracts for the International Sale of Goods, which states: "Such a choice may be limited to a part of the contract. "

example, the parties can choose one law to govern the contract in general and another law to govern a particular transaction carried out in performance of the contract.[26]

Therefore, no obstacles seem to prevent the Emirati courts from allowing parties to choose different laws to govern different parts of the contract. The judge could refer to Article 23 of the CTC, which allows the judge to rely on principles of private international law.

Choice of an unconnected law

The third point of contention is whether the law chosen by the contracting parties and the contract should be otherwise related. On the one hand, some argue that parties cannot choose a law that is not connected with the contract, because this freedom to choose the applicable law is restricted by the aim of the contract.[27] On the other hand, others suggest that such a requirement is not necessary. Parties are free to choose any law even if it is not connected with the contract as long as the commercial needs of the parties can be met and their best interests are promoted. The use of Article 23 of the CTA to address this issue seemingly makes the second opinion more sensible and appropriate to be applied.

The Emirati courts could refer to Article 3 of the Rome I Regulation, which enables parties to choose the law that should govern a contract, without requiring any connection between the law chosen by the contracting parties and the contract. Furthermore, Recital 11 to the Regulation states: "The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations". Therefore, the Emirati judge could rely on this rule, which is consistent with the wording of Article 19.

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[26] See *Centrax v Citibank* [1999] 1 All ER (Comm) 557 at 562.

[27] Dr. Aoudallah Shaiba Alhamd,(تنازع القوانين واحكام التنازع القضائي في القانون الاماراتي) *Conflict of laws and the conflicts of international jurisdiction in the Emirati Law* (Dubai Police Academy, 2001), p. 297 (in Arabic).

Choice of a non-territorial law

The final point of contention is whether the parties are allowed to choose a religious law, rather than the territorial law of a country, as the law that governs the contract. Article 19 of the CTC has not specified any principle with regard to this issue. However, the wording of Article 19 implies that the legislator can allow parties to choose a non-territorial law, such as Shari'a law, as the main law that governs their contract. This suggestion derives its strength from Article 7 of the Permanent Constitution of the UAE, which provides that "Islam is the official religion of the Union. The Islamic Tiara's (Shari'a) shall be a main source of legislation in the Union ..."[28] Moreover, restricting the parties to choose a particular territorial law would be contradictory to the application of Shari'a rules as ensured by Article 7 of the Permanent Constitution. Therefore, if the parties have chosen Shari'a law, the judge will deal with the case under Shari'a laws rather than ordinary UAE law.

It important to point out that Shari'a law is divided into several schools. The determination of the Shari'a law school upon which the judge should rely on in his decision can be found under Article 1 of the CTC. Article 1 of the CTC provides:

> Legislative provisions shall be applicable to all matters dealt therein, in letter and context. In presence of an absolutely unambiguous text, there is no room for personal interpretation. In the absence of a text in this Law, the judge shall adjudicate according to the Islamic Shari'a taking into consideration the choice of the most appropriate solutions in the schools of Imam Malek and Imam Ahmad Ben Hanbal and, if not found there, then in the schools of Imam El Shafe'i and Imam Abou Hanifa, as the interest so requires. Where no such solution is found, the judge shall decide according to custom, provided it is not incompatible with public policy and morals. In case the custom is restricted to a specific Emirate, it shall be effective therein.

[28] The Ministry of State for Federal National Council Affairs Web site, available at www.mfnca.gov.ae/?lang=en&m=options&act=content_detail&content_id=440 (accessed on 30th March 2014). Notably, the application of Shari'a law can be found in many areas, such as marketing and banking, which have a major application of these rules.

Based on Article 1, the judge must follow the specified order of Islamic schools when he decides in relation to issues under Shari'a law. First, he must look to the school of Imam Malek. If he does not find a solution there, he must look to the school of Imam Ahmad Ben Hanbal. Finally, he should look to the schools of Imam El Shafe'i and Imam Abou Hanifa, respectively. However, where the Islamic schools do not provide an answer to the matter in question, the judge can rely on common practice to adopt a solution.

In contrast, under the Rome I Regulation, the chosen law has to be the law of a country, rather than a non-state body of law, such as a religious law. Although the parties are not permitted to choose a non-territorial religious law under the Rome I Regulation, they can choose a law of a country that applies Shari'a law, for example. For instance, if the parties chose Saudi law, then Shari'a law will be applied to the extent that it is applied by Saudi courts along with all other rules applied by those courts. However, a definite judiciary (the Saudi judiciary) exists whose interpretation of Shari'a law will be followed.[29]

Another of question that could arise is how the UAE court should deal with a case in which the parties have chosen substantive rules laid down in a treaty to which the UAE is not a party. For example, if the parties agree to choose the Vienna Convention 1980 on Contracts for the International Sale of Goods as the governing law, such a choice should be interpreted sensibly and regarded as an indication of an implied choice of the law of a connected country that is a party to the Convention, since the provisions of the Convention are part of the internal law of the participating countries. A similar case could arise in an English court, since the United Kingdom is not a party to the Vienna Convention.

[29] Supra note 2, at p. 294.

Establishing the content of the chosen law

One of the issues that may arise in relation to a choice of law is what should happen when the content of the chosen law is unknown or unclear. This can occur if its substantive rules are unknown to the UAE courts or if their meaning is unclear. In such a case, the judge will apply the UAE law, as under Article 28 of the CTC the Emirati judge needs to consider two essential requirements before applying a foreign law. Otherwise, the law of the UAE will apply. Article 28 of the CTC specifies that:

> The law of the UAE shall be applied, if the proof of the existence of the applicable foreign law could not be established nor its significance could be determined.[30]

This rule places the burden on the parties to provide the Emirati court with the necessary information as to the contents of the applicable foreign law, because failing to provide the court with sufficient information regarding the contents of the chosen law will result in the application of UAE law. However, the parties are permitted to choose the law of the UAE, if they think that it would difficult for them to provide the court with information as to the contents of the foreign law.

It is important to point out that Emirati judges are obliged to give detailed reasons when they rule that the chosen law is not applicable because of the lack of information or difficulties in interpreting the chosen law.[31] Moreover, the application and the interpretation of the applicable law are monitored by the Supreme Court and the Court of Cassation. This was confirmed by the Court of Cassation, which ruled that "the trial court in its interpretation of foreign laws in which it refers to foreign legal experts in such interpretation is monitored by the Court of Cassation."[32]

[30] The importance of these two requirements in the sphere of contract is to ensure that the chosen law is accurately applied to the contract in accordance with the parties' intention in choosing such a law.
[31] Supra note 15, at pp. 292-95.
[32] Case no. 132/1995 on 18/2/1995 Dubai Court of Cassation. The author's translation.

Another situation in which the UAE courts must have recourse to their own internal law is in the interpretation an ambiguous choice of law clause. For example, the court may have to interpret a choice of law clause that refers to "the seller's residence" when the seller is a multilateral corporation. In such a case, it seems that the UAE court will have to interpret the reference to residence in accordance with UAE internal law. Moreover, the court may on occasion be driven to the conclusion that the choice of law clause is so ambiguous that it is not possible, under their rules of interpretation, to give it any intelligible meaning, with the result that the choice of law clause is void for uncertainty.

IMPLIED CHOICE OF LAW

The Rome I Regulation

As previously noted, under the Rome I Regulation the parties involved in a contract have the right to choose the law that governs the contract and is used in the determination of disputes arising from the contract. However, in some situations, the parties do not expressly choose the law that governs their contract. In the absence of an express choice, the contract may be governed by a law impliedly chosen by the parties; or, if they have made no choice (express or implied), the governing law will be determined in accordance with the default rules specified in Article 4. The presence of the default rules specified in Article 4 makes it clear that in some cases it will not be possible for the court to discover an implied choice.

Under Article 3 of the Rome I Regulation, an implied choice of law may be determined and applied to a contract in some cases where an express choice has not been made by the parties. Article 3(1) of the Regulation insists that such a choice must be "clearly

demonstrated by the terms of the contract or the circumstances of the case." In contrast, Article 3(1) of the Rome Convention required that an implied choice should be "demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case." The change of wording in the Regulation, as compared to the Convention, does not seem to indicate any actual difference in the requirements for the determination of an implied choice. This was confirmed by the English Court of Appeal in *Lawlor v Sandvik Mining*,[33] in which Lord Toulson explained that the change of language was not designed to entail a change of meaning, but merely to bring the English and German texts into line with the French text of the Convention.

Several special factors are considered with a view to determining an implied choice of law. Although these special factors may not exist in every case, they are regarded as potentially indicative of an implied choice. They may be contrasted with ordinary factors that exist in almost every case, such as the residence of each party and the places of negotiation and performance. It seems clear that such ordinary factors cannot alone provide the basis for determining an implied choice.

The first of the special factors that may justify the discovery of an implied choice is the presence of a connected law, which, as compared with other connected laws, was at the time of contracting much more familiar with and had much more detailed rules on the interpretation of the particular type of contract in question. For example, in *Amin Rasheed Shipping Corporation v Kuwait Insurance Co*,[34] a marine policy issued in Kuwait by a Kuwaiti insurance company to a Liberian shipping company was written in English and employed a Lloyd's standard form, but it did not contain an express choice of law. Claims under the policy were payable in Kuwait. After the vessel in question was

[33] [2013] EWCA Civ 365.
[34] [1984] AC 50.

detained by the Saudi authorities in connection with oil smuggling, the Liberian company brought a claim under the policy in the English court.

The House of Lords ruled that the proper law of this contract was English law, explaining that the Lloyd's standard form used for this policy originated in England and that, at the time of contracting, there was no ascertainable Kuwaiti law that concerned marine insurance contracts. In contrast, the English law was highly developed in matters relating to marine insurance. On the basis of these considerations, the Court inferred that the parties intended English law to govern the contract. It is clear that, if the insurer had been Australian or French, then the law of the insurer's residence would have been applied, since Australian and French law had substantial familiarity with marine insurance and adequate rules for interpreting such contracts, so that recourse to the origin of the form used would not have been necessary in order to apply the law likely intended by the parties to resolve the dispute arising out of the contract.

The validity of the contract under one connected law, but not under another connected law, may also indicate an implied choice of the validating law. A good example is *Re Missouri Steamship Co*,[35] which involved an English ship registered at the port of Liverpool. The agent for the ship's company in Boston, Massachusetts, signed contracts of carriage to transport goods from Boston to England using an English form. The contracts contained an exemption clause stating that the company would not be responsible for damages or losses caused by the negligence of a ship's master or crew. This clause was invalid under Massachusetts law, because it infringed its public policy, but it was valid under English law. In the course of the voyage, the ship in question sank at Carnarvon, Wales, as a result of the negligence of its master and crew. A Mr. Munroe,

[35] (1889) 42 ChD 321.

who had shipped cattle on the ship, and was an American citizen residing in Boston, claimed against the Missouri steamship company for the loss of his cattle. The English Court of Appeal held the contract was governed by English law on the basis of an implied choice by the parties. The Court reasoned that the validity of the exemption clause under English law but not under Massachusetts law showed that the parties must have intended that the contract should be governed by English law.

In such cases, difficulties may arise in discovering an implied choice where the parties were not aware of the difference with respect to the validity of the terms between various laws that were connected to the contract, especially where the contract had several strong connecting-factors, each with a different law, even if one law was more strongly connected to the contract.

The form of a contract is one of the factors that can direct a court to the law governing the contract, as particular standard forms are drafted in the light of particular laws, and are sometimes used mainly in particular countries. This factor was recognised by the House of Lords in *Miller v Whitworth*,[36] in which the Court held that English law governed a construction contract. An English owner of land located in Scotland used for the contract an English form suggested by his English architect rather than the separate Scottish form that was normally used in Scotland.

Another factor mentioned in the Giuliano–Lagarde Report is that "a previous course of dealing" can be used to demonstrate an implied choice of law when the parties had chosen the law that applied to their earlier contracts. However, applying this factor in the

[36] [1970] AC 583.See also *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50.

absence of an express choice is conditioned on the parties not having changed the practices which they had agreed on before.[37]

An implied choice also comes into play in cases in which parties have chosen the court capable of hearing disputes linked to their contract. By Recital 12 of the Regulation, an agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated. The English traditional practice regards the inclusion of a jurisdiction clause in the contract as usually implying a choice of the law of the country whose court is chosen.[38]

This factor can also be used in the case of an arbitration clause to determine an implied choice of law in the absence of an express choice. In *Egon Oldendorff v Libera Corp*,[39] for example, the parties chose an English form, written in English, and agreed that any arbitration would be carried out in London, which led the Court to decide that English law was the applicable law in the case.

Links between related contracts are another factor that helps to determine an implied choice of law.[40] However, in order for these to be used as indications of the law appropriate to a contract, there must be a commercial need for, and advantages related to, making several contracts subject to the same law. In the absence of such needs and advantages, this factor cannot be used to determine the applicable law.[41] Similarly, all obligations arising from a banker's letter of credit should be governed by a single law,

[37] [1980] OJ C282/17.
[38] See *The Komninos S* [1991] 1 Lloyds Rep 370, decided under the traditional English law; and *Marubeni v Mongolian Government* [2002] 1 All ER (Comm) 873 (Aikens J), decided under the Rome Convention 1980.
[39] [1996] 1 Lloyd's Rep 380.
[40] *Gard Marine and Energy Ltd v Glacier Reinsurance AG* [2010] EWCA Civ 1052.
[41] Peter Stone, *EU Private International Law* (3rd edn, Edward Elgar Publishing Ltd, Cheltenham, 2014), at pp. 301-02.

that of the country in which the specified documents (such as a bill of lading) are to be presented for payment by the beneficiary at a bank office, which is expected to authorise payment.[42] Therefore, this law will govern the obligations between the beneficiary and the issuing bank; the obligations between the beneficiary and the notifying or confirming bank; and the obligations between the two banks. However, the main contract of sale may be governed by another law, which may be chosen expressly or impliedly or determined under the default rules.

In some cases, a combination of two or more special factors may indicate an implied choice of law. For example, using a standard form from a particular country can strengthen the argument for an implied choice that is based on other considerations. This can be seen in *Gard Marine and Energy Ltd v Glacier Reinsurance AG*,[43] in which the English Court of Appeal took a broader view of an implied choice than it had taken in earlier cases. In this case, insurance with an English insurer had been partly reinsured by an English reinsurer and partly by a Swiss reinsurer with an office in London, and the two reinsurers were involved in the dispute. The underlying insurance was governed by English law, and the form of documentation for the reinsurance was a standard English form, which was used by both reinsurers. The Court relied on the form of the contract in determining the implied choice, but the Court also relied on the connection between the two reinsurance contracts and their connection with the main insurance contract. The Court also specifically indicated that, even if an implied choice could not be determined, English law would still have governed the Swiss reinsurer's contract, because of the application of the closest connection analysis under Article 4 of the same factors. The

[42] See *Bank of Baroda v Vysya Bank* [1994] 2 Lloyd's Rep 87 (Mance J); *Attock Cement v Romanian Bank for Foreign Trade* [1989] 1 WLR 1147 (CA); *BCCHK v Sonali Bank* [1995] 1 Lloyd's Rep 22 (Cresswell J); and *Marconi Communications v Pan Indonesia Bank* [2005] EWCA Civ 422.
[43] [2010] EWCA Civ 1052.

case also notably broadened the English perspective on closest connection under Article 4, as both the form and the connection between the contracts were considered under that provision.

This approach was confirmed in *Golden Ocean v Salgaocar*,[44] in which the English Court of Appeal had to decide which law was applicable to a breach of an agent's warranty of authority. In this case, the Court held that such a claim should be governed by "the same law as the proposed principal contract to which it is ancillary." The Court also stated that the same result would be achieved under Article 4.

The aforementioned special factors play an important role in determining which law is applicable to a contract, as they indicate the parties' preference for a specific law. However, in some circumstances, one of these factors may conflict with others, or new special factors may arise. In such circumstances, the special factors should be considered as parts of a whole and evaluated in the light of the circumstances of each case in order to determine the parties' choice regarding the proper law. In general, however, at least one special factor is necessary to enable the determination of an implied choice, and where only one special factor is present, or there are several such factors and they all point to the same law, it will usually be proper to conclude in favour of an implied choice of the law so indicated.

The UAE

The Emirati legislator did not overlook the case in which the parties involved have not chosen the applicable law or failed to reach an agreement on the law applicable to the contract. Therefore, Article 19 has directed the court to examine all of the circumstances of the contract with a view to discovering an implied choice of the applicable law.

[44] [2012] EWCA Civ 265.

Notably, Article 19 has given the court a wide discretion in determining the applicable law, since the Article has not restricted the court by requiring it to take into account any specific circumstances in determining an implied choice. However, there is a danger that this wide discretion, without any legislative guidance, may result in the application of a law that does not accord with the parties' intention. Therefore, to avoid such a consequence, the court can rely on general principles of private international law as authorised by Article 23 of the CTC to ascertain and follow the proper principles in determining an implied choice of law.

The court could thus rely on Article 3(1) of the Rome I Regulation in determining an implied choice of law. The Article requires that an implied choice should be clearly demonstrated by the terms of the contract or by the circumstances of the case. By applying such a requirement, the UAE court will have clear guidance that will assist it in reaching an outcome that complies with the parties' intention as to the applicable law.

On this basis, the Emirati court could consider several factors to determine the implied choice by referring to the rulings of English and other European courts. The form used in the contract is one of these factors that the court can use to determine the applicable law.[45] For example, if two French nationals were residing in the UAE at the time of the contracting, and they used in the contract an English form that is generally used only in England, the applicable law would be English law by reason of the form used in the contract.

Another factor is a jurisdiction clause, in which the parties have chosen the courts to which disputes arising from the contract should be brought. Similar significance arises in

[45] *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* [1984] AC 50.

the case of an arbitration clause which designates the seat of the arbitration.[46] Another factor arises when the contract is connected with other contracts, and commercial needs make it desirable that it should be governed by the same law as those contracts.[47] A previous course of dealing in which the parties have chosen the applicable law for the earlier contracts can also be used to determine the implied choice of law.[48]

It seems, however, that, since the UAE legislation provides for implied choice but not for the closest connection, a wider view of implied choice should be adopted in the UAE than in the EU, where the default rules under Article 4 enable the rebuttal of the presumptions so as to apply a clearly more closely connected law. In contrast, the UAE default provision seems to lead to a rigid reference to the law of the common residence or (in the absence of a common residence) the place of contracting. While the default rule that favours the common residence is unlikely to lead to problematic results, the default rule in favour of the place of contracting lacks any reasonable justification and may frequently lead to arbitrary or unexpected results. Thus, a wide approach to the discovery of an implied choice offers the UAE courts a route by which they can rely on the explicit text of Article 19 and at the same time avoid the reference therein to the law of the place of contracting.

[46] *Egon Oldendorff v. Libera Corp* [1996] 1 Lloyd's Rep 380.
[47] *Gard Marine and Energy Ltd v Glacier Reinsurance AG* [2010] EWCA Civ 1052.
[48] Giuliano–Lagarde Report, [1980] OJ C282/17.

THE DEFAULT RULES

The Rome I Regulation

The default rules set out in Article 4 of the Rome I Regulation apply to situations in which the parties involved in a contract have failed to reach an explicit agreement on the law applicable to their contract, perhaps because each party insisted on the application of the law of his own country, and in which there is no sufficient indication from which an implied choice can be determined. Article 4 of the Regulation was derived from Article 4 of the Rome Convention 1980, which was based on the principle that the law of the country most closely connected to a contract should be the law applied.

This section of this chapter is focussed on the default rules under the Rome I Regulation (Article 4). It will first indicate the differences and the similarities between the Rome I Regulation and the Rome Convention 1980, after which it will examine the present provisions in detail. This will be followed by an examination of certain types of contract in relation to the Rome I Regulation.

The most obvious difference between the Regulation and the Convention is the list of contracts established by Article 4(1) of the Regulation, to which no corresponding provision existed under the Convention. Despite this difference in structure, the outcomes of the two provisions are largely the same, since many of the entries in the list serve to indicate which party should be regarded as the characteristic performer with respect to the type of contract in question.

Article 4(1) of the Regulation mentions several types of contract and the related factors that can be used to determine the applicable law in cases in which the law was not chosen under Article 3. These factors are the law of the country in which the seller has his or her

habitual residence (in a contract for the sale of goods);[49] the law of the country in which the service provider has his or her habitual residence (in a contract for the provision of services);[50] the law of the country in which immovable property is situated (in a contract concerning a right *in rem* or a tenancy of an immovable property);[51] the law of the country in which the landlord has his or her habitual residence (in a short-term tenancy of an immovable property, provided that the tenant is a natural person and has his habitual residence in the same country as the landlord);[52] the law of the country in which the franchisee has his or her habitual residence (in a franchise contract);[53] the law of the country in which the distributor has his or her habitual residence (in a distribution contract);[54] the law of the place where an auction was held (in a contract for the sale of goods by auction, if the place where the auction was held can be identified);[55] and, finally, the law governing a financial market as defined by Article 4(1)(17) of EC Directive 2004/39 (in contracts concluded in a financial market).[56]

Contracts relating to land

Article 4(1)(c) of the Regulation deals with contracts involving a right *in rem* in immovable property or a tenancy of an immovable property and provides that the applicable law is the law of the country in which the property is situated. Despite the difference in wording of the Rome I Regulation and the Rome Convention 1980, the contents of both provisions are in substance the same. It has been suggested that the new word "tenancy", which replaces "the right to use", could be considered more restrictive.[57]

[49] Article 4(1)(a) of the Regulation.
[50] Article at 4(1)(b).
[51] Article at 4(1)(c).
[52] Article at 4(1)(d).
[53] Article at 4(1)(e).
[54] Article at 4(1)(f).
[55] Article at 4(1)(g).
[56] Article at 4(1)(h).
[57] Ferrari, I.F. and Leible, S.L., *Rome I Regulation: The Law Applicable to Contractual Obligation in Europe*, (sellieuropean law publishers GmbH, Munich, 2009), p. 38.

However, it seems that such changes are insignificant and that both provisions have the same outcome.

An exception is made by Article 4(1)(d) in favour of the law of the landlord's habitual residence in cases in which the tenancy of the land is for no longer than six consecutive months, and the parties habitually reside in the same country.

Auction sales

The sale of goods by auction is subject to Article 4(1)(g) of the Regulation.[58] Under this provision, the applicable law for a contract for the sale of goods by auction is the law of the place where the auction is held, if that place can be identified.[59] In some cases, difficulties may arise in identifying the location of an auction for instance, if the auction takes place on the Internet. It seems that the Regulation does not attempt to provide guidance in establishing the location of an auction in cases in which this is unclear. It can be argued that the location of the website to which bids are sent is the location of that auction. However, such a solution is unsatisfactory for two reasons: first, a website might be hosted on several servers located in different parts of the world in order to maintain availability; and second, applying such a solution could be unfair or arbitrary in some cases -- for example, where both the seller and the buyer were resident in France, and the website to which bids were sent was located in Australia. Applying Australian law would be inappropriate in this case, as French law would be more closely connected. Moreover, the location of the server might be unknown to the bidders, especially where the auctioneer's website is on the multinational .com register rather than a national register (such as .co.uk or .de).

[58] No similar provision can be found in the Rome Convention 1980.
[59] The same approach can be found in the Hague Convention 1955 on the Law Applicable to International Sales of Goods.

In cases such as the one mentioned above, Article 4(1)(a) of the Regulation, which refers to the law of the country in which the seller has his habitual residence, could be applied, unless the circumstances of the case indicated a more closely connected law. But since, in the case of an auction sale, the seller's identity may be unknown to the bidders, one can then look to the residence of the auctioneer, who is the seller's agent.

Contracts of loan

It is clear that neither the Convention nor the Regulation have specifically addressed contracts for the loan of money, which are both common and important. In loan contracts, it is not clear who is the characteristic performer. In view of Recital 17 to the Rome I Regulation and the ruling of the European Court in *Falco and Rabitsch v Weller-Lindhorst*[60] on the Brussels I Regulation, a party who carries out an activity in return for a payment of money should be regarded as a service provider. However, contracts for the loan of money appear not to fall under the concept of services under Article 4(1)(b).

Loan contracts are crucial for commercial interests, as the majority of individuals and companies require cash for business start-up. In contracts for which a loan is obtained to provide long-term finance for a company (as when finance is obtained by means of an issue of shares), it seems reasonable to regard the characteristic performance as the repayment of the loan (or the issuing of the shares).[61] However, the characteristic performer in the case of other loans is unclear, as it could be either the lender or the borrower. The trend in the recent UK case law is to regard the lender as the characteristic performer.[62]

[60] Case C-533/07, [2009] ECR I-3327.
[61] See *Mirchandani v Somaia* [2001] WL 2397782 (Morrit V-C).
[62] See *Atlantic Telecom GmbH* [2004] SLT 103; *Hathurani v Jassat* [2010] EWHC 2007 (Ch) (Mann J); and *Deutsche Bank v Khan* [2013] EWHC 482 (Comm) (Hamblen J). Some earlier decisions regarded the borrower as the characteristic performer. See *Tavoulareas v Tsavliris* [2006] 1 All ER (Comm) 109

Securities Settlement Systems

It is worth mentioning that Securities Settlement Systems (SSS) do not fall within Article 4(1)(h) but instead under the general principles of Articles 3 and 4(2).[63] In cases related to SSS, a particular presumption is not required, because the operation of the systems falls under EC Directive 1998/26. This Directive does not attempt to deal with the law governing the underlying contract. According to Article 2(a) of this Directive, participants must choose the applicable law of a member state to govern a "system" in order to enable the system to function and be counted as such. This system is based on putting each transaction into the netting system after it is concluded, so that it will be settled at a certain time thereafter.

This provision is supported by Recital 31 of the Rome I Regulation, which provides that "Nothing in this Regulation should prejudice the operation of a formal arrangement designated as a system under Article 2(a) of Directive 98/26/EC". If the transaction enters the netting system after it is concluded, the Directive will be applied even if one of the parties becomes insolvent, and the insolvency proceedings start after the transaction enters the system. Moreover, the Directive will be applied even if a dispute arises between the parties concerning the transaction after the transaction has entered the system.

The characteristic performer's residence

If a contract does not fall under the scope of Article 4(1), or falls within more than one category of Article 4(1), one must endeavour to apply Article 4(2). The law applicable to the contract under Article 4(2) is the law of the country in "which the party required to

(Andrew Smith J); and *Raiffeisen Zentralbank v National Bank of Greece* [1991] 1 Lloyd's Rep 408 (Tuckey J).

[63] Francisco J. Garcimartin Alferez, "The Rome I Regulation: Much ado about nothing?", *The European Legal Forum* (2008), vol. 2.

affect the characteristic performance of the contract is habitually resident". Therefore, the application of Article 4(2) can be divided into two aspects, the first of which aims to identify the characteristic performance involved in a contract, and the second of which aims to locate the habitual residence of the party who is required to effect the performance characteristic of the contract.[64] The main aim of most of the detailed rules specified in Article 4(1) of the Regulation is to identify the characteristic performer and thus pre-empt the operation of Article 4(2).

The concept of characteristic performance has been taken from Swiss law,[65] but its definition is set out neither by the Swiss legislation on private international law, by the Rome Convention, nor by the Rome I Regulation.[66] For contracts that involve a single party's performance, such as gift contracts or termination fee payment contracts, which are considered unilateral contracts,[67] identifying the characteristic performance may at first sight seem not to involve any complications. In unilateral contracts, one party promises to pay in return for the other's performance, but without any obligation from the second to perform. Under the Rome Convention, the English courts held that the only obligation which exists is to pay, and that is therefore the characteristic performance. However, it is arguable that there could be a characteristic performance which is not promised.[68] In a unilateral contract, where one party has not promised to provide a service, but has provided a service as requested and now seeks the promised payment, it seems arguable that such a contract should be regarded as a contract for services and,

[64] James Fawcett and Janeen M. Carruthers, *Cheshire, North & Fawcett Private International Law*, 14th edition, (Oxford University Press, Oxford, 2008), p. 711.
[65] Oliveira, D "Characteristic Obligation" in the Draft EEC Obligation Convention, (1977) 25 American Journal of Comparative Law 303 at 314.
[66] See the Swiss Federal Statute on Private International Law of 18 December 1987, Art 117. The statute is set out in (1989) 37 AJCL 193.
[67] See *Ark Therapeutics plc v True North Capital Ltd* [2005] EWHC 1585 (Comm.) at (55), [2006] 1 All ER (Comm) 138.
[68] For example, if an individual has lost his dog and he offers a reward of $100 to the person who finds it, the second party is not obliged to perform. However, if he does perform, the first party is obliged to give him $100.

therefore, that the service provider should be regarded as the characteristic performer under Article 4(1)(b).

Under most contracts, both parties have obligations to perform, and this makes it difficult to determine which party is the main performer under the contract.[69] The Giuliano and Lagarde Report identifies a characteristic performance as "the performance for which payment is due".[70] While English and Scottish courts have applied this concept to goods and service contracts without much difficulty, its application can be complex in some cases, as in *Print Concept GmbH v GEW(EC) Ltd*,[71] which involved an oral distributorship contract. In this case, the English Court of Appeal ruled that the characteristic performer was the manufacturer supplying products, because the products allowed the distributor to gain access to the German market. However, under the Regulation, this decision has been overruled by Article 4(1)(f), and the distributor is now regarded as the characteristic performer.

The second part of the application of Article 4(2), as well as much of Article 4(1), involves determining the habitual residence of the characteristic performer. The definition of habitual residence is found in Article 19. Article 19(1) defines habitual residence as "the place of central administration" of a company or other body, as well as the "principal place of business" in the case of a natural person performing business activities on his own account.

The notion of central administration, which is also used in Article 63(1)(b) (ex Article 60(1)(b)) of the Brussels I Regulation, is comparable to the notion of the place of central management and control, which was used in Section 42 of the Civil Jurisdiction and Judgments Act 1982 and refers to the place where the principal administrative and

[69] See Supra fn (64), p. 712.
[70] At p. 20.
[71] (2001) EWCA Civ 352, (2002) CLC 354.

managerial organ of the company (in English terms, the board of directors) holds its meetings and makes major decisions.[72] For this purpose, the distinct legal personality of a subsidiary company is respected, save perhaps in special circumstances in which a parent company has successfully appropriated the roles of the subsidiary's board, which has stood aside.[73] The English Court of Appeal in *Young v Anglo American South Africa Ltd*[74] recently considered the concept of central administration under Article 63(1)(b) (ex Article 60(1)(b)) of the Brussels I Regulation). In that case, Aikens LJ explained that the reference to central administration refers to the place where the company involved makes important decisions in relation to its operation through its relevant organs. Moreover, he considered that the concept of central administration has the same meaning under Article 63(1)(b) of the Brussels I Regulation as under Article 54 of the Treaty on the Functioning of the European Union, which deals with freedom of establishment. He concurred with the decision of Andrew Smith J in *Vava v Anglo American South Africa Ltd (No 2)*. He rejected the approaches adopted in some earlier English decisions: *King v Crown Energ* was unhelpful in its reasoning;[75] *Iranian Ministry of Defence v Faz Aviation Ltd* lacked analysis;[76] and different legislative wording was addressed in *Rewia*.[77]

For a period of time, the English courts confused the concept of the principal place of business, which is also used in Article 63(1)(c) (ex Article 60(1)(c)) of the Brussels I Regulation), with the concept of central administration, which is used in Article 63(1)(b) (ex Article 60(1)(b)), so that both referred to the place where the board of directors held their meetings.[78] However, recent rulings have recognised that the concepts are different

[72] See *The Rewia* [1991] 2 Lloyd's Rep 325 (CA). See also Calliess, G. C. (2011), *Rome Regulations: Commentary on the European Rules of the Conflict of Laws*, Kluwer Law International, The Netherlands, p. 309.
[73] See *Vava v Anglo American South Africa Ltd (No 2)* [2013] EWHC 2131 (QB) (Andrew Smith J).
[74] [2014] EWCA Civ 1130.
[75] [2003] lLPr 28.
[76] [2008] 1 All ER. (Comm) 372 (Langley J).
[77] [1991] 2 Lloyd's Rep 325.
[78]Supra fn(41).

and that the principal place of business is the location at or from which the most important and numerous of the company's dealings with outsiders are conducted, or the place in which the most essential of its economic, industrial or commercial activities are located and the majority of its employees and business resources are organised.[79] In *Young v Anglo American South Africa Ltd*,[80] Aikens LJ accepted that the concept of principal place of business diverges from the concept of central administration and that the concept of principal place of business refers to the place where the company in question does its essential business.

Article 19(2) specifies that, "Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or establishment is located shall be treated as the place of habitual residence". Article 19(3) states that the time when a contract is concluded is the relevant time in the determination of the place of habitual residence. The new provision in the Regulation provides that, if the conclusion of an agreement is carried out in the course of the operations of a secondary establishment, this establishment will count as the habitual residence. According to Stone, this "appears far more sensible, since it is on the establishment which negotiates the contract that the other party's attention will normally be focused".[81] However, the position is obscure when, for example, the seller is a German company, but the sale is negotiated by its French branch and is to be performed by its English branch.

With regard to the habitual residence of an individual who is not acting in the course of his business, the meaning of the habitual residence is not defined by the Rome I

[79] *Vava v Anglo American South Africa Ltd (No 1)* [2012] EWHC 1969 (QB) (Silber J).
[80] [2014] EWCA Civ 1130.
[81] Peter Stone, *EU Private International Law* (3rd edn, Edward Elgar Publishing Ltd, Cheltenham, 2010), at pp. 310-11.

Regulation nor by any other EU enactment in the field of private international law (such as the Rome II Regulation,[82] the Brussels IIA Regulation,[83] or the Insolvency Regulation).[84] Nevertheless, it is likely that, in such cases, the approach adopted by the European Court in cases involving family matters under the Brussels IIA Regulation is likely to be followed for the purpose of other EU regulations in the sphere of private international law, such as the Rome I Regulation. This was confirmed by the English High Court in *Winrow v Hemphill*,[85] in which Slade J held that a British army wife who had been living with her husband for a substantial period in the country in which he was stationed was habitually resident in that country for the purpose of the Rome II Regulation.

The rulings of the European Court on the habitual residence of a spouse or parent in relation to jurisdiction in family matters under the Brussels IIA Regulation establish that, for this purpose, the concept of habitual residence must be uniformly defined under European Union law rather than be referred to the law of the forum State. The most helpful European Court ruling on this concept was given in *Mercredi v Chaffe*,[86] which involved the habitual residence of a very young child, who had been removed by her mother to France from her previous habitual residence (England) and had resided in France for a few days before the crucial date. The mother was a French national and had resided in England for nearly nine years prior to her return to France with the baby. With regard to an adult, the European Court indicated that, for the habitual residence to be transferred to a State, it is essential that the individual in question have the intention to establish there the centre of his interests on a lasting basis. The actual duration of the stay

[82] EC Regulation No 864/2007 on the Law Applicable to Non-Contractual Obligations, (OJ L199/40).
[83]EC Regulation No 2201/2003 concerning Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters and the Matters of Parental Responsibility, repealing Regulation (EC) No 1347/2000, (OJ L338/1) .
[84] EC Regulation No 1346/2000 on Insolvency Proceedings, (OJ L160/1)
[85] [2014] EWHC 3164 (QB) (Slade J).
[86] Case C-497/10-PPU, [2010] ECR I-14309.

is merely a factor in determining the durability of the residence. Moreover, the person's integration in a social and family environment must also be considered.

A similar approach was suggested in the Borras Report,[87] which relied on the definition provided by the European Court in another context,[88] that habitual residence refers to the place where the person established, on a fixed basis, his permanent or habitual centre of interests, with all of the relevant facts being taken into account for the purpose of determining such residence. Moreover, this definition was applied by the English courts in *Marinos v Marinos*[89] and *Munro v Munro*[90] in relation to matrimonial jurisdiction under Brussels IIA Regulation.

A question not yet settled concerns the minimum duration of the intended residence that can be regarded as a lasting or substantial period. It seems likely that an intention to stay for at least three years would be sufficient, but an intention to stay only for a shorter period (such as one year) would not.

As regards the default rules for determining the law applicable to a contract, when the habitual residence of the relevant person cannot be ascertained to enable the proper law to be determined in accordance with Article 4(1) or (2) of the Rome I Regulation, as a last resort one can have recourse to Article 4(4) of the Regulation to refer to the law of the country with which the contract is most closely connected.

Rebuttal

Under Article 4(3) of the Rome I Regulation, the law of a country other than that indicated by Article 4(1) and (2) should be applied if it is clear that the contract is manifestly more closely connected to that other country. This is referred to as the "escape

[87] Borras, explanatory report on the Brussels I Convention on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matter [1998], at para. 32.
[88] See Case 76/76: *Di Paolo v Office National de l Emploi* [1977] ECR 315; and Case C-102/91: *Knoch v Bundesanstalt fur Arbeit* [1992] ECR I-4341.
[89] [2007] 2 FLR 1018 (Munby J).
[90] [2008] 1 FLR 1613 (Bennet J).

clause" by Recital 20, which suggests that "the court should take account, inter alia, of whether the contract in question has a very close relationship with another contract or contracts".[91] The words "clear" and "manifestly" are used to distinguish Article 4(3) of the Regulation from Article 4(5) of the Rome Convention, which required a contract only to be more closely connected to another country. Here, the Rome I Regulation seems, at least at first sight, to be more restrictive, as it requires a closer connection to be clear and manifest.[92] But the difference may be minimal when the case law under the Convention is considered.

An example of the application of Article 4(5) of the Convention can be found in *Intercontainer Interfrigo v Balkenende Oosthuizen and MIC Operations*,[93] in which the European Court held that, if it appears clearly from the overall circumstances that a contract is more closely connected with a country other than that indicated by Articles 4(2)-(4), the court can apply the law of the country that is most closely connected with the contract and not take the rules of Articles 4(2)-(4) into consideration. This approach was confirmed in *Gard Marine and Energy Ltd v Glacier Reinsurance AG*,[94] in which the English Court of Appeal, taking Article 3 into consideration, held that English law governed a contract, as it was the law impliedly chosen, and that the same factors led to the same conclusion under Article 4(5) of the Convention as showing the closest connection. The Court also emphasised the terminology used in the document and the connection between the various contracts, which indicated that English law was the applicable law. A similar case was *British Arab Bank v Bank of Communications*,[95] which involved a performance bond issued by a Syrian bank with respect to the performance of

[91] Recital 20.
[92] Supra fn (81), pg 317.
[93] (2009) Case C-133/08.
[94] [2010] EWCA Civ 1052.
[95] [2011] EWHC 281 (Comm), [2011] 1 Lloyd's Rep 664.

a Chinese contractor under a construction contract, as well as a counter-guarantee issued to the Syrian bank by an English bank. In that case, the English High Court applied Article 4(5) of the Convention in matters concerning the counter guarantee and ruled that Syrian law governed the counter guarantee between the English and Syrian banks based on its having the closest connection.

The last resort

In cases in which there is no express or implied choice and the law that governs a contract cannot be determined by applying Article 4(1) or (2) of the Regulation, Article 4(4) must be applied. This is known as the "last resort clause" and specifies that the law of the country most closely connected with a contract should be the applicable law for the contract.[96] However, the operation of this provision can be very difficult in some cases. For instance, in a contract in which guns are exchanged for butter, both parties have an obligation to deliver goods, and it is difficult to determine which law is the most closely connected with the contract.[97] The reference in Recital 19 to the centre of gravity does not appear to be of much help in resolving such difficulties. Another situation in which Article 4(4) can apply is when the habitual residence of the person referred to in Article 4(1) or (2) cannot be ascertained.

Contracts for the carriage of goods

Article 5(1) of the Regulation deals with contracts for the carriage of goods and permits the parties to choose the law applicable to their contracts in accordance with Article 3. In the absence of such a choice, the law that governs the contract will be the law of the country of the habitual residence of the carrier, provided that the place of receipt, the

[96] Alférez,*supra* fn (63) at 69.
[97] Another example can be found in cases in which the parties exchange services for services. For example, hotel accommodations or theatre tickets are exchanged for advertising services.

place of delivery or the habitual residence of the consignor is also situated in that country. "If those requirements are not met, the law of the country where the place of delivery as agreed between the parties is situated shall apply". The place of delivery refers to the place of discharge of the goods at the termination of the voyage.[98] However, these rules are reduced to rebuttable presumptions by Article 5(3), which makes an exception in favour of the law of the closest connection.

However, this may raise difficulties in cases in which there are several places of agreed delivery. For example, a Spanish consignor contracts with an Italian carrier to deliver 400 containers by ship. The containers are to be loaded at a Spanish port, but out of the 400 containers, 100 containers are to be delivered to Egypt, 100 to California, 100 to Denmark, and 100 to Australia. On one interpretation of Article 5(1), the applicable laws for the various goods would be the Egyptian, Californian, Danish and Australian laws, respectively, even though they are all subject to the same contract of carriage, since there is no single "place of delivery" for all of the goods. However, to avoid the application of two different laws in the case of disputes concerning two places of delivery, the parties would be well advised to choose the applicable law. Another possible approach would be to disregard Article 5(1) and look to the closest connection under Article 5(3). Presumably, in the above example this would be Spain as the consignor's residence and the place of loading.

Recital 22 explains that a single-voyage charter party and other contracts the main function of which is the carriage of goods should be considered contracts for the carriage of goods. It also defines the term "consignor" as referring to any person who enters into a

[98]Supra, fn (81), pg 321.

contract of carriage with a carrier and "the carrier" as referring to the party to the contract who undertakes to carry the goods, whether or not he performs the carriage himself.

In *Intercontainer Interfrigo v Balkenende Oosthuizen and MIC Operations,*[99] the European Court held that Article 5(1) of the Regulation is applicable not only for single-voyage charter party contracts, but that it also applies to other contracts when the main function of the contract is the actual carriage of goods, not making available the transport resource. It seems that, in *Interfrigo,* the European Court regarded the actual contract before it as a contract for the hire of the railway wagons and thus as not falling within Article 5(1).

Accordingly, a normal time charter of a ship, under which the shipowner retains control of the ship, employs the crew, and undertakes the carriage of goods, falls within the scope of Article 5(1).[100] However, a bareboat charter, under which the shipowner provides the ship to the charterer, who employs the crew and undertakes the carriage of goods, is excluded from the application of Article 5(1).

Despite the wording of Article 5(1), it is apparent that the second limb of this provision is not applicable, if the parties have not reached an agreement on the place of delivery, as it applies only if the parties reach an agreement on the place of delivery.[101]

An exception to the operation of Article 5(1) has been provided by Article 5(3), which provides that, in the absence of a choice of law, and when it is clear from all of the circumstances of the case that the contract is manifestly more closely connected to a country other than that indicated in Article 5(1), then the law of that other country applies.

[99] Case C-133/08, [2009] ECR I-9687.
[100] Supra, fn (81), pg 322.
[101] Supra, fn (57), pg 107.

The UAE

The default rules under the CTC can be found in Article 19(1), which directs the courts to follow two rules in determining the applicable law of a contract in the absence of an applicable law chosen by the parties. The first rule is that the applicable law should be the law of the country where both parties resided. However, this rule is restricted in that it envisages that the parties should have been resident in the same country. If the parties were resident in different countries, then the court will have to apply the second default rule of Article 19(1), which makes the law of the country in which the parties contracted the applicable law in the absence of an express or implied provision chosen by the parties.

It seems that applying those rules in the absence of a law chosen by the parties could be difficult and could lead to unacceptable results. In most international contracts, the parties have different domiciles, so that the first rule is inapplicable. The second rule, which makes the law of the place of contracting the applicable law, is difficult to apply in some situations. For example, suppose that one party is resident in Dubai and the other party in Kuwait, and after some negotiations by correspondence between their offices they meet while attending a one-day conference in Bahrain, and there they sign the contract. Application of the second rule, which makes the place of contracting the applicable law in this situation, will lead to an unacceptable outcome, as Bahrain law does not have any substantial link to the contract. Moreover, it could be difficult to determine the place of contracting when the negotiations are conducted by correspondence across borders, such as, for example, by telephone or email. One could suggest that the rule in favour of the law of the place of contracting should be confined to cases in which all of the potentially relevant communications were both sent and received within a single country. Otherwise, one finds a gap and introduces a test of the closest connection under Article 23. However, if the place of contracting is clear, while leading to an undesirable result, the solution

could be to adopt a wide view of implied choice, wider than under the Rome I Regulation.

Summary

The parties have the freedom to choose expressly the law applicable to their contract under both the Rome I Regulation and the CTC choice of law provisions. However, the CTC is silent on several matters, such as whether the parties have the right to change the governing law at any time after contracting, whether the governing law must be a law of a country (a territorial unit), and whether the parties are allowed to spilt the governing law. In contrast, under the Rome I Regulation, these matters are clearly addressed. However, the key to solving these issues under the choice of law provisions of the CTC may be through Article 23, which permits the use of general principles of private international law, as has been fully discussed in this chapter.

With regard to the implied choice of law, it seems that such a choice is accepted under both the Rome I Regulation and the CTC provisions. However, it seems that, under the Rome I Regulation, an implied choice of law is required to be clearly demonstrated, while, under the CTC, there is no such requirement to determine an implied choice. Moreover, the CTC does not provide any examples or specify any factors indicative of an implied choice, whereas the Rome I Regulation provides several examples, and indicative factors are also identified in case law.

With regard to the default rules that apply in the absence of an express or implied choice, those specified by the CTC seem inappropriate for the needs of commerce, as their application may lead to unpredictable results inconsistent with the parties' expectations. However, those results could be avoided if the court were to take a narrow view of

Article 19 and could proceed to fill the gap by reference to general principle in accordance with Article 23.

The default rules under the Rome I Regulation offer more sensible solutions by permitting the application of the law of the country that is most closely connected with the contract. Moreover, the default rules under the Regulation also subject different types of contract to different rules and thus endeavour to achieve a combination of reasonable certainty with respect for the distinct nature of certain types of contract.

Chapter 4 - Exceptions to the Operation of the Proper Law

Introduction

In general, the proper law of the contract, whether ascertained by reference to a choice by the parties or under the default rules, will govern all issues that may arise in relation to the contract.[1] By way of exception, there are certain issues (such as a person's capacity) the nature of which may lead to the application of a different law. By way of a further exception, there are cases in which the content of the substantive rules contained in the proper law may lead to seriously unacceptable results, so that the court will refuse to apply them as incompatible with the public policy of the forum country. A related exception may enable a court to give overriding effect to certain mandatory rules contained in its own law or possibly in the law of a third country.

This chapter will first deal with issues the nature of which may lead to the application of a law other than the proper law. Consideration will be given to personal capacity, formalities, formation, minor details of performance, essential validity and formation, and the consequences of invalidity. These issues will be considered under the Rome I Regulation and the CTC. Then, the public policy provisos of the Rome I Regulation and the CTC will be discussed. Finally, the operation of overriding mandatory rules under the Rome I Regulation and the CTC will be considered.

Personal Capacity

Capacity under the Rome I Regulation

By Article 1(2)(a) and (f) of the Rome I Regulation, the capacity of both individuals and companies to contract is excluded from the scope of the Regulation. Therefore, the

[1] The rules for determining the proper law of a contract were examined in Chapter 3 above.

traditional conflict rules of the forum country will be applied to such matters. However, an exception is provided in Article 13, which provides:

> 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.

The wording of Article 13 makes it clear that the exception is limited to the capacity of individuals and does not extend to that of companies. Historically, the exception is derived from French case law, which in the 19th century introduced a departure of this kind from a general rule referring a person's capacity to the law of his nationality.[2]

Subject to the exception provided by Article 13, the determination of a person's capacity by the English courts continues to be governed by the traditional English conflict rules. With regard to the capacity of an individual, the English conflict rules refer alternatively to the law that governs the contract and to the personal law of the relevant individual (that of his domicile and/or residence). Consequently, it is sufficient that he has capacity under either of these laws.[3]

However, with regard to companies, the traditional English conflict rule requires that a company should have capacity both under the law of the country of incorporation and under the law governing the contract.[4] A recent decision of the English Court of Appeal in *Haugesund Kommune v Depfa ACS Bank*[5] involved a contract of loan, governed by English law, between a Norwegian local authority and an Irish subsidiary of a German bank. The Court ruled that the contract of loan was invalid, since, under Norwegian law, the local authority lacked power to obtain loans for speculative purposes. The Court

[2] See especially the ruling of the French Court of Cassation in *De Lizardi v Chaise* Sirey 61.1.305 (1861).
[3] See Dicey, 15th edition, Rule 228; and Stone, 3rd edition, pp. 324-26.
[4] This was confirmed in *Continental Enterprises Ltd. v Shandong Zhucheng Foreign Trade Group Co* [2005] EWHC 92 (Comm), in which the court ruled invalid a contract governed by English law, as the buyer lacked capacity under the law of its incorporation, Chinese law, to enter into transnational trade. See also Dicey, Rule 175.
[5] [2010] EWCA Civ 579.

disregarded a further Norwegian rule that validated contracts despite incapacity when the other party acted in good faith on the ground that it is the law which governs the contract in question which governs the consequences of incapacity to contract. This application of part of Norwegian law to invalidate a contract which would be valid under Norwegian law as a whole seems very unsatisfactory.

Capacity under the CTC

Article 19 of the CTC does not apply to capacity, as this matter is specifically addressed by Article 11. With regard to the capacity of an individual, Article 11(1) lays down a general rule that the law of the state of which a person has the nationality applies to his civil status and competence. But it makes an exception with relation to financial dealings that are transacted in the United Arab Emirates and the results of which materialise therein. In such a case, if one of the parties is an alien of defective capacity under the law of his nationality, and the lack of capacity is attributable to a hidden cause which the other party could not easily discover, such a cause will have no effect on his capacity.

The exception specified by Article 11(1) has some similarity to that adopted by Article 13 of the Rome I Regulation. But under the CTC, the place of performance and the place of contracting are material, and there is no explicit requirement that the parties must be present in the UAE. Moreover, under the CTC, the incapacity in question will be wholly disregarded, so that the party who dealt with the incapable person will be precluded from invoking the person's incapacity to escape from the contract.

With regard to corporate capacity, Article 11(2) of the CTC deals with the legal regulation of foreign juridical persons, including companies, associations, and establishments, and this includes their capacity to contract. It lays down a general rule making applicable the law of the state in which such bodies have their actual main

administrative centre. It also provides for an exception when such a body carries on an activity in the United Arab Emirates and in that case makes UAE law applicable instead.

The general rule laid down by Article 11(2) of the CTC referring corporate matters, including capacity, to the law of the company's administrative centre accords with the approach traditionally adopted in many European countries, such as France and Germany. Thus, if a company has its administrative centre within the UAE, its capacity will be governed by UAE law.

But the exception in Article 11(2), by which the capacity of a company the administrative centre of which is abroad and which merely carries on an activity within the UAE will be subject to UAE law, is less easy to justify. It is not even clear that the contract in question need have any connection to the UAE establishment. For example, a company might have its headquarters in Florida and have a branch in Dubai, and it might (through its Florida head office and not its Dubai branch) enter into a contract with a Japanese company to deliver goods in New York. The company might later become insolvent, and insolvency proceedings might be opened in both Florida and Dubai. The Japanese creditor might seek to prove its claim in the Dubai proceeding so as to obtain payment from assets there. On a wide reading of the exception, the creditor's claim in the Dubai insolvency would be defeated if the company for some reason lacked capacity to enter the contract under UAE law, even though the transaction had no connection with the UAE.

The best solution for capacity to contract is to refer the capacity of an individual to the law of his habitual residence and the capacity of a company to the law of its place of incorporation. If such a place is difficult to identify, one can refer instead to the law of the place where the company's central administration is located.

Formal Validity

Formal requirements deal with the form in which a contract must be concluded. They include such requirements as that a contract must be concluded in writing;[6] that the writing should be signed by the parties and/or witnesses; and that there should be as many original copies of the contractual document as there are parties. Such requirements must be distinguished from substantive requirements, which deal with such matters as the need for consideration or a legitimate purpose, or the validity of the agreed terms. Here, we shall deal with formal requirements. Substantive requirements are governed by the proper law of the contract, subject to exceptions with respect to public policy and overriding mandatory rules (discussed later in this chapter).

Formal Validity under the Rome I Regulation

In the Rome I Regulation, Article 11(1) reflects a widespread international practice by specifying that a contract concluded between persons who are, or whose agents are in the same country at the time of its conclusion is formally valid if it satisfies either the formal requirements of the law that governs it in substance under the Regulation or those of the law of the country where it is concluded.

Article 11(2) advances the policy of validation with regard to formalities when there is any reasonable basis for doing so by dealing with cases in which a contract is concluded between persons who are, or whose agents are in different countries at the time of its conclusion. In such a case, the formal validity of the contract will be governed by its proper law or by the law of a country, where one of the parties or agents is present at the time of conclusion, or by the law of a country in which one of the parties is habitually resident at that time. Among these laws, the one which is most favourable to the formal validity of the contract will apply. Thus, a contract between two parties or their agents

[6] Thus, an oral contract (for example, one concluded by means of a telephone conversation) is formally valid if the law applicable to formal validity does not require writing.

who were in different countries would be formally valid if it satisfied the formal requirements of any of the following laws: the law that governs the contract; the law of a country in which one of the parties or agents was present at the time of contracting; the law of a country in which the other party or agent was present at the time of contracting; the law of the country in which one party was habitually resident; and the law of the country in which the other party was habitually resident.

Article 11(3), which again adopts a strong preference for a valid law, deals with the formal validity of a unilateral act intended to have legal effect relating to an existing or contemplated contract; for example, a release from liability under an existing contract. Such an act is formally valid if it satisfies the formal requirements of the law that governs or would govern the existing or contemplated contract in substance under the Regulation, or those of the law of a country in which the act was done, or those of the law of the country in which the person by whom it was done had his habitual residence at that time.

An exception provided by Article 11(5) of the Regulation, which specifies that contracts the subject matter of which is a right *in rem* in immovable property or a tenancy of immovable property are subject to the formal requirements of the law of the country in which the property is located, if by that law those requirements are imposed irrespective of the country of contracting and irrespective of the law governing the contract, and they cannot be derogated from by agreement. This probably applies, for example, to the English requirement that a contract for the sale of English land should be concluded in writing, imposed by Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

Formal Validity under the CTC

Under the CTC, no special rules concern the formal validity of a contract. Instead, the formal validity of a contract is subject to the same conflict rules that apply to other

contractual issues. Indeed, Article 19 of the CTC explicitly refers to both the form and the substance of contractual obligations. Thus, under Article 19 the formal validity of a contract will be governed by the law chosen by the parties. In the absence of such a choice, formal validity will be governed by the law of the country in which both parties reside, if they both reside in the same country; or if they reside in different countries, by the law of the place of contracting.

It could be suggested that the reference by the CTC of formal validity to the law governing the contract is too restrictive and that it should alternatively be sufficient to comply with the formal requirements of the law of a place in which a party or agent was present at the time of the negotiations by which the contract was concluded.

Minor details of performance

A minor exception to the operation of the proper law has been provided by Article 12(2) of the Regulation, which enables the place of performance to play a role in regulating the manner of performance and the steps to be taken in the event of defective performance. This may be seen as reflecting the approach adopted earlier by the English courts. Thus, in *Mount Albert BC v Australian Assurance Soc*,[7] it was held that the minor details of performance may be governed by the law of the place of performance insofar as this does not affect the substance of the obligation.

Article 12(2) applies to such issues as the determination under the contract of sale of the business hours within which the delivery should be affected. This principle could also apply in cases in which the parties have expressed a debt in a currency that differs from that of the place of payment to the question of whether, in the absence of a specific agreement, the debtor has the option to deliver local currency of equivalent value rather

[7] [1938] AC 224.

than paying in the currency of the account itself.[8] It also ensures that a sea-carrier is able to fulfil the obligation that a bill of lading should be returned to the customs agent after presentation, when this obligation is imposed by the law of the place of discharge, in order to show that the delivery has been made.[9]

There is no provision in the CTC which corresponds to Article 12(2) of the Regulation.

In addition, it has traditionally been recognised in England that a foreign proper law could be displaced by a stringent English public policy in cases when it would require a performance that it is prohibited under criminal penalty at the place of performance. Such cases are now specifically regulated by Article 9(3) of the Regulation. This role of the place of performance will be considered later in this chapter.

Essential validity and formation

By Article 10(1) of the Rome I Regulation, the existence and validity of a contract or of any term of a contract is subject to the proper law of the contract under the Regulation, which is determined on the assumption that the contract or term is valid. The essential validity and the formation of a contract fall within the scope of Article 10(1) of the Regulation.

By Article 10(1) of the Regulation, matters concerning the essential validity of the contract as a whole will governed by the proper law of the contract. This includes the need for consideration and the effect of infringement of exchange restrictions.[10]

With regard to formation, Article 10(1) of the Regulation subjects the formation of a contract to the proper law of the contract in question. This applies to such issues as the existence of a sufficient offer and acceptance. Therefore, if, for example, the letter of

[8] See Dicey, Morris and Collins, at para. 32-151.
[9] See *East West Corp v DKBS* 1912 [2002] 2 Lloyd's Rep 182 (Thomas J).
[10] See *Kahler v Midland Bank* [1950] AC 24.

acceptance is lost in the post, it will be for the proper law of the contract to determine whether the contract was validly formed.[11] The determination of whether a person has become a party to an existing contract between others will also be subject to the proper law of the contract, such as, for example, with regard to the holder of a bill of lading.[12]

The determination of whether a party's consent is invalid by reason of misrepresentation, improper economic pressure or mistake is governed by the proper law of the contract under Article 10(1). However, in England, a stringent public policy under Article 21 will usually displace foreign rules that deny relief against fraud or non-economic pressure.

Article 10(2) of the Regulation provides an exception to the general rule specified by Article 10(1) in relation to formation. The exception applies when it appears from the circumstances that it would not be reasonable to determine the effect of a party's conduct in accordance with the proper law. In such an instance, he may rely on the law of his habitual residence to establish that he did not consent. This could be applied in a case in which an offer received from a foreign country was ignored by an English resident, but silence was regarded as consent under the law that governed the offer. For this purpose, a person's habitual residence will be determined in accordance with Article 19 of the Regulation.

English case law has shown reluctance to apply Article 10(2). In *Egon Oldendorff v Libera Corp*,[13] the Court refused to apply Japanese law under Article 10(2) to deprive a London arbitration clause of effect, since doing so would disregard commercial expectations, and such a clause would be expected in an international contract. Similarly, in *Horn Linie v Panamericana Formas E Impresos*,[14] the Court adopted the same

[11] See *Albeko v Kamborian Shoe Machine Co* (1961) 111 LJ 519.
[12] See *The Ythan* [2006] 1 All ER 367 (Aikens J).
[13] [1995] 2 Lloyd's Rep 64.
[14] [2006] EWHC 373 (Comm).

approach with regard to the parties' consent to a choice of law clause and accordingly gave effect to a choice of English law despite an argument that the clause infringed Colombian public policy.

The English Court also narrowed the application of Article 10(2) in *Lupofresh v Sapporo Breweries,*[15] where it restricted Article 10(2) to the existence of consent as distinct from its validity. On this basis, the provision would apply where consent was inferred from silence under the proper law of the contract. However, it would not apply to vitiate consent by mistake, misrepresentation, non-disclosure, undue influence or duress. These factors would simply be subject to the proper law of the contract under Article 10(1). It is difficult to see the merit of this narrow interpretation of Article 10(2).[16]

There is no provision in the CTC corresponding to Article 10(2) of the Regulation.

The consequence of nullity

The consequences of nullifying a contract are subjected to the proper law of the contract by Article 12(1)(e) of the Rome I Regulation. This provision is derived from the idea that the proper law of the contract, which governs validity, should also govern its consequences.

Article 12(1)(e) of the Regulation corresponds to Article 10(1)(e) of the Rome Convention 1980. However, reservations excluding Article 10(1)(e) were permitted by the Convention, which excludes the application of Article 10(1)(e).[17] No such reservations are possible under the Regulation.

Some confusion arises from Article 1(2)(i) of the Regulation, which excludes from the scope of the Regulation obligations arising out of dealings prior to the conclusion of the

[15] [2013] EWCA Civ 948.
[16] See Stone, 3rd edition, p. 322.
[17] Such a reservation is made by the United Kingdom and by Italy.

contract, and from Recital 10, which explains that Article 12 of the Rome II Regulation applies to such obligations.[18] Therefore, it is unclear whether tort or restitution claims that arise from the invalidity of a contract by reason of dealings prior to its conclusion will be subject to Article 12 of the Rome II Regulation or to Article 12 (1)(e) of the Rome I Regulation.

Public Policy

Public policy under the Rome I Regulation

By Article 21 of the Regulation, the application of a rule of the law of any country specified by the Regulation may be refused, if such application is manifestly contrary to the public policy (*ordre public*) of the forum.

This provision is similar to the public policy proviso under traditional English law. The Regulation uses a formula that refers to manifest incompatibility derived from the Hague Conventions, but in substance the test is the same as under the traditional English rule, which (as formulated by some commentators) referred to the forum's stringent public policy. The application of Article 21 of the Regulation can have two results. First and most frequently, it may lead the court to consider a contract invalid that would otherwise be valid under its governing law. Secondly and conversely, it may lead the court to uphold and enforce the contract, contrary to the law that governs it. In both cases, the relevant foreign rule is excluded, and the issue is determined in accordance with the internal lex fori. The most common application of the public policy proviso is to disregard a foreign rule, because its content is regarded as totally unacceptable in terms of the forum's fundamental values. Thus, on this basis English courts have invoked the

[18] Ibid, p. 330.

proviso in order to invalidate contracts entered into as a result of illegitimate non-economic pressure.[19]

A further probable effect of Article 21 of the Regulation is to enable the continued operation of the traditional English rules, which aim to prevent the English courts from requiring or encouraging parties to perform a contract in a country in which such performance would infringe the criminal law of that country. Although this result may now be achieved by reference to Article 9(3) of the Regulation, it seems probable that Article 21 also remains available for this purpose, since these rules aim to avoid giving judgments by the English courts which could be the subject of legitimate diplomatic complaint by foreign governments, and thus to facilitate the conduct of the United Kingdom's foreign policy.

The first of these English rules applies when the parties' main intention at the time of contracting was that the performance of the contract should be carried out by means of acts done in disobedience of a known criminal prohibition under the law of a country where the performance of the act would take place. In this case, the rule will have the effect of rendering the whole contract invalid in England.

The second rule regarding criminal prohibitions applies when there was no actual intention of the parties to defy a known prohibition, but unknown to them there existed at the time of contracting, or there came into effect between the time of contacting and the time when the contract was to be performed, in a country where an act was required by the contract to be performed, a criminal prohibition of such an act. In such cases, the English courts will treat at least the obligation to perform the prohibited act as discharged by reason of the prohibition.

[19] See *Kaufman v Gerson* [1904] 1 KB 591 (CA), and *Royal Boskalis v Mountain* [1999] QB 674 (CA).

This rule was applied by the Court of Appeal in *Ralli v Naviera*,[20] which involved a charterparty for the carriage of goods from India to Spain, which was governed by English law. The freight was payable in Spain on arrival. During the voyage, a new Spanish rule was brought into effect which prohibited payment of freight at a rate beyond a legal limit. The court ruled that the new Spanish rule had the effect of discharging the obligation to pay the freight to the extent that it exceeded the legal limit. Although the decision can be regarded as an application of the English doctrine of frustration to a contract governed by English law, it seems clear that an English court would have disregarded under the public policy proviso a rule of a foreign proper law that in such circumstances insisted on upholding the obligation to pay the agreed freight in Spain in defiance of the Spanish prohibition. Today, the same results could also be reached by reference to Article 9(3) of the Regulation, which specifically permits a court to respect overriding mandatory rules of a country in which an obligation should be performed but which prohibits such performance.

Public policy under the CTC

Article 27 of the CTC specifies that "It shall not be permissible to apply the provisions of a law specified by the preceding Articles if such provisions are contrary to Islamic Shari'a, public order, or morals in the State of the United Arab Emirates."

Thus, Article 27 excludes the application of foreign law if such application would conflict with the public policy of the UAE as embodied in its law. It is apparent that, in this context, the UAE legislator has placed strong emphasis on the Islamic Shari'a as an element of UAE law and policy. It is important to point out that, while there are some Islamic Shari'a provisions that apply only to Muslims, there are also some rules of the Islamic Shari'a that are part of UAE public policy and that apply equally to Muslims and

[20] [1920] 2 KB 287.

non-Muslims. These include, for example, the prohibition of marriage between close relatives (such as between a brother and his sister). Such a marriage is prohibited under the Islamic Shari'a, and this prohibition is considered as constituting a public policy that applies equally to Muslims and non-Muslims. Another example (more relevant to the contractual sphere) is the prohibition of dealings with illicit drugs. This too is considered a matter of public policy and is based on Islamic Shari'a rules that apply to both Muslims and non-Muslims.

The application of the public policy proviso leads to positive and negative results. First, it has a negative result in that the rules that contradict public policy will be set aside. Secondly, it has a positive result, as internal law of the forum becomes applicable to fill the gap arising from the exclusion of the normally applicable law.

The court, in considering what counts as public policy under Article 27, should take a broadminded view and accept that the scope of public policy in the context of transnational relationships should be narrower than in the context of internal relationships. Thus, not all internal mandatory rules give rise to an internationally applicable public policy.

Overriding mandatory rules

Overriding mandatory rules under the Rome I Regulation

The provisions concerning the overriding of mandatory rules under the Rome I Regulation can be found in Article 9(1)-(3).

Overriding mandatory rules of the forum country under Article 9(2)

Article 9(2) of the Rome I Regulation provides that nothing in the Regulation is to restrict the application of the overriding mandatory provisions of the law of the forum. The definition of overriding mandatory rules can be found in Article 9(1), which specifies that overriding mandatory provisions are provisions the respect for which is regarded as

crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation.

Recital 37 explains that the application of Article 9(2) is narrow, as it applies in exceptional circumstances, and that the concept of overriding mandatory provisions has a narrower scope than that of provisions that cannot be derogated from by agreement, for which provision is made by Article 3(3)-(4).

The relevant substantive rules must be regarded by the forum country as so important in relation to its public interests that in appropriate cases they must be given overriding effect, so as to displace the normally applicable foreign law. But, despite the reference to the country's public interests in Article 9(1), Article 9(2) can be applied to mandatory rules of the lex fori, the aim of which is to protect weaker parties, such as a small business dealing with a large business. This was confirmed by the European Court of Justice in *Unamar v Navigation Maritime Bulgare*,[21] in which it recognised that mandatory provisions of the lex fori for the protection of commercial agents could be applied under Article 9(2), even in a case where the proper law of the contract is that of another Member State, and that law includes provisions that are compatible with a European Union measure that has the same aim. In such a case, it is permissible for the forum to invoke Article 9(2) to provide the weaker party with the protection of its own mandatory rules, which are more demanding or have a wider scope than those of the law that governs the contract and complies with the EU harmonising measure. Thus, in the definition supplied by Article 9(1), it is the crucial or important, rather than the public, character of the forum's substantive rule that is significant.

[21] Case C-184/12, [2014] 1 All ER (Comm) 625.

Overriding mandatory rules of a third country under Article 9(3)

Under Article 9(3) of the Rome I Regulation, effect may be given to the overriding mandatory provisions of the law of the country in which 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. Moreover, the Article specifies that, 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.

This provision addresses cases in which the law applicable to a contract is a law of a country other than the forum country, and the contract imposes obligations that are valid under the normally applicable law, but the contractually agreed performance is prohibited by the law of the country of performance. Before the Rome I Regulation, the problem was dealt with in England under the public policy proviso specified by Article 16 of the Rome Convention 1980. It seems probable that the English courts remain free under the Regulation to follow their traditional approach and that this freedom may now be derived from both Article 9(3) and Article 21 in favour of the public policy of the forum country.

Overriding mandatory rules under the CTC

The UAE legislator has not included in the CTC any special provision dealing with overriding mandatory rules in relation to private international law even with regard to contracts involving weaker parties.

However, some other UAE enactments contain mandatory rules that cannot be derogated from by agreement. Such provisions can be found in legislation on employment or consumer contracts. Thus, Article 20 of Employment Law no. 8 concerning youth labour provides that young persons of either gender younger than fifteen years of age should not

be employed. Similarly, Article 16 of Consumer Law no. 24 regarding consumer rights provides that a consumer is entitled to compensation for personal or material damages in accordance with the general rules in force and that any agreement to the contrary is null and void.

Since there are no separate provisions concerning mandatory rules in the context of private international law, it seems clear that a UAE court may properly invoke the public policy proviso contained in Article 27 of the CTC to enable it to apply UAE mandatory rules, such as those designed to protect weaker parties (such as employees or consumers) when the situation has a suitable connection with UAE territory. Such rules may, for example, favour an employee who works within the UAE or a consumer who is resident in and negotiates the contract in or from the UAE.

Summary

The provisions concerning capacity under the Rome I Regulation differ from those adopted in the CTC. The capacity of an individual under the Rome I Regulation is governed by the conflict rules of the forum country, whereas under the CTC the capacity of the individual is subject to the law of his nationality.

Another matter in which the Rome I Regulation differs from the CTC is in the rules concerning formalities. Under the Rome I Regulation, it is sufficient, with regard to formalities, to comply with the law of a place where a party or agent was present at the time of the negotiations by which the contract was concluded. In contrast, under the CTC, there are no special rules with regard to formalities, and they are subject to the general rules on choice of law for contracts.

Both the Rome I Regulation and the CTC have special provisions concerning public policy, by which the parties' freedom to choose the applicable law can be overridden in order to give effect to other important values.

With regard to overriding mandatory rules, the Rome I Regulation provides for special rules designed to enable the forum country to insist on its own solutions when it claims to have a strong interest in doing so. In contrast, the CTC contains no such provisions in relation to overriding mandatory rules. However, UAE substantive law contains some mandatory rules which the parties cannot contravene by agreement. Therefore, it seems legitimate for a UAE court to apply such mandatory rules in cases appropriately connected to the UAE territory by utilising the public policy proviso.

Chapter 5 - Protection of Weaker Parties

Inequality of bargaining power is a controversial issue. Many problems are caused by the inequality of bargaining power in commercial contracts, despite the guidelines that were agreed to by the contractual parties in a commercial contract.

There has been little academic discussion about the importance of bargaining power in commercial transactions.[1] In this academic discussion, there are three main views. The first and most common view consists of those arguing that, because transactions between powerful and weak parties are naturally difficult, courts should adopt particular doctrinal remedies to help them identify and invalidate unfair contracts.[2] A second view includes proposals that courts should take inequality of bargaining power into account in circumstances other than contract invalidation and non-enforcement. The third view criticises the judiciary's analysis of bargaining power and attempts to address the theoretical questions that have been raised, but not answered, by the case law.

The Rome I Regulation provides special rules for certain types of contract with a view to protecting the weaker party. The relevant types are certain consumer contracts, contracts for the carriage of passengers, insurance contracts, and individual employment contracts.This chapter will deal in turn with each of these types of contract. Each type will be examined in relation both to the Rome I Regulation and the CTC.

[1] Helveston, M.H., Jacobs, M.J., 2014. The Incoherent Role of Bargaining Power in Contracts Law, *Wake Forest Law Review*, Vol.49,Apr 3, pp.1017-1058.
[2] Ibid

Consumer Contracts

Why is protecting consumer contracts important?

The parties' freedom to choose the law applicable to their contracts should be based on equality between the parties, so that it enables each to take care of his own interests and to make a conscious choice of the risks involved.[3] But since the beginning of the second half of the last century, the development of industrialization and capitalist economic processes has undermined such equality, so that there is often evident inequality in the economic, technical and legal capacities of the parties to a contract. This is especially the case with regard to transactions between a trader (a person carrying on a business or profession) and a consumer (a person not carrying on a business or profession). Traders commonly use for their contracts standard forms that are drafted to maximize their own advantages at the expense of consumers and that make the contracts unbalanced. This places the consumer in a weaker position economically and technically and requires some legal regulation to protect the consumer and to rebalance the relationship between the parties.

Accordingly, consumer protection has become an important issue, especially in the present day, in the context of both state-controlled and market economies. The need is for an appropriate means of protecting the consumer from unfair conditions that are commonly included (or incorporated by reference) in consumer contracts, sometimes without the consumer's knowledge or understanding.[4]

[3] Dr Khaild Kalel, (حماية المستهلك في القانون الدولي الخاص) *The protection of the consumer in private international law* (dar alnahtha al arabeia, Cairo, 2002), p. 198 (in Arabic).
[4] See above note 3, at pg 199.

The Rome I Regulation

Conflict rules concerning certain consumer contracts are specified by Article 6 of the Rome I Regulation. The relevant contracts are defined by reference both to substantive and territorial requirements. The definition used by the Rome I Regulation is similar to that used by Article 17 (ex Article 15) of the Brussels I Regulation.

Substantive Scope

Article 6(1) of the Rome I Regulation defines a consumer contract as "a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)".

This definition differs from that used by Article 5(1) of the Rome Convention 1980, which referred to "a contract the object of which is the supply of goods or services to a person ('the consumer`) for a purpose which can be regarded as being outside his trade or profession, or a contract for the provision of credit for that object."[5] Under the new definition in the Rome I Regulation, it is explicitly required that the consumer must be an individual rather than a company.

Article 6(4)(c) of the Regulation provides an exclusion from Article 6. Article 6(4)(c) refers to "a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC." Thus, contracts for the sale or letting of land do not count as protected consumer contracts.

[5] This definition accorded with that in the parallel Brussels Convention on Jurisdiction and Enforcement and Recognition of Judgements, [1972] OJ L 299/32, Articles 13-15.

Other exclusions are made by Article 6(4)(a), which refers to "a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than that in which he has his habitual residence", and by Article 6(4)(b), which refers to "a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays and package tours."[6] These exceptions are similar to those made under Article 5(4) and (5) of the Rome Convention 1980.

Insurance contracts concerning mass risks situated within the European Union are also excluded from Article 6, as the initial words of Article 6(1) ensure that Article 7 will be applied instead. This is confirmed under Recital 32, which explains that the rules provided by Article 7 should be sufficient to provide the necessary protection for policy-holders. But it is unclear whether insurance contracts concerning mass risks situated outside of the European Union may fall within Article 6.[7]

The Territorial Requirement

The Rome I Regulation insists on imposing a territorial requirement restricting the application of the rules that protect the consumer by applying the law of his habitual residence to cases in which the contract or the supplier has a sufficient link with that country. However, the territorial requirement was redefined in the Rome I Regulation to correspond largely with the one used under the Brussels I Regulation. The territorial requirement under the Rome Convention 1980 resembled the one adopted under the Brussels I Convention.[8]

[6] On such packages, see Cases C-585/08 and C-144/09: *Pammer v Reederei Karl Schlüter* and *Hotel Alpenhof v Heller* [2010] ECR I-12527.

[7] See Stone, P., *EU Private International Law,* 3rd edn, 2014. Edward Elgar, Cheltenham, p. 364.

[8] Article 5(2) of the Rome Convention 1980 provides that one of three alternative requirements had to be met: that in the country of the consumer's habitual residence the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising, and he had taken in that country all of the steps necessary on his part for the conclusion of the contract; or that the other party or his agent received the consumer's order in that country, or that the contract was for the sale of goods and the consumer had

The territorial requirement is defined by Article 6(1) of the Rome I Regulation, which requires that a professional must: "(a) [pursue] his commercial or professional activities in the country where the consumer has his habitual residence; or (b) by any means, [direct] such activities to that country or to several countries including that country; and the contract [must fall] within the scope of such activities."

The European Court examined the concept of directing activities to the consumer's country under 17(1)(c) of the Brussels I Regulation in *Hotel Alpenhof v Heller* and *Pammer v Reederei Karl Schluter*,[9] in the context of activities on the Internet. It is clear, in view especially of Recital 7 to the Rome I Regulation,[10] that the ruling must also apply for the purpose of Article 6 of the Rome I Regulation. Therefore, to decide whether a trader whose activity is advertised on a website can be regarded as directing its activity to the Member State of the consumer's habitual residence, it should be determined whether it is apparent from the trader's overall activity via the website and elsewhere that he envisaged doing business with consumers habitually resident in one or more countries, including the habitual residence of the consumer being considered, in the sense that he intended to conclude contracts with them. But there is no need for a contract between a consumer and trader to be concluded at a distance, as was confirmed by the European Court in *Muhlleitner v Yusufi* under Article 17(1)(c) of the Brussels I Regulation.[11] According to Stone, the Regulation has failed to offer any protection for the mobile consumer, who contracts abroad in situations where it would be unreasonable to subject the supplier to the law of the consumer's residence.[12]

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travelled from that country to another country and there given his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy.

[9] Cases C-585/08 and C-144/09, [2010] ECR I-12527.

[10] Recital 7 declares: "The substantive scope and the provisions of this Regulation should be consistent with [the Brussels I Regulation] and [the Rome II Regulation].

[11] Case C-190/11, ECLI:EU:C:2012:542.

[12] See note 7 above, at p. 347.

The Protective Regime

Under Article 6(1) of the Regulation, the law of the consumer's habitual residence serves as the applicable law, if the parties have not expressly or impliedly chosen the applicable law under Article 3. The default rules concerning the closest connection and the characteristic performer's residence under Article 4 are not applicable in the case of a protected consumer contract.

Under Article 6(2) of the Regulation, if the parties have chosen the applicable law expressly or impliedly under Article 3, the choice of law will in general be effective. However, the application of the law chosen by the parties will operate subject to any mandatory rules of the consumer's habitual residence that are designed to protect the consumer as the weaker party. The effect is to provide protection for the consumer as a weaker party by giving him the benefit both of the protective rules of the chosen law and of those of the law of his habitual residence. Therefore, the protective provisions which offer the consumer greater protection will prevail.

There is some controversy as to whether consumer protection provisions can be applied as overriding mandatory rules under Article 9 of the Regulation. One view is that Article 6 deals exhaustively with consumer protection, and any inadequacy of Article 6 cannot be cured by reference to Article 9.[13] A contrary view accepts the application of Article 9 in cases in which Article 6 is not applicable.[14] The importance of the issue is diminished, but not eliminated, by the fact that the scope of Article 6 is broader than the scope of Article 5 of the Rome Convention, and therefore the number of the consumer contracts

[13] See note 7 above, at p. 349.
[14] Plender and Wilderspin, *European Private International Law of Obligation*, (Sweet & Maxwell, Limited, 4th edn, 2014), at para. 12-040.

which fall outside of its scope is smaller.[15] The issue is confined to protective provisions of the lex fori, since this is not a situation in which the law of the place of performance renders performance unlawful, so as to satisfy the requirements of Article 9(3). On the second view, Article 9 might apply in a case where an English visitor to France, who buys from a French trader there, seeks to rely on Article 9 in a French court to get the benefit of French protective provisions, the contract having expressly chosen the law of Iran.

As another example, let us suppose that an English consumer travels to Italy and there contracts to buy goods. If under the contract the goods have to be delivered to the consumer's residence in England, the consumer can bring a claim for breach of contract in England against the Italian seller.[16] But, in the absence of a contrary choice by the parties, the claim will be governed by Italian law in accordance with Article 4 of the Regulation, and the English buyer will not be able to rely on the protection offered by Chapter 1 of Part I of the (UK) Consumer Rights Act 2015. If, however, the contract contains a choice of the law of Iran, Section 32(1) of the 2015 Act seems to enable the buyer to invoke the protection of that Act, since in the circumstances the contract appears to have a close connection with the United Kingdom.

Section 31(1) specifies that:

> If –
> (a) the law of a country or territory other than an EEA State is chosen by the parties to be applicable to a sales contract, but
> (b) the sales contract has a close connection with the United Kingdom,
> this Chapter, except the provisions in subsection (2), applies despite that choice.

[15] Devenney. J and Kenny. M, *European consumer protection*, (Cambridge University Press, 2012), pg 246.
[16] Article 5(1)(a) of Brussels I Regulation will be applied; and Article 6 will not be applicable, since the territorial requirement is not met.

This provision is evidently designed to reflect Article 6(2) of EEC Directive 93/13 on unfair terms in consumer contracts,[17] but it is not limited to the provisions of the 2015 Act, which are designed to transpose the substantive rules harmonized by the Directive. Insofar as section 32 applies to English protective rules, which are not designed to transpose the Directive, it seems to rely on, and thus endorse, the broader view of Article 9 of the Rome I Regulation, in which a Member State is entitled to use Article 9 in consumer cases to provide protection to the consumer in addition to that provided for by Article 6 of the Regulation.

Another situation worthy of consideration concerns a consumer contract for credit in connection with a sale of goods. For example, assume that an English consumer takes out a loan from a French lender in circumstances that do not fall within Article 6 of the Regulation. Since section 173(1) of the Consumer Credit Act 1974 forbids contracting out, the provisions of the Act must be regarded as mandatory rules within Article 6(2) of the Regulation and therefore applicable in cases where the requirements of Article 6 are satisfied. But the difficult question is whether the English court will apply the Consumer Credit Act as an overriding mandatory rule under Article 9 of the Regulation in cases where the requirements of Article 6 are not satisfied. This matter is not addressed by the Act, but the ruling of Lord Mance in *Office of Fair Trading v Lloyds Bank TSB*[18] on the international application of the Act indicates the Act is of an overriding mandatory nature.[19]

In addition, by Article 11(4), the law of the consumer's habitual residence will govern the formal validity of a protected consumer contract.

[17] [1993] OJ L95/29.
[18] [2007] UKHL 48.
[19] See above note 7, pg 248.

Consumer contracts under the CTC

With regard to consumer contracts under the CTC, the UAE legislator has not provided any special rules regarding choice of law in such contracts. Therefore, consumer contracts are subject to the general rules of choice of law specified in Article 19 of the CTC. As explained in Chapter 4 above, Article 19(1) permits an express or implied choice of law by the parties; and in the absence of such a choice, Article 19(1) makes applicable the law of the residence of both parties, if such a common residence exists, or the law of the place of contracting, where no such common residence exists. In addition, Article 19(2) makes the law of the location of real property applicable to contracts made with respect thereto.

Hence, if the parties choose the governing law expressly or impliedly, the chosen law will be applied. In the absence of an express or implied choice by the parties, then the default rules will apply. If the parties are domiciled in the same country, the law of that country will govern the consumer contract. However, if the parties are domiciled in different countries, the law of the country in which the consumer contract was concluded will be the applicable law.

The application of the default rules can produce unwelcome results in some cases. For example, if the seller met the buyer at an exhibition in a country in which neither was resident and they contracted there, the reference by Article 19 to the law of the place of contracting could point to the law of a country with which the contract and the parties had little connection. Moreover, even the application of the law of the seller's country (perhaps by reference to general principles, available under Article 23) might offer inadequate protection to a consumer who resides elsewhere.

Thus, despite the importance of consumer contracts, the UAE legislator has failed to establish any special choice of law rules concerning such contracts. As a result, no special protection is given to the consumer as a weaker party.

If there are any points relating to consumer contracts that are not covered by Article 19, the judge will apply Article 23 of the CTC to supplement or interpret Article 19. Article 23 specifies that "Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles, regarding cases of conflict of laws." Insofar as Article 23 is available, the judge can refer to the rules concerning consumer contracts specified in Article 6 of the Rome I Regulation to resolve any issues that are not covered by Article 19.

Some scholars argue that the default rules are not applicable for reasons discussed earlier and that the applicable law should be the law of the country where the contract is performed.[20] This approach would give rise to difficulty, especially where the buyer buys goods in the seller's country but requests delivery of the goods to his own country. In such a case, both parties have obligations to perform under the contract, so that the suggested approach might lead to the application of both laws. A better solution might be to adopt a default rule subjecting consumer contracts to the law of the consumer's habitual residence. This would draw inspiration from the Rome I Regulation but go beyond the solution adopted by Article 6 of the Regulation, which would not apply in the case last envisaged, since the buyer seems to be a mobile consumer.[21]

It must also be borne in mind that the UAE consumer legislation includes some mandatory substantive rules that are designed to protect the consumer as a weaker party and to invalidate any conflicting rules. For example, in Federal Law no. 24 on Consumer

[20] See above note 1, at pg 147.
[21] See Stone, supra fn (10).

Protection, Article 13 deals with a supplier's obligation by providing that "the service supplier is required to guarantee the service rendered by him for a period appropriate to the nature of this service; otherwise he must return the money paid by the service recipient or redo the service in a valid manner. The implementing Regulation to this Law shall determine the kinds of services and the terms of guarantee decided for each of them." Also, Article 16 of the Consumer Law strengthens consumer rights by providing that the consumer is entitled to compensation for personal or material damages pursuant to the general rules in force and that any agreement to the contrary is invalid.

Since there are no specific provisions in the CTC concerning the application of UAE mandatory rules for the protection of consumers, the court can invoke the public policy proviso under Article 27 of the CTC to apply such mandatory rules in cases where the contract has a sufficient connection with the territory of the UAE. To identify such a connection, Article 6 of the Rome I Regulation may provide a useful analogy. Thus, the UAE mandatory substantive rules for the protection of consumers may be applied where the consumer was resident in the UAE, and the supplier was either also resident there or had chosen to deal with consumers resident there.

Carriage of Passengers

Contracts for the carriage of passengers fell within the scope of Articles 3 and 4 of the Rome Convention 1980, as they were treated as ordinary contracts for the purpose of the Convention. However, under the Rome I Regulation, special provisions concerning the contracts for the carriage of passengers are specified by Article 5(2) and (3).

Under Article 5(2) of the Regulation, the parties are allowed to choose the governing law for a contract for the carriage of passengers in accordance with Article 3, but the range of laws from which such a choice is permitted is restricted. The parties may choose as the law applicable to such a contract in accordance with Article 3 only the law of one of the following countries: that of the passenger's habitual residence; that of the carrier's habitual residence; that of the carrier's place of central administration; that in which the place of departure is situated; or that in which the place of destination is situated.

Article 5(2) of the Regulation also provides default rules, which apply in the absence of a valid choice by the parties. In that case, there is a presumption in favour of the law of the country of the passenger's habitual residence, provided that either the place of departure or the place of destination is situated in that country; or, where no such concurrence exists, in favour of the law of the carrier's habitual residence. Article 5(3) provides that these presumptions are displaced where it is clear from all of the circumstances that the contract is manifestly more closely connected to a country other than that indicated by the relevant presumption, in which event the law of the country of closest connection applies.

Insurance Contracts

Why protecting the contracts of insurance policy-holders is important

At least in the case of ordinary day-to-day insurance, insurance companies have strong economic power compared to the insured, who is in a weaker position. This power enables the insurance companies to impose standard terms that have been drafted on the advice of their lawyers. Such contracts are not negotiated and are not subject to any kind of modification or amendment by the insured, whose only option is to accept the contract as a whole and sign it or to reject it as a whole.[22]

It is not easy for the insurance companies to give up their standard form contracts, as these enable speedy contracting and define the obligations of the insurance company in detail. The insured usually focuses on the insurance premium and the general risk covered rather than the detailed obligations under the contract. The insured often tends to trust the insurance company and signs the insurance contract without even reading its full content. In any case, the insurance documents are drafted by the insurance companies in complicated language that is difficult for the insured to understand and that enables the insurance companies to insert conditions favorable to their interests at the expense of the policy-holders. Thus, the policy-holders are not in a position of equality, and they do not have the same freedom of choice.

To protect the insured from unfair practices and terms adopted by insurance companies, a separate legal regime context is required.[23]

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[22] Dr Hasham Abdulall, (عقود التامين في القانون الدولي الخاص) *Insurance contracts in private international law*, (dar alnahtha al arabeia, Cairo, 2000), in Arabic.

[23] Suad Nawery, *Compartive study in the protection of weaker party in insurance contract*, p. 3 (in Arabic), available online at slconf.uaeu.ac.ae/SLConf22/Part-1/%D8%B3%D8%B9%D8%A7%D8%AF%20%D9%86%D9%88%D9%8A%D8%B1%D9%8A.pdf. [Accessed: September 15, 2015].

European Law

It should first be noted that reinsurance contracts are not regarded as insurance contracts for the purpose of EU legislation. A reinsurance contract is treated as an ordinary non-insurance contract, and the reinsured does not receive any special protection.

Insurance contracts under the Rome Convention and the Insurance Directives

Prior to the entry into operation of the Rome I Regulation, many insurance contracts were excluded from the application of the Rome Convention 1980. Insurance contracts that covered risks situated within the European Community were excluded from the Rome Convention under Article 1(3). Instead, such contracts were subject, in the case of non-life insurance, to the choice of law rules specified by Article 7 of EC Directive 88/357 (as amended by EC Directive 92/49),[24] and, in the case of life insurance, to those specified by Article 32 of EC Directive 2002/83.[25] The Directives also defined the location of risks for this purpose.

But the rules concerning choice of law specified in the Rome Convention 1980 applied when the risk was not situated within the European Community. These enabled the parties to choose the governing law expressly or impliedly in accordance with Article 3, and in the absence of such choice, Article 4 would operate, and the governing law would usually be the law of the country in which the insurer was established. In addition, the usual savings for overriding mandatory rules and public policy, specified by Articles 3(3), 7 and 17, could operate in cases where an insurance contract fell within the scope of the Convention.

[24] [1988] OJ L172 and [1992] OJ L228.
[25] [2002] OJ L345.

It is also important to point out that, in some situations in which the risk was situated outside of the European Community, an insurance contract could be regarded as a protected consumer contract within Article 5 of the Convention. In such a case, the law of the policy-holder's habitual residence was the applicable law under Article 5. Finally, mandatory rules concerning the protection of the weaker parties contained in the law of the policy-holder's habitual residence operated if the parties chose another law as the governing law.

Insurance Contracts under the Rome I Regulation

Almost all insurance contracts now fall within the scope of the Rome I Regulation. There is a minor exception, specified in Article 1(2)(j), which refers to "insurance contracts arising out of operations carried out by organisations other than undertakings referred to in Article 2 of [EC Directive 2002/83] concerning life assurance[,] the object of which is to provide benefits for employed or self-employed persons belonging to an undertaking or group of undertakings, or to a trade or group of trades, in the event of death or survival or of discontinuance or curtailment of activity, or of sickness related to work or accidents at work."

Otherwise, the Rome I Regulation applies to all insurance contracts. Both non-life and life insurance contracts fall within the scope of the Regulation. The Regulation covers insurance of both large risks and mass risks. The Regulation applies regardless of whether the risk is situated with the European Union and whether the policy-holder is resident therein. But different provisions of the Regulation apply in the case of the insurance of large risks from those applicable to mass risks. The distinction is defined by EC Directive

72/239 as amended by Directives 88/357 and 90/618.[26] Any risk that is not a large risk counts as a mass risk.

Large Risks and Mass Risks

Under the Directives, in general a business risk is regarded as large, unless the policy-holder is a small business. Thus, many types of risk are regarded as large risks, if the policy-holder is involved in and the risks relate to a large or medium-sized business. With regard to size, two of the following three conditions must be satisfied with respect to policy-holder (or the corporate group to which it belongs): that the balance-sheet total exceeds EUR 6.2 million; that the net turnover exceeds EUR 12.8 million; or that the average number of employees during the financial year exceeds 250.

Many transport risks are regarded as large risks regardless of the policy-holder's business size or character. These include damage to or loss of aircraft or ships; damage to or loss of goods in transit or baggage, irrespective of the form of the transport; and liability arising out of the use of the ships or aircraft, including carrier's liability.

The law governing large risks

The determination of the law applicable to an insurance contract covering large risks is governed by Article 7(2) of the Rome I Regulation. This provision applies regardless of whether the risk is situated within the European Union. The proper law of an insurance contract covering large risks under Article 7(2) is the law that is expressly or impliedly chosen by the parties in accordance with Article 3.

[26] [1973] OJ L 228, [1988] OJ L172, and [1990] OJ L330. A slightly amended version of the distinction will be introduced by Directive 2009/138, [2009] OJ L335/1, when it enters into operation.

In the absence of an express or implied choice by the parties, under Article 7(2) the law of the country in which the insurer has his habitual residence will serve as the applicable law for an insurance contract covering large risks, unless it is clear from all of the circumstances that the contract is manifestly more closely connected with another country, in which event the law of that other country will apply.

The rules specified in Article 7(2) of the Regulation are similar to those that formerly applied under Article 4 of the Rome Convention 1980 with regard to risks situated outside of the European Community.

When a Member State imposes an obligation to take out insurance with respect to a large risk, additional rules specified in Article 7(4) of the Regulation will apply.

The law governing mass risks

The determination of the law applicable to an insurance contract covering mass risks is addressed in Article 7(3) of the Rome I Regulation. This provision is restricted by Article 7(1) to cases in which the risk covered is situated within the European Union. When the mass risk is situated outside of the European Union, the insurance contract will be subject to the same rules as apply to ordinary non-insurance contracts or in some cases to those applicable to consumer contracts.

Under Article 7(6) of the Regulation, along with Article 2(d) of Directive 88/357 and Article 1(1)(g) of Directive 2002/83,[27] the main rule as to the location of a risk is that a risk is located in the country in which the policy-holder has his habitual residence, if the policy-holder is an individual. If the policy-holder is a legal person, the risk is located in the country in which its establishment to which the contracts relates is situated.

[27] These will be replaced by Article 13(13) and (14) of Directive 2009/138, when it enters into operation.

Under Article 7(3) of the Rome I Regulation, when an insurance contract covers mass risks located within the European Union, the parties are free to choose the applicable law expressly or impliedly in accordance with Article 3, but this freedom is restricted to a range of laws that have certain specified connections with the contract. The choice is limited by Article 7(3)(i) to the following laws: (a) the law of a Member State where the risk is situated at the time of the conclusion of the contract; (b) the law of the country where the policy-holder has his habitual residence; (c) in the case of life assurance, the law of the Member State of which the policy-holder is a national; (d) for insurance contracts covering risks limited to events occurring in a single Member State other than the Member State where the risk is situated, the law of the Member State in which the events covered are to occur; (e) when the policy-holder pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks that relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of the habitual residence of the policy-holder.

Article 7(3)(ii) of the Regulation expands the permissible choices of law in limited cases by referring to the conflict rules of a Member State the internal law of which may be chosen under Article 7(3)(i). Under these rules, the parties are allowed to choose another law that is permissible under the conflict rules of the Member State where the risk is located, or the policy-holder has his habitual residence, or in which is located one of the risks relating to a business activity of the policy-holder.[28]

In the absence of an express or implied choice of law by the parties to an insurance contract that covers mass risks within the European Union, the default rule specified in

[28] This expansion of the permissible range of choice of law constitutes an exception to the elimination of renvoi by Article 20 of the Regulation.

Article 7(3)(iii) will apply. The applicable law will be that of the Member State in which the risk is located at the time the contract is concluded. There is no exception in favour of a manifestly closer connection. For this purpose, when an insurance contract covers risks located in several Member States, the contract must be treated as comprising several contracts, each relating to a single Member State.[29]

In cases in which a Member State imposes an obligation to take out insurance covering a risk, the additional rules specified in Article 7(4) will be applicable.

Insurance contracts covering mass risks located outside of the European Union are excluded from the application of Article 7 of the Rome I Regulation.[30] Therefore, unless the contract is a protected consumer contract within Article 6, the contract will be treated as an ordinary non-insurance contract and will be subject to the general rules concerning choice of law specified by Articles 3 and 4. Thus, effect will be given to an express or an implied choice of law by the parties. In the absence of such a choice, the default rules under Article 4 refer to the closest connection, with a rebuttable presumption in favour of the law of the insurer's habitual residence. Consequently, if the risk is situated outside of the European Union, a policy-holder who is a small business will not be protected.

Compulsory Insurance

Article 7(4)(a) of the Regulation provides that an insurance contract will not satisfy the obligation to take out insurance unless it complies with the specific provisions relating to that insurance laid down by the Member State that imposes the obligation.[31] The second sentence of Article 7(4)(a) adds that, when the law of the Member State in which the risk

[29] See Article 7(5) of the Rome I Regulation.
[30] See Article 7(1) of the Rome I Regulation.
[31] The same rule was laid down by Article 8(2) of Directive 88/357.

is situated and the law of the Member State imposing the obligation to take out insurance contradict each other, the latter shall prevail.

Article 7(4)(b) provides that, by way of derogation from Article 7(2) and (3), a Member State may lay down that the insurance contract shall be governed by the law of the Member State that imposes the obligation to take out insurance. By Article 7(5), in relation to compulsory insurance, when the contract covers risks situated in more than one Member State, the contract must be treated as constituting several contracts, each relating to a single Member State.

Insurance Contracts under the CTC

The UAE legislator has not set out any special rules in the CTC regarding choice of law for insurance contracts. Therefore, insurance contracts are subject to the general conflict rules for contracts specified in Article 19 of the CTA. Hence, if the parties choose governing law expressly or impliedly, the chosen law will be applied. In the absence of an express or implied choice by the parties, then the default rules will apply, so that, if the parties are domiciled in the same country, the law of that country will govern the insurance contract; or if they are domiciled in different countries, the law of the country where the insurance contract was concluded will be the applicable law. These rules do not provide any special protection to the weaker party.

If there are any points relating to insurance contracts that are not covered by Article 19, the judge will apply Article 23 of the CTA to provide clarification or supplementation. Article 23 of the CTA specifies that "Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles, regarding cases of conflict of laws." By referring to Article 23, the judge can take into account the

rules concerning insurance contracts specified by Article 7 of the Rome I Regulation to resolve issues that are not addressed by Article 19.

It is important to point out that, in UAE insurance law, there are some mandatory substantive rules that are designed to protect the insured as a weaker party and that invalidate any terms or conditions that affect the insured's rights. Article 1028 of the CTC provides that the following conditions in a policy of insurance are void: conditions providing for the forfeiture of the right to insurance on account of a breach of the laws, unless such breach constitutes a deliberate felony or misdemeanor; condition providing for the forfeiture of the insured's right due to his delay in notifying the relevant authorities or in producing documents, if it appears that the delay was for an acceptable excuse; any printed condition relating to cases involving nullity of the contract or forfeiture of the insured's right that is not shown in a clear manner; an arbitration condition included in the printed general conditions of the policy and not as a special agreement distinct therefrom; and any arbitrary condition, the breach of which appears to have no bearing on the occurrence of the event insured against.

Since there are no specific provisions in the CTC concerning the application of UAE mandatory rules for the protection of insured persons, the court can invoke the public policy proviso under Article 27 of the CTC to apply such mandatory rules in cases in which the contract has a sufficient connection to the territory of the UAE.

Employment Contracts

Why is protecting employment contracts important?

In the 19th century, the relationship between employees and employers was governed by the general law of contract.[32] The parties to this relationship were seen as equals before the law, freely exercising their will over the letting and hiring of the worker's services. Wages given in exchange depended on the law of supply and demand. This liberal model of regulating employment, however, never brought about genuine equality. Instead, it exposed the difference in socio-economic power between employers and workers that enabled the former to impose their terms on the latter. It became acknowledged that the typical features of employment contracts were not freedom and equality, but submission, subordination and inequality of bargaining power. This change in perception led to the formation of an autonomous notion of employment contracts and to the development and extension of collective bargaining and protective legislation.[33] An aim of regulating employment has thereafter been to compensate employees as they are in weaker position. Apart from pursuing the goal of distributive justice, modern legal regulation of employment is also motivated by the objectives of social inclusion, protection of human rights in the workplace, and greater economic efficiency and competitiveness of businesses.[34] Achieving parallelism with the substantive law of employment requires commensurate efforts in private international law.

Employers usually have more resources than employees. Therefore, employees generally cannot afford legal advice in a matter concerning their employment contract by referring

[32] B. Veneziani, *The Evolution of the Contract of Employment*, in B. Hepple (ed), *The Making of Labour Law in Europe: A Comparative Study of Nine Countries up to 1945* (London, 1986), at 31.
[33] Grušić .U, *The International Employment Contract: Ideal, Reality and Regulatory Function of European Private International Law of Employment*, (PhD thesis, The London School of Economics and Political Science, 2010), p. 19.
[34] Ibid, p. 20.

to employment lawyers or specialists from various jurisdictions. Additionally, an employee will not usually bring a claim in relation to his employment contract unless the claim outweighs the cost of legal advice, or the outcome of such claim is clear and has been recognised in case-law. Employment contracts are usually regarded as advantageous to employers, since they are the parties who benefit from the economies of scale: the larger the number of employees, the lower the cost of legal advice per employee. In comparison the employee, in acceding to an employment contract, does not have the same weight as the employer in comparable transactions. The variation in practical accessibility of legal opinion and experience leads to information asymmetry.

Moreover, because of the length and complexity of formal employment contracts, which include choice of law and choice of court clauses, the employees might overlook these provisions. The employee might not realise the effect of choice of law and choice of court clauses and might underestimate the consequences of the contractual terms and conditions, because there are many in the contract.[35] Even when the employee realises the risks or may be aware of other choices, he might not object to the choice of law or court proposed by the employer, because he is afraid of losing the job.

Private international law rules should ensure the operation of the law and jurisdiction of the courts with which employees are sufficiently closely connected and whose application and jurisdiction the parties rationally expect.

A negative effect might occur by applying the lax employment laws of the country in which the employee carries out his work for the employer. In some countries, employees may be dismissed without explanation or notice, or the provision of redundancy payment by the employers. In England, for instance, an employee must have worked for the

[35] Ibid, p. 20.

employer for more than two years continuously to meet the criteria for the right not to be unfairly dismissed and to claim a redundancy payment.[36] In some countries, employers can require their employees to work for long hours for low wages in unhealthy environments and without job security. The protective provisions will not operate, if employers are permitted to force their employees to accept the application of the law and jurisdiction of the courts of such countries. Such a choice may be efficient for the business involved. However, such choice may not be efficient generally, if consideration is given to the broader social costs, such as, for example, the costs of injured workers and their dependants.[37] In order to compel employers to shoulder such social costs, legal regulation is required. To accomplish this aim, party autonomy should be restricted.

Respect for terms of international contracts leads to legal certainty. However, because of the significance of their fundamental values and policies, states are usually reluctant to respect choice of law and choice of court clauses included in international employment contracts. Thus, substantial uncertainty may arise when the particular employment contract is not most closely connected with the country whose law or courts are chosen in the clauses. Uncertainty may arise with regard to whether the chosen court will accept jurisdiction and whether the courts whose jurisdiction was rejected will accept this outcome. The operation of choice of law clauses depends on the forum's private international law rules. Such a clause may operate fully, partly, or not at all. Even if the chosen court accepts jurisdiction and applies the choice of law clause, the resulting judgment may not be recognised and enforced abroad. By considering the states' legitimate interests in applying their laws to issues relating to employment contracts with which they are sufficiently closely connected, a high level of legal certainty in this field

[36] Employment Rights Act 1996 ('ERA 1996'), ss.108, 155.
[37] H. Collins, *Justifications and Techniques of Legal Regulation of the Employment Relation*, at pp. 15-16.

of private international can be achieved. Limiting the parties' freedom to choose the applicable law in an employment contract can be justified to accomplish this aim.

European Law

The Rome I Regulation

Article 8 of the Rome I Regulation contains provisions concerning choice of law for an "individual employment contract", which are designed to protect the employee as a weaker party. No explicit definition of an employment contract is specified in the Rome Convention 1980 or the Rome I Regulation. Some assistance may be drawn from the recent opinion of Cruz Villalón AG in *Holterman Ferho v Spies*[38] in relation to the Brussels I Regulation. He defined a contract of employment as one whereby a person subjects himself to the directions and instructions of another person, in the performance of a particular activity, in return for remuneration.

In the case of an employment contract, if the parties have not chosen the applicable law expressly or impliedly under Article 3, Article 8(2)-(4) of the Regulation will be applied. They are designed to protect the employee as a weaker party with regard to such contracts. Under Article 8(2), the applicable law, in the absence of the choice by the parties, is the law of that country in which or, failing that, from which the employee habitually carries out his work in performance of the contract; and the country in which the work is habitually carried out remains unchanged if he is temporarily employed in another country.

However, if the place of habitual work cannot be identified, the applicable law will be determined in accordance with Article 8(3), which refers to the law of the country in which the place of business through which the employee was engaged is situated. Under

[38] Pending Case C-47/14; opinion of 7 May 2015.

Article 8(4), the rules specified by Article 8(2) and (3) will be displaced if it appears from the circumstances as a whole that the contract is more closely connected with another country than that indicated by Article 8(2) and (3); and in that case the law of that other country will apply.

It is well established that the reference in Article 8(2) to the country in or from which the employee habitually carries out his work in performance of the contract has the same meaning as in the Brussels Convention and the Brussels I Regulation, and that the relevant case law of the European Court is equally applicable to jurisdiction and to choice of law. As the European Court explained in *Mulox v Geels*[39] and *Rutten v Cross Medical*,[40] where the employee does not carry out his work in a single country, one must refer to the place where the employee conducted his effective working activities, at which crucial duties were performed.

Where the centre of the effective working activities is difficult to identify, because the employee has worked in several places for different periods, the relevant place will be the place where the employee worked the longest. This was confirmed by the European Court in *Weber v Universal Ogden Services*,[41] where the Court ruled that, where there is no effective centre of activities, the whole duration of the employment relationship must be considered. But the latest period of work will be decisive when the employee, after having worked for a period in a single place, has then moved his activities to another place on a permanent basis.

The European Court further clarified the place of habitual work in *Koelzsch v Luxembourg*[42] and *Voogsgeerd v Navimer*,[43] both of which involved employment in international transport (as a member of a ship's crew and as a lorry driver). The Court

[39] Case C-125/92, [1993] ECR I-4075.
[40] Case C-383/95, [1997] ECR I-57.
[41] Case C-37/00, [2002] ECR I-2013.
[42] Case C-29/10, [2011] ECR I-1595.
[43] Case C-384/10, 15 December 2011.

explained that a broad interpretation should be given to the place of habitual work as referring to the place in which or from which the employee actually carries out his working activities, and reference must be made to the place where he carries out the majority of his activities in cases where a centre of activities cannot be identified. Furthermore, with regard to employment in international transport, the Court explained that, when the place where the employee receives instructions regarding his transport tasks and commences the carrying out of his transport tasks is always the same, that place will count as the place where the employee habitually carries out his work in view of the nature of work in the sphere of international transport.

Moreover, the European Court emphasised that Article 8(3), which refers to the place of business at or through which the employee was engaged, applies only in cases when the country of habitual work cannot be identified by the court seised. It also explained that the way in which the employee's actual employment is carried out is not relevant under Article 8(3), which focuses instead on the conclusion of the employment contract.

Article 8(4) of the Regulation provides for displacement of the presumptions in favour of the law of the country of habitual work or of the engaging establishment, so as to make applicable instead the law most closely connected to the contract. The application of this provision was clarified by the European Court in *Schlecker v Boedeker*,[44] which involved an employment contract between a German company and a German resident who worked in the Netherlands for more than eleven years as a manager. The Court held that, even though the employee worked for a long period of time in the country where the work was carried out, displacement is still possible in favour of a more closely connected law under Article 8(4).

[44] Case C-64/12, QB 320.

Under Article 8(1) of the Regulation, if the parties have chosen the applicable law expressly or impliedly under Article 3, the choice of law will in general be effective. However, the application of the law chosen by the parties will operate subject to the mandatory rules of the law that would be applicable in the absence of choice under Article 8(2)-(4), the sections of which are designed to protect the employee as a weaker party. Thus, both the protective provisions of the chosen law and those of the law specified by the default rules are available, and the employee will benefit from the more protective of these laws.

The Directive on the posting of workers

The Directive applies in certain cases in which a worker is posted temporarily to another Member State in the context of the transnational provision of services. Its main significance may be in relation to the posting of construction workers to Germany. The Member States are required by the Directive to ensure that workers posted to their territory receive the minimum protection of certain mandatory rules (such as on minimum rates of pay) of the Member State where the work is carried out. Therefore, where the Directive applies, it makes available to the worker the protection imposed by the law of the country where he temporarily, but not habitually, works.

Employment contracts under the CTC

Despite the importance of employment, the UAE legislator has not established any special choice of law rules concerning employment contracts. As a result, there is no specific provision designed to offer special protection for the employee as a weaker party. Therefore, employment contracts are subject to the general choice of law rules specified by Article 19 of the CTA. Hence, if the parties choose the governing law expressly or impliedly, the chosen law will be applied. In the absence of an express or implied choice

by the parties, then the default rules will apply, under which, if the parties are domiciled in the same country, the law of that country will govern the employment contract; but if the parties are domiciled in different countries, the law of the country in which the employment contract was concluded will be the applicable law.

It seems that the application of the default rule in the favour of the law of the place of contracting can lead to unwanted results, since it could point to a law which has little connection to the employment contract. For example, if an employer based in the UAE came to England searching for employees to work in the UAE, and he found some who signed the contact in England, it seems unreasonable to subject the employment contract to English law, since the employee agreed to perform and is performing his work in the UAE and residing there while doing so.

If there are any points relating to employment contracts that are not covered by Article 19, the judge may apply Article 23 of the CTC to provide clarification or supplementation. Article 23 specifies that "Principles of the private international law shall be observed where no express provision appears to exist in the preceding Articles, regarding cases of conflict of laws." Some argue that the best rule to be adopted for the employment contracts in the absence of a law chosen by the parties is the law of the place where the employing company has its central administration. However, this solution could be unattractive in some situations. For example, if an airline had its central administration in France and it employed a few ground staff at its branch at a Spanish airport, it would be difficult to accept the application of the French law to the matter in question based on the rule in favour of the employer's central administration, since the matter will be mostly connected to Spanish law. The best solution to adopt is to utilise Article 23 to resolve any issues that are not addressed by Article 19 and to follow the rules concerning employment contracts specified in Article 8 of the Rome I Regulation,

which subjects an employment contract to the law of the place where the employee habitually carries out his work for the employer.

Another issue on which the UAE legislature has been silent concerns cases in which the location of the employee's working activities is not wholly clear. Such problems can be addressed by applying Article 23 of the CTC and adopting solutions drawn from the rulings of the European Court under the Brussels I Regulation and the Rome I Regulation.[45] Thus, where the employee divides his working activities for the employer between different places, as where he works at an office in Brussels for three days each week and at an office in Amsterdam for two days each week, reference can be made to the place where the employee works the longest. Another case is when the employee moves his working activity permanently from one place to another, such as when he is transferred from the employer's Paris office to its London office. Reference can then be made to the place to which he has moved. More generally, one may refer to the place where the employee has established the effective centre of his working activities, at or from which he performs the essential part of his duties towards his employer or, in the absence of such a centre, to the place where he carries out the majority of his activities.

It is important to point out that, in UAE employment law, there are some mandatory substantive rules that are designed to protect the employee as a weaker party and that invalidate any agreement between the parties to the contrary. Thus, some of the provisions of Federal Law no. 8 on the Regulation of labour relations are considered mandatory rules. For instance, Article 25, which deals with young workers, provides that the maximum effective working hours for young workers shall be six hours per day, with

[45] See Case C-383/95: *Rutten v Cross Medical* [1997] ECR I-57; Case C-125/92: *Mulox v Geels*,[1992] ECR I-4075; Case C-37/00: *Weber v Universal Ogden Services* [2002] ECR I-2013; Case C-29/10: *Koelzsch v Luxembourg* [2011] ECR I-1595; and Case C-384/10: *Voogsgeerd v Navimer*, 15th December 2011.

one or more intervals for rest, meals or prayer, the total of which must be at least one hour. Such interval(s) must be set in such a manner that the young person does not work more than four consecutive hours, and he may not be kept at the work location for more than seven consecutive hours.

Similarly, Article 31, regarding women workers, specifies that, during a period of eighteen months after giving birth, a nursing mother must be entitled, in addition to the normal rest period, to an two additional periods per day for this purpose, the duration of each of which is not to exceed half an hour. Such additional periods must be treated as part of the working hours and shall not entail any deduction from wages.

Since these UAE substantive rules are mandatory in character, the court can rely on the public policy proviso under Article 27 of the CTC to apply them in cases that it considers sufficiently connected to UAE territory, such as, for example, where the employee performs his work wholly or mainly within the UAE.

Summary

Having examined different types of contracts under the Rome I Regulation and the CTC, the Rome I Regulation has special provisions that are designed to protect the weaker party in relation to consumer contracts, employment contracts and insurance contracts. Under the CTC, there are no special provisions concerning consumer contracts, employment contracts or insurance contracts, and all such contracts will be subject to the general rules of choice of law under Article 19. Even though there are no provisions concerning the choice of law in those contracts, there are some provisions under the substantive law of consumer, employment and insurance laws that are designed to protect the weaker party and cannot be derogated by agreement of the parties. The Rome I

Regulation offers more protection for the weaker party than the CTC, as the Rome I Regulation has special provisions regarding choice of law.

Chapter 6 - Private International Law in the DIFC

INTRODUCTION

The DIFC (Dubai International Financial Centre) was established with the intent of providing a secure and efficient environment from which business and financial institutions could reach into and out of the emerging markets of the region. Another potential benefit of the DIFC is that it could increase Dubai's economic development by encouraging the banking and financial sectors while reducing the reliance on oil income.[1]

The DIFC is a territorial enclave that has its own law and courts. Its laws are distinct from the federal laws that are applied in all other UAE courts. The development of the DIFC courts has succeeded in making the DIFC an attractive centre of interests for many international businesses. As a result, an increasing number of cases have been determined by the DIFC courts, especially after the recent expansion of DIFC jurisdiction.[2] The quality and range of DIFC's independent regulation, common law framework and supportive infrastructure and its tax-friendly regime make it the perfect base from which to take advantage of the region's rapidly growing demand for financial and business services.[3] Another reason for applying the common law rules is that foreign companies widely accept such rules because they are written in English, so they can easily understand them and do not have to translate their contracts. Second and most importantly, the parties trust the common law rules more than the CTC rules as they have

[1] Campbell.F, *The Dubai International Financial Centre: Legislative changes Regarding the DIFC*, available at www.tamimi.com/en/magazine/law-update/section-7/may-6/the-dubai-international-financial-centre-legislative-changes-regarding-the-difc.html [Accessed: January 17, 2016].

[2] On the recent expansion of the bases of jurisdiction of the DIFC courts, see Dubai Law No 16 of 2011, available on: http://www.difc.ae/sites/default/files/Translation-Law%20No%2016%20of%202011%20Amending%20DIFC%20Courts%20Law%20%28040212%29FINALsigned%20%28external%20doc%29123_0.pdf. [Accessed: October 4, 2014]. This matter is discussed in the second part of the present chapter.

[3] Discover the DIFC, available on: www.difc.ae/discover-difc [Accessed: January 17, 2016].

seen and experienced the application of these rules in countries in which it is based on the application of the common law rules.

The chapter will deal with the DIFC in relation to private international law. It is divided into two parts. The first part will deal with choice of law. The relevant enactments dealing with choice of law will be introduced. Then, the proper law of a contract will be discussed with regard in turn to cases in which there is an express choice of law by the contracting parties, and to cases in which there is no such choice of law. Finally, choice of law in relation to non-contractual issues will be considered.

The second part of this chapter will address other aspects of private international law with regard to the DIFC. It will deal in turn with the jurisdiction of the DIFC courts; arbitration in the DIFC; the recognition and enforcement in the DIFC of judgments and awards from elsewhere; and the recognition and enforcement elsewhere of judgments and awards from the DIFC. It must be admitted that, in this respect, the thesis will go beyond its normal scope of addressing questions relating directly to the determination of the substantive law that is applicable to contractual issues. The rationale for this extension is that examination of the additional issues may enable a greater understanding of the practical significance of the DIFC as a host for international businesses and of the context in which its choice of law rules are to be applied. Moreover, the recent creation of the DIFC means that its legal order is at an early stage of its development, and many interesting issues with respect to its private international law rules have not yet been definitively resolved.

PART 1 - CHOICE OF LAW IN THE DIFC COURTS

Choice of law enactments

Various DIFC enactments lay down rules concerning choice of law. In view of the complex network of such enactments, it is convenient to set out their provisions in (more or less) chronological order first and then to discuss their combined effects.

At the Dubai level, Article 6 of Dubai Law 12/2004 (as amended) with respect to the Judicial Authority at Dubai International Financial Centre, which may conveniently be referred to as the Judicial Authority Law, provides:

> The [DIFC] Courts shall apply the Centre's Laws and Regulations, except where parties to the dispute have explicitly agreed that another law shall govern such dispute, provided that such law does not conflict with the public policy and public morals.

The earliest and most fundamental enactment at the DIFC level is DIFC Law 3/2004 on the Application of Civil and Commercial Laws in the DIFC, which may conveniently be referred to as the First Application Law. It regulates the ascertainment of the law to be applied by the DIFC courts, in terms both of ascertaining the content of DIFC internal law and of enabling the application of foreign law by virtue of conflict rules. Its Article 8 provides:

> (1) Since by virtue of Article 3 of Federal Law No.8 of 2004, DIFC Law is able to apply in the DIFC notwithstanding any Federal Law on civil or commercial matters, the rights and liabilities between persons in any civil or commercial matter are to be determined according to the laws for the time being in force in the Jurisdiction chosen in accordance with paragraph (2).
>
> (2) The relevant jurisdiction is to be the one first ascertained under the following paragraphs:
>
> (a) so far as there is a regulatory content, the DIFC Law or any other law in force in the DIFC; failing which,
>
> (b) the law of any Jurisdiction other than that of the DIFC expressly chosen by any DIFC Law; failing which,

(c) the laws of a Jurisdiction as agreed between all the relevant persons concerned in the matter; failing which,

(d) the laws of any Jurisdiction which appears to the Court or Arbitrator to be the one most closely related to the facts of and the persons concerned in the matter; failing which,

(e) the laws of England and Wales.

Provisions which focus more specifically on private international law are laid down by DIFC Law 10/2005 (replacing DIFC Law 4/2004) Relating to the Application of DIFC Laws, which may conveniently be referred as the Second Application Law**.**

Its Article 7(2) provides:

> In relation to any matter which under this Law is governed by the law of another jurisdiction, any rule of the law of that jurisdiction applying the law of another jurisdiction in relation to that matter shall be disregarded.

Its Article 8 provides:

> The existence, validity, effect, interpretation and performance of a contract, or any term thereof, including any requirements as to formality, shall be determined by the law which governs it.

Its Article 9 provides:

> An express choice of a governing law in a contract shall be effective against all persons affected thereby.

Its Article 10 provides:

> If the parties do not specify the governing law of a contract, the contract shall be governed by the law of the DIFC.

The DIFC's internal substantive law of contract is defined by DIFC Law 6/2004, the Contract Law, which consists of 184 articles and a schedule on interpretation. The rules adopted are derived from English contract law and the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods. Its Article 7 provides:

> The law relating to the Application of DIFC laws makes provision with respect to the choice by parties of governing law and jurisdictions in a contract.

This appears to refer to the Second Application Law.

The Contract Law is supplemented by DIFC Law 6/ 2005, the Implied Terms in Contracts and Unfair Terms Law, which also lays down substantive rules which regulate certain contractual issues. Part 2 defines the terms that are implied in various types of contract. Part 3 invalidates certain contractual or similar terms that exclude liability. The substantive provisions appear to be modelled on English legislation, such as the Unfair Contract Terms Act 1977 and the Sale of Goods Act 1979. Its Article 7 provides:

> (1) [Part 2] applies to any contract governed by the law of the DIFC, subject to Articles7(2) and 7(3).
>
> (2) [Part 2] does not apply to:
>
> (a) any contract so far as it relates to real estate;
>
> (b) any contract so far as it relates:
>
> (i) to the formation or dissolution of a body corporate or unincorporated association; or
>
> (ii) to its constitution or the rights or obligations of its members or partners; or
>
> (c) any contract so far as it relates to the creation or transfer of securities or of any right or interest in securities.

Its Article 35 provides:

> (1) Insofar as it relates to liability in contract, [Part 3] applies to any contract governed by the law of the DIFC.
>
> (2) Insofar as it relates to any other liability, [Part 3] applies to any liability arising from, or in relation to, an act or omission in the DIFC.

Also relevant to choice of law is Article 30 of DIFC Law 10/2004, the Court Law, which provides:

> (1) In exercising its powers and functions, the DIFC Court shall apply:
>
> (a) the Judicial Authority Law;

(b) DIFC Law or any legislation made under it;

(c) the Rules of Court; or

(d) such law as is agreed by the parties.

(2) The DIFC Court may, in determining a matter or proceeding, consider decisions made in other jurisdictions for the purpose of making its decision.

From this maze of potentially applicable provisions, some general conclusions may be drawn as to the resulting rules on choice of law with respect to transnational contracts. It seems proper to interpret the various provisions together to produce harmonious solutions that avoid conflict between them and to give the greatest weight to the most specific of the provisions. On this basis, the most important enactment is the Second Application Law, and the principal choice of law rules are that a contract is governed by the internal law expressly chosen by the parties, if such a choice has been made; but, in the absence of such a choice, the contract will be governed by DIFC internal law, the lex fori.

Express choice of law

An express choice of law by the parties will be respected under the DIFC enactments. The First Application Law ensures the parties' right to choose the governing law, as Article 8(2)(b) directs the DIFC courts to apply any law expressly chosen by a DIFC law, thus referring (inter alia) to the Second Application Law, and Article 8(2)(c) directs the courts to apply the laws agreed to by the relevant parties. The Second Application Law Act deals with the choice of the governing law by Articles 8 and 9, which enable contracting parties to choose the governing law expressly with effect against all persons concerned. This solution is confirmed by Article 30(1)(d) of the Court Law, which obliges the court to apply the law agreed to by the parties; and by Article 6 of the Judicial Authority Law, which permits the parties to choose the law that governs their contract.

Some doubt as to whether it is possible for the parties to choose ordinary UAE law (that is, the law of the rest of the UAE, apart from the DIFC) may have been created by the decision of Yaakob J in the DIFC first-instance court in *Rasmala Investments v Banat.*[4] In dealing with a claim for unfair dismissal, the judge disregarded an agreement between the parties to an employment contract which chose the UAE labour law as the applicable law for issues not covered by DIFC regulations and laws. The judge dismissed the claim in accordance with the DIFC internal rule that an employee has no cause of action for unfair dismissal. It is difficult to see any sound basis for this ruling. One possible basis for the ruling might be that a choice of ordinary UAE law cannot be effective in a DIFC court because of Article 3(2) of Federal Law 8/2004 concerning financial free zones, which states that "financial Free Zones and the Financial Activities shall be also be subject to all federal laws, with the exception of the civil and commercial federal laws." The argument would be that, since the UAE labour law is a part of a civil law, the DIFC judge cannot apply it. Another possible basis for the decision in *Rasmala* would be that the DIFC legislation on employment was chosen deliberately, albeit by omission, to deny an employee any rights with respect to unfair (as distinct from wrongful) dismissal, and that this denial amounted to an overriding mandatory rule or a stringent public policy. But even this explanation is unconvincing, and it is submitted that the case was wrongly decided.

There is no doubt that the UAE legislator, in adopting Article 3(2) of Federal Law 8/2004, was aiming to ensure that a financial free zone is a separate entity and to establish its own laws concerning any civil or commercial matters. This rule empowered the DIFC to set up its own legal framework concerning civil and commercial matters. However, this consideration does not provide any justification for ignoring an agreement between

[4] [2006-09] DIFC. C.L.R. 7.

contracting parties choosing ordinary UAE law as the governing law. Such a restriction would be especially undesirable now that the jurisdiction of the DIFC courts has been expanded.[5] It may become very common for two parties resident in the UAE to agree to bring a dispute to the DIFC courts but to choose ordinary UAE law as the governing law.

It is also difficult to accept that a DIFC court is able to apply any foreign law chosen by the parties, such as Egyptian or Kuwaiti law, but is unable to respect their choice of ordinary UAE law.

Article 3(2) of Federal Law 8/2004 should have been interpreted differently, as its aim is to ensure that the DIFC has a distinct law of its own for civil and commercial matters. Therefore, the exclusion specified by Article 3(2) should be interpreted in the light of the distinction between internal law and private international law. It ensures that the ordinary UAE law is not applicable as part of the internal law of the DIFC. But it does not prevent the application in the DIFC courts of ordinary UAE law as a foreign or quasi-foreign law in accordance with DIFC conflict rules.

The question of the meaning of choice of law and jurisdiction clauses was raised in *National Bonds Corp v Taaleem*,[6] which involved a clause that referred to Dubai law and courts. In the instant case, the DIFC Court of Appeal interpreted the clause as referring to DIFC law and courts, because the contractual arrangements were designed to use trusts, which are a feature of common law but not of civilian law. However, in most instances, a reference to Dubai law and Dubai courts should mean non-DIFC law and courts, because parties using such a clause most often do so in continuance of practices established before the creation of the DIFC, at a time when the clause could only refer to the ordinary Dubai

[5] On this expansion, see note 2 above.
[6] CA 001\2011.

law and courts.[7] The creation of the DIFC as a distinct territory has given rise to a new situation. Thus, good practice now requires that clauses choosing a jurisdiction or law should indicate explicitly whether they are referring to ordinary Dubai/UAE courts or laws or to DIFC courts or laws.

Shrayh has stated:

> [I]n order to eliminate any remaining risk of being involuntarily drawn into the net of the DIFC Courts, a jurisdiction clause should still make it clear that a reference to the "Dubai Courts" is to the local (non-DIFC) Dubai Courts and not to the DIFC Courts. Therefore, where a party or transaction with any link to the DIFC intends to contract out of the DIFC Courts' jurisdiction and refer disputes to the local (non-DIFC) Dubai Courts, the jurisdiction clause should make it clear that all disputes are to be referred to the Dubai Courts as established under Dubai Law No. 3 of 1992.[8]

By way of exception, an express choice by the parties will be disregarded in favour of DIFC public policy or DIFC overriding mandatory rules. This exception is clearly stated in several enactments. Thus, Article 8(2)(a) of the First Application law gives priority to a DIFC law that has regulatory content, and Article 6 of the Judicial Authority Law allows the parties to choose the law that governs their contract, so long as the chosen law does not conflict with public policy or public morals.

Under Article 7(2) of the Second Application Act, when an express choice operates, the internal law of the relevant country, rather than its choice of law rules, is applied.

The DIFC legislator failed to consider some essential points regarding the choice of law under its enactments. First of all, the enactments do not specify clearly whether the parties' freedom to choose the applicable law extends to allowing them to alter their chosen law at any time after contracting, though Article 9 of the Second Application Law appears to envisage an express choice contained in the contract. A second point is that the

[7] See also Shrayh, T.S., 2012. *Opting Out Of The Exclusive Jurisdiction Of The DIFC Courts*. Available at: <www.tamimi.com/en/magazine/law-update/section-6/november-3/opting-out-of-the-exclusive-jurisdiction-of-the-difc-courts.html> [Accessed: October 15, 2014].
[8] Ibid.

enactments do not clarify whether parties are permitted to choose different laws for different parts of their contract. Finally, the enactments do not clearly indicate whether the parties are able to choose a religious law to govern the contract, or whether they are obliged to choose the law of a country, though Article 8(2) of the First Application Act suggests that the choice must be of a territorial law.

The impact of overriding DIFC legislation is well illustrated by the decision of Chadwick DCJ (in the DIFC Court of First Instance) in *Al Khorafi v Bank Sarasin-Alpen (ME) Ltd and Bank Sarasin & Co Ltd*,[9] which involved claims by Kuwaiti investors against a Swiss bank and its DIFC subsidiary arising from an investment in derivatives. The Court upheld the claims against both defendants based on the DIFC legislation on the provision of financial services.[10] The subsidiary had breached the DIFC regulatory provisions by accepting inappropriate clients and by recommending unsuitable investments, and the parent by providing financial services in or from the DIFC without a licence to do so. In contrast, it was accepted that a contractual claim against the parent for giving poor investment advice was governed by the expressly chosen Swiss law.

The default rule in the absence of an express choice of law

In the absence of an express choice of law by the parties, DIFC internal law will apply. The default rule in favour of DIFC internal law arises from various enactments. The clearest indication is by the Second Application Law, Article 9 of which gives effect to an express choice, and Article 10 provides that if a choice is not specified, DIFC law becomes applicable. Similarly, Article 6 of the Judicial Authority Law specifies that the court should apply the DIFC internal law, unless the parties have explicitly agreed that another law should govern the disputes. It seems clear that the references to a law agreed

[9] CFI 026/2009, 21 August 2014.
[10] DIFC Law 1/2004 and the DFSA Rules made thereunder.

to by the parties, contained in Article 8(1)(c) of the First Application Law and Article 30 of the Court Law, must be restricted to explicit agreements so as to accord with the other enactments. The Contract Law and the Implied Terms in Contracts and Unfair Terms Law serve to specify the relevant internal law of the DIFC.

In cases in which the internal law of the DIFC applies, but there is no DIFC enactment or judicial decision establishing the content of the relevant rules, the corresponding rule of English law will usually be imported, sometimes with modifications considered necessary in the light of local conditions. Such importation is authorised by Article 8(2)(e), which allows the judge to refer to English law. In *Dutch Equity Partners v Daman Real Estate,*[11] which involved company law, the judge utilised Article 8(2)(e) and applied English law to supplement the DIFC enactments on companies with respect to points that were not explicitly dealt with in these enactments. This application of English law was justified by the fact that the companies' law in the DIFC was based on the common law, and the application of English rules would support the provisions of the DIFC enactments.

In *Forsyth Partners Global Distributors*,[12] which involved preferential debts in insolvency proceedings, the DIFC insolvency law did not contain any explicit provision concerning preferential debts at the time of hearing. Hwang J therefore referred to Article 8(2) of the First Application Law. But he ultimately refused to import any rules creating preferential rights. He declined to introduce the preferences recognised by UAE law under Article 8(2)(d), since the UAE insolvency law might be influenced by priorities and social conditions in the UAE. He also declined to import the preferences recognised by English law under Article 8(2)(e), as the English rules were not necessarily appropriate in the circumstances existing in the DIFC. He left the possible introduction of preferential

[11] [2006-09] DIFC. C.C.L.R.1. The companies law in DIFC 2004 and 2006.
[12] [2006-09] DIFC.C.C.L.R.3.

rights to future DIFC legislation and adhered to the basic rule in insolvency law, that of equality between creditors. Preferential debts are exceptional and reflect a legislative choice involving policy considerations and possibly somewhat arbitrary solutions. Therefore, it was not unreasonable for the judge to rule that, until further legislation is adopted in the DIFC, no preference was available there.

Other laws, especially ones resembling English law (such as Australian law), may also considered models that may be imported. Authority for this can be found in Article 30(2) of the Court Act, which permits the judge to consider decisions made in other jurisdictions to assist in making his decision. This was confirmed in *Raul Silva v United Investment Bank*,[13] in which the Chief Justice explained (in paragraph 77) that the trial judge had been wrong in referring to some cases under the English law concerning unfair dismissal to support his decision on a claim for wrongful dismissal, since such cases were irrelevant in view of the absence of any right with respect to unfair dismissal under DIFC law. Therefore, it must be recognised that the importation of English law under Article 8 is restricted, as it must not conflict with the DIFC substantive law as enacted.

A striking feature of the DIFC enactments concerning choice of law is that they do not appear to admit an implied choice by the parties or a test of closest connection to be ascertained by the court. Such references might at first sight seem to be authorised by Article 8(2)(c) and (d) of the First Application Law. However, they now appear to be blocked by the combined effect of Article 8(2)(a) and (b) of that Law, Articles 8 and 10 of the Second Application Law, Article 30 of the Court Law, and Article 6 of the Judicial Authority Law.

[13] CA 004\2014.

Other choice of law rules

The Second Application Law also provides specific choice of law rules for subrogation, agency and property. However, torts remain governed by Article 8(2) of the First Application Law, so that a test of closest connection is available for torts under Article 8(2)(d). It should be noted that some guidance concerning torts might be drawn from the Rome II Regulation. That regulation, for instance, favours the law of the place of injury in the absence of a common habitual residence.

In *Al Khorafi v Bank Sarasin-Alpen (ME) Ltd and Bank Sarasin & Co Ltd*,[14] which involved claims by Kuwaiti investors against a Swiss bank and its DIFC subsidiary arising from an investment in derivatives, Chadwick DCJ (in the DIFC Court of First Instance), in reliance on Article 8(2)(d) of the First Application Law, applied Kuwaiti law to tort claims against the DIFC subsidiary for negligence in advising and for misrepresentation. These tort claims were most closely connected with Kuwait, where the claimants resided and where they received and acted on the advice. Thus, these claims were rejected, since Kuwaiti law did not admit concurrent claims in contract and tort and did not impose liability for non-fraudulent misrepresentation. A claim for misrepresentation against the parent company was also rejected on the basis that it was governed by the expressly chosen Swiss law and that, in the absence of proof to the contrary, Swiss law was presumed to be the same as DIFC law. Under DIFC Law, the claim failed, because the relevant statements were of opinion rather than fact.

Agency

Article 11 of the Second Application Law determines the law applicable to agency. Under Article 11(1), the capacity and authority of the agent must be determined by reference to

[14] CFI 026/2009, 21 August 2014.

the law that governs the contract under which the agent was appointed. Therefore, an express choice of law between the principal and the agent will govern such a matter. In the absence of an express choice of law between the principal and the agent, the default rules will be applied. This approach is also adopted by the Rome I Regulation. Nonetheless, the Rome I Regulation excludes the question of capacity from its scope; in other words, it does not insist that the law of the agent's habitual residence will govern the question of his capacity. The DIFC provision contrasts with the English approach to capacity, which subjects the agent's capacity either to the proper law of a contract or to his personal law, whichever is more favourable to capacity.[15]

Agency agreements can be very complicated, as many countries have legislation in place that protects commercial agents and that are regarded as overriding mandatory rules. Within the EU, an agency contract will be governed by the law chosen by the parties in the contract, unless there are mandatory rules that override the law selected by the parties. For example, in *Ingmar GB Ltd v Eaton Leonard Technologies Inc*,[16] a contract between a Californian principal and an English agent contained a clause choosing California law. The European Court ruled that the protective provisions of a European directive[17] operated as overriding mandatory rules and applied, despite a choice of an external law, whenever the agent was established and carried on his activities within the European Union.

However, by Article 11(2), the rights and liabilities of the principal with regard to third parties, in cases where an agent contracts on behalf of a principal, must be determined by reference to the law that governs the main contract concluded by the agent on behalf of the principal with the third party. This provision corresponds with the approach adopted

[15] See Dicey, Rule 228; and Stone, 3rd edition, pp. 324-26.
[16] Case C -381/98, [2000] ECR I-9305. See also Lucy Pringle and Peter Snaith, of Bond Dickinson LLP, *Which law governs agency agreements?*, published in Lexology, 19 February 2014.
[17] EEC Directive 86/653, on self-employed commercial agents, [1986] OJ L382/17.

by English law.[18] Such a matter is excluded from the scope of the Rome I Regulation by Article 1(2)(g). In contrast, the Hague Convention of 14 March 1978 on the Law Applicable to Agency, in Article 11(1), usually subjects this matter to the law of the country in which the agent has his business establishment.[19]

Rights of subrogation

The law that governs the right of subrogation is dealt with in Article 12 of the Second Application Law, which provides:

> Where a person (the "creditor") has a contractual claim upon another (the "debtor"), and a third party has a duty to satisfy the creditor, or has in fact satisfied the creditor in discharge of that duty, the law which governs the contractual claim shall determine the extent to which the third person is entitled to exercise against the debtor the rights which the creditor had against the debtor under the law governing the contractual claim.

This contrasts with Article 15 of the Rome I Regulation, which instead subjects the right of legal subrogation to the law that governs the third person's duty to satisfy the creditor, though it limits the debtor's liability to that existing under the law governing the relationship between the creditor and the debtor.

Property

Articles 14 and 15 of the Second Application Law provide that the law that governs proprietary rights is the law of the country in which the property is situated. Article 14 provides that the lex situs governs the classification of property and the validity and extent of interests in property, and Article 15 subjects to the lex situs the validity and proprietary effects of a transfer of property. There is an exception in favour of the law governing the transfer, when the property is in transit or its location is not known.

[18] See Dicey at p. 2,125. See also Stone at p. 327.

[19] The convention is enforced in three of the EU Member States, namely France, the Netherlands and Portugal. Rules based on the Convention were proposed by the Commission in its initial proposal for the Rome I Regulation, but they were rejected by the Council and the Parliaments and were not included in the Regulation as adopted.

Some related questions

Another question that could arise is how the courts within the other UAE territories should treat DIFC law if it is the governing law as agreed by the parties. On the one hand, it could be argued that the judge will treat the DIFC law as a foreign law, as the majority of the DIFC legislation is formulated in the English language and needs to be translated. On the other hand, some may argue that the judge should treat the DIFC law as a local law rather than a foreign law, because this law was established by Dubai legislation and in the name of the ruler of Dubai. However, any judge within the UAE courts (outside of the DIFC) should treat the DIFC law as foreign law for the purposes of private international law, as this law applies only in the DIFC territory. The situation is analogous to the treatment within one part of the United Kingdom of the law of another part of the United Kingdom. For example, the Scottish court applies Scottish law, but if the parties choose English law to govern their contract, the Scottish court will apply English law in accordance with the Scottish conflict ruling requiring the choice to be respected, and will treat English law as a foreign law despite the fact that England and Scotland are both parts of the United Kingdom.

Another question is whether in such cases the parties are obliged to prove the content of the DIFC law in proceedings in other courts within the UAE. Even though the DIFC courts are among the Dubai courts, the DIFC has its own legal system, and its laws are completely different from the civil or commercial laws that apply elsewhere in the UAE, as the DIFC laws are based on the common law and are formulated in English. Therefore, it seems necessary that the parties should be obliged to prove the DIFC laws in any other UAE courts and that they should have to produce translations of them into Arabic.

PART 2 - OTHER PRIVATE INTERNATIONAL LAW ISSUES RELATING TO THE DIFC

As explained above, this part of this chapter will address other aspects of private international law in relation to the DIFC. It will deal in turn with the jurisdiction of the DIFC courts; arbitration in the DIFC; the recognition and enforcement in the DIFC of judgments and awards from elsewhere; and the recognition and enforcement elsewhere of judgments and awards from the DIFC.

Before addressing these issues, it is necessary to provide some clarification about territories and some corresponding definitions.

Although the UAE (apart from the DIFC) has a single substantive law, it has various courts for different emirates. Dubai , Ras Al Khaimah and Abu Dhabi each has its own courts, while in all of the other emirates there is a unified federal court structure, in which the federal Supreme Court is the court of final appeal. That Court also deals with conflicts between judgments of different UAE courts, even when one of them is a Dubai court.

In these circumstances, it is convenient to use the following terminology: "main Dubai" refers to Dubai except for the DIFC enclave, and "main Dubai courts" has a corresponding meaning; "main UAE" means the UAE except for Dubai; and "external country" refers to a country outside of the UAE (such as England or France).

Jurisdiction

Jurisdiction of the DIFC courts

The DIFC courts' jurisdiction was initially established in Article 5(A)(1) of Dubai Law 12/2004 (as amended), which states that the Court of First Instance shall have exclusive jurisdiction to hear and determine the following civil or commercial claims:

(a) claims and actions to which the DIFC or any DIFC Body, DIFC Establishment or Licensed DIFC Establishment is a party;

(b) claims and actions arising out of or relating to a contract or promised contract, whether partly or wholly concluded, finalised or performed within the DIFC or that will be performed or is supposed to be performed within the DIFC pursuant to express or implied terms stipulated in the contract;

(c) claims and actions arising out of or relating to any incident or transaction that has been wholly or partly performed within the DIFC and is related to DIFC activities; and

(d) any claim or action over which the Courts have jurisdiction in accordance with DIFC Laws and DIFC Regulations.

Article 5(A)(1) remains in force, but it has now been supplemented by Article 5(A)(2)-(4). These further provisions were added by the amendment of Dubai Law 16/2011, which broadened the Courts' jurisdiction.

Article 5(A)(2) provides that the Court of First Instance may hear and determine any civil or commercial claims or actions, if the parties agree in writing to file such claim or action with it whether before or after the dispute arises, provided that such agreement is made pursuant to specific, clear and express provisions.

Article 5(A)(3) provides that the Court of First Instance may hear and determine any civil or commercial claims or actions falling within its jurisdiction, if the parties agree in writing to submit to the jurisdiction of another court over the claim or action, but that court dismisses the claim or action for lack of jurisdiction.

However, Article 5(A)(4) provides that the Court of First Instance may not hear or determine any civil or commercial claim or action with respect to which a final judgment is rendered by another court.

Article 5(B)(1)(a) provides that the DIFC Court of Appeal has exclusive jurisdiction to hear and determine appeals filed against judgments and decisions made by the Court of First Instance.

The relation between the DIFC courts and laws and those of the other emirates in the UAE may be affected by the Supreme Court's ruling No 192/13[20] on the relations between the Dubai courts and the UAE Federal courts. The Court held that, since Dubai has elected to have its own judicial system, and accordingly its courts have jurisdiction over matters within its territory, the distribution of jurisdiction between the Dubai courts and the Federal courts is a matter of public policy, so that it is not open to parties to make agreements that conflict with these jurisdictional principles. Both the Federal and the Dubai courts should abide by the limits of their jurisdiction positively and negatively and should neither waive their jurisdiction nor assume the jurisdiction of another court. In light of this ruling, an agreement to give jurisdiction to the DIFC courts or to the main Dubai courts may be challenged as violating public policy, if, for example, an Abu Dhabi party asserts that Abu Dhabi courts have jurisdiction over the matter.

In this context, it must be understood that conflicts of jurisdiction can arise in situations in which two courts within the UAE territories have jurisdiction over the same matter, and they issue incompatible judgments on the merits of the dispute. In order to tackle this problem, the UAE legislator has given the Federal Supreme Court the authority to select the court that has jurisdiction over the matter. But the Supreme Court cannot exercise such authority unless the judgments are final. In another words, the parties cannot raise this point before the Supreme Court until the judgments have been affirmed by the Court of Appeal or the Court of Cassation.

[20] (1992).

The role of the Federal Supreme Court applies to conflicts between a DIFC judgment and an Abu Dhabi judgment. However, the role of the Federal Supreme Court does not apply to conflicts between a DIFC judgment and a main Dubai judgment, since both courts belong to the same emirate. In this situation, although there is no explicit legislative authority, a similar role seems naturally to belong to the Dubai Court of Cassation.

In *Rodever Lechet v Baker Hughes EHO Ltd. (Dubai Branch) and International Professional Resources Ltd. and Oilfields Supply Center Ltd*,[21] the main Dubai courts asserted that the DIFC has no jurisdiction to rule on labour disputes. It reasoned that labour disputes do not count as civil and commercial disputes for the purpose of Article 5 of DIFC Law 12/2004. The main Dubai court also confirmed its exclusive jurisdiction to resolve labour disputes by referring to Article 25 of the Federal Civil Procedures Law 11/1992, as amended by Federal Law 30/2005, and Federal Law 10/2014, which states that "first instance courts shall have the competence to review civil, commercial, administrative, labour and personal status disputes except for the disputes to which the federation is a party, as they are adjudged by the Federal Courts."

It is strange that the main Dubai courts have distinguished between labour law and civil law, as labour law counts as one element of the civil laws as normally understood under UAE law. Moreover, the contrast made by the main Dubai court between the explicit inclusion of labour disputes in the Federal Civil Procedures Law 11/1992 with the omission specifically to refer to labour disputes in the DIFC legislation is misconceived, since the DIFC legislation is drafted against the background of English law, under which labour matters are regarded as civil matters without a need for a specific mention.

This ruling may lead to many problems. First, it can lead to a conflict of judgments between the DIFC courts and the main Dubai courts, since the DIFC courts have ruled

[21] Case No. 133/ 2014, Labor Appeal [2015].

that their jurisdiction does extend to labour matters,[22] and the employment provisions under the DIFC laws differ from those adopted under the CTC.[23] Moreover, since the DIFC provisions are in some respects less favourable to employees than the main Dubai provisions, employees may have an incentive to sue in main Dubai courts, while conversely employers may have an incentive to sue in DIFC courts.

For example, there are differences in the provisions concerning maximum working hours. Under the UAE labour law, Article 65 provides:

> The maximum normal hours of work of adult workers shall be eight a day or 48 a week. The hours of work may be increased to nine hours a day in commercial establishments, hotels and cafes and of guard duties and any other operations where such increase is authorized by order of the Minister of Labour and Social Affairs. The daily hours of work may be reduced in the case of arduous or unhealthy operations by order of the Minister of Labour and Social Affairs. The normal hours of work shall be reduced by two during the month of Ramadan. The periods spent by a worker in traveling between his home and place of work shall not be included in his hours of work.

In contrast, Article 21 of the DIFC employment law provides that an employee's working time shall not exceed an average of 48 hours for each 7 day period unless the employer has first obtained the employee's consent in writing. Both laws have the same rule concerning the normal weekly maximum hours of work. However, the UAE labour law offers more protection for the employee who might be in weaker position by prohibiting any agreement on a longer working week, whereas the DIFC employment law allows such an agreement and thus puts the employer in a better bargaining position.

If the two parties bring the dispute to both the DIFC courts and the main Dubai courts, one of the parties can request the judge to stay proceedings until it has been decided by the first court to which the dispute is brought. If the two courts give inconsistent rulings,

[22] See the Rasmala *Investments v Banat* decision.
[23] This is particularly true in relation to the *Lechet* case itself, which involved unfair dismissal, since there are no provisions concerning unfair dismissal under the DIFC law, as was confirmed by the DIFC ruling in *Rasmala Investments v Banat*.

then the Dubai Court of Cassation must select which ruling should be enforced and which court had jurisdiction.[24] The Dubai Court of Cassation has this role, since Dubai has its own courts and is not subject to the federal legal system in the same way as the Emirates of Ajman or Sharjah, the courts of which fall under the federal umbrella and for which the Federal Supreme Court is the final court of appeal.

It is important to emphasise that any issues relating to the establishment of the DIFC will be decided by the Dubai Court of Cassation, since the establishment of the DIFC is subject to Dubai law. However, if the issue relates to the establishment of free zones, the Federal Supreme Court will have jurisdiction, since the free zones are established by the federal law.

Recently, the Supreme Legislation Committee of Dubai (SLC)[25] issued a marker opinion concerning the jurisdiction of the DIFC. The SLC opinion was based on Article 83 of Law 6/1997 on Contracts of Government Departments, which states that "the Dubai Courts shall have the jurisdiction to hear any dispute that arises between a government entity and a customer…"

The SLC explained that the DIFC court is considered one of the Dubai courts and part of its legal system. Therefore, its jurisdiction should include any civil or commercial disputes raised between a government entity and a contractor, as long as both parties agree to give the jurisdiction to the DIFC courts.

It seems that there is no obstacle to prevent the Dubai government entity from commencing litigation in the DIFC court if both parties agree. However, the other party needs to obtain permission from the Government of Dubai Legal Affairs Department to

[24] In a similar situation involving courts of two different emirates, such as, for example, Dubai and Abu Dhabi, the Supreme Court would decide which courts had the jurisdiction over the dispute and whose judgment should therefore be enforced.
[25] The SLC was established by Dubai Law no.24 of 2014.

register the case two months after the application for such permission.[26] The period of two months is designed to enable the issue to be resolved without litigation.

This ruling, which allows a government entity to agree on DIFC jurisdiction, can be useful in new contracts, because new contracts can include such an agreement. However, in the case of old contracts, a new agreement between the parties regarding jurisdiction will be necessary, and, in its absence, the dispute will have to be brought before the main Dubai court.

Jurisdiction clauses

The expansion of the jurisdiction of the DIFC courts by Dubai Law 16/2011 took effect in November 2011. This amendment enables any parties who reside outside of the DIFC to agree to choose the DIFC courts to hear their disputes. Parties can include a choice of the DIFC courts in their contracts at the conclusion stage, and the choice may be exclusive or non-exclusive. Alternatively, they can jointly agree in writing to refer a dispute to the DIFC courts after the dispute has arisen.

Practice Direction 2/2012 on the DIFC Courts' Jurisdiction recommends three types of jurisdiction clauses:

"A) Exclusive Jurisdiction of the DIFC Courts Before a Dispute Arises

> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be subject to the exclusive jurisdiction of the Courts of the Dubai International Financial Centre.
>
> This contract shall be governed by and construed in accordance with the law of [INSERT PLACE]"
>
> B) Non-Exclusive Jurisdiction of the DIFC Courts Before a Dispute Arises
>
> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be subject to the non-exclusive jurisdiction of the Courts of the Dubai International Financial Centre.

[26] Law no. 3 of 1996 of Government Claims law.

Each party irrevocably submits to the jurisdiction of the DIFC Courts and waives any objection it may have to disputes arising out of or in connection with this contract being heard in the Courts of Dubai International Financial Centre on the grounds that it is an inconvenient forum (forum non conveniens).

This contract shall be governed by and construed in accordance with the law of [INSERT PLACE]"

C) Exclusive Jurisdiction After a Dispute Arises /Over Existing Disputes

A dispute having arisen between the parties concerning [DEFINE DISPUTE], the parties hereby agree that the dispute shall be subject to the exclusive jurisdiction of the DIFC Courts.

The governing law of this agreement shall be the law of [INSERT PLACE]

Arbitration

The Arbitration Law of the DIFC

In the DIFC, the legal regime relating to arbitration was established in 2008 by DIFC Law 1/2008 (the DIFC Arbitration Law), which came into force on 1 September 2008. The DIFC Arbitration Law is based on the UNCITRAL Model Law, which forms the foundation of the arbitration law of many countries and has come to represent the accepted international standard for a modern statutory arbitration regime. The DIFC Arbitration Law covers all aspects of arbitration from the formal requirements of arbitration agreements to the enforcement of awards. In accordance with this Law, there is no requirement for parties to have any "nexus" or "connection" with the DIFC in order to enable them to provide for arbitration to be seated in the DIFC. Anyone, from any country, can opt for the DIFC as an arbitral seat.[27] Furthermore, the rules that govern the arbitration can be chosen by the parties, as they are free to choose the applicable rules. In

[27] John Gaffney and Dalal Al Houti, "Arbitration in the UAE: Aiming for Excellence", published in the Law Update, May 2014; available online at www.tamimi.com/en/magazine/law-update/section-8/may-7/arbitration-in-the-uae-aiming-for-excellence-1.html [Accessed: June 15, 2015].

the absence of such agreement, the arbitral tribunal will decided on the procedures that should be applied.

It should be noted that, pursuant to Article 7 of the Judicial Authority Law (Dubai Law 12/2004), DIFC awards, once ratified by the DIFC courts, are enforceable by the main Dubai courts, if the ratified award is "final and appropriate for enforcement" and is accompanied by an Arabic translation. The main Dubai courts have no jurisdiction to review the merits of the DIFC awards before their enforcement in main Dubai.

Once an execution order is obtained from the main Dubai courts, the DIFC awards are automatically enforceable throughout the UAE and can be enforced in the other Gulf Co-operation Council (GCC) states – Saudi Arabia, Bahrain, Qatar, Oman and Kuwait - under the GCC Convention for the Execution of Judgments, Delegations and Judicial Notifications (1996). In addition, the DIFC is bound by other international conventions ratified by the UAE, which means that DIFC awards are also enforceable in all of the more than 140 states party to the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[28]

The DIFC-LCIA Arbitration Centre

The DIFC-LCIA Arbitration Centre is based in the DIFC and was established on 17 February 2008 as a joint venture between the DIFC and the well-established London Court of International Arbitration (the LCIA). The LCIA is based in the United Kingdom and is generally regarded as one of the leading administrative institutions dealing with commercial arbitration and mediation in the world, with roots going back more than 100 years. The launch of the DIFC-LCIA Arbitration Centre was seen by many as an historic milestone in the development of the DIFC and the Emirate of Dubai as an international

[28] Freshfields Bruckhaus Deringer, Newsletter September 2008, "The New DIFC Arbitration Law".

finance and commercial centre for the region. The announcement of the DIFC-LCIA Arbitration Centre was the first step in bringing to the DIFC, as a seat of arbitration, a well-established set of administrative and procedural rules for conducting arbitration.

The DIFC-LCIA Arbitration Centre is guided by the DIFC-LCIA International Rules of Arbitration 2008 (the DIFC-LCIA Rules), which are modelled on the Rules of Arbitration of the LCIA with minor amendments. The DIFC-LCIA Rules are compatible with both civil and common law systems. They also provide a modern and comprehensive framework, which allows the international business community, international lawyers and arbitrators to conduct arbitrations under the auspices of the DIFC-LCIA Centre with confidence and efficiency. The Centre serves to promote the UAE as an effective dispute-resolution venue for international commercial disputes.

The DIFC-LCIA Centre is independent from the DIFC courts, but the DIFC Court Law (Law 10/2004) recognises that the DIFC courts will exercise the "curial", or supervisory, role that in all systems of law is exercised by the relevant national court.[29] Parties who choose the DIFC as the seat of arbitration are free to arbitrate under the rules of arbitral institutions other than the DIFC-LCIA Centre, including, for example, the Rules of the Dubai International Arbitration Centre (DIAC). Further, parties are free to agree on the procedure to be followed by the tribunal. When the parties have not agreed on the procedure to be followed, then the tribunal has discretion to discharge its duties in order to conduct the arbitration in a fair, efficient and expeditious manner. Arbitral awards under the DIFC-LCIA Rules are final and binding, and the parties irrevocably waive any right to appeal.[30]

[29] Sir Antony Evans, Chief Justice of the DIFC Courts, "The Future of Arbitration in Dubai', Judge's Address, December 31, 2008, available online at difccourts.ae/the-future-for-arbitration-in-dubai/ [Accessed: June 20, 2015].

[30] "Arbitration Reference – Norton Rose", available online at www.nortonrosefulbright.com/files/arbitration-reference-26054.pdf [Accessed: June 20, 2015].

The DIFC-LCIA Centre has jurisdiction to hear disputes when there is an agreement among the parties in writing that the arbitration will proceed under its provisions and rules. Therefore, the Centre provides dispute-resolution services for parties globally rather than only to parties in the DIFC region. The DIFC-LCIA Rules provide an expedited procedure for the formation of the arbitral tribunal in matters of exceptional urgency. The Rules respect the parties' freedom to choose the law governing the arbitral procedure, as Article 14 specifies that, "unless agreed otherwise by the parties, the tribunal shall have 'the widest discretion to discharge its duties allowed under the law(s) or rules of law' as determined by the tribunal."

The DIFC-LCIA Arbitration Centre recommends that parties who wish to have the Centre resolve their disputes insert the following clause into their contract:

> Any dispute arising out of or in connection with this contract, including any question regarding its existence, validity or termination, shall be referred to and finally resolved by arbitration under the Arbitration Rules of the DIFC-LCIA Arbitration Centre, which Rules are deemed to be incorporated by reference into this clause. The number of arbitrators shall be [one/three]. The seat, or legal place, of arbitration shall be [city and/or country]. The language to be used in the arbitration shall be [language]. The governing law of the contract shall be the substantive law of [governing law].

Respect in the DIFC for foreign arbitration clauses

In *International Electromechanical Services Co. LLC v Al Fattan Engineering LLC*,[31] one of the questions addressed by the Court was whether the DIFC courts have the power to grant a stay of their proceedings when there is an arbitration clause, and the seat of arbitration is outside the UAE. David Williams J ruled that the DIFC court has an inherent power to grant a stay of proceedings in such cases. In arriving at this ruling, the Court refused to follow the earlier decision in *Injazat Capital Limited and Injazat*

[31] CFI 004/2012.

Technology Fund B.S.C. v Denton Wilde Sapte & Co,[32] in which Sir David Steel ruled that the Court could not stay its proceedings in favour of a foreign-seated arbitration. Sir David Steel based his ruling in *Injazat* on Article 7 of Law 1/2008 concerning the recognition of arbitral agreements, which restricted Article 13 thereof to cases in which the seat of arbitration is the DIFC. In contrast, David Williams J found the power to stay on the basis of other provisions and principles and thus was able to avoid a situation in which the DIFC courts would be unable to comply with the obligations of the UAE as a party to the New York Convention.

The recognition and enforcement of non-DIFC awards in the DIFC

Recent cases before DIFC courts have considered the jurisdiction of the DIFC courts to make orders for the recognition and enforcement in the DIFC of arbitral awards made outside of the DIFC. The cases have involved, in particular, situations in which the award was made against a defendant who resided in main Dubai and had no assets within the DIFC. The essential background to these disputes is the greater efficiency of the DIFC courts, as compared with the main Dubai courts, in dealing with applications for enforcement of an arbitral award. In these cases, the jurisdiction of the DIFC courts has been upheld.

In *Banyan Tree v Meydan Group LLC*,[33] the appellant challenged the first instance judgment issued by H.E. Al Muhairi.[34] The appeal concerned the recognition and enforcement by the DIFC Court of a domestic arbitration award issued in main Dubai in favour of a company incorporated in Singapore. In the Court of First Instance H.E. Judge Al Muhairi ruled that the DIFC courts have jurisdiction to ratify a domestic arbitration

[32] CFI 019/2010.
[33] CA-005-2014.
[34] CFI 004/2012.

award issued outside of the DIFC. The Court adopted the same approach as in the earlier decision in *X1 and X2 v Y1 and Y2*,[35] in which the claimants were award creditors located outside of Dubai, who applied for an order recognising and granting leave to enforce a foreign arbitral award gained in their favour in opposition to award debtors located in main Dubai but outside of the DIFC.

The Court of Appeal, per Sir David Steel, affirmed the decision at the first instance and explained that Article 42 of the DIFC Arbitration Law gives the DIFC the jurisdiction to recognise and to enforce an arbitral award, irrespective of the state or jurisdiction in which it was made.[36] In the case of an award issued in Dubai, the New York Convention is not applicable. However, Article 42 does not distinguish between a domestic and a foreign award.

Moreover, the Court approved the ruling at first instance that Article 5(A)(1)(E) of the Judicial Authority Law serves as the gateway by which Article 42 of the Arbitration Law confers jurisdiction on the DIFC Courts to recognise the award as binding within the DIFC.[37] This jurisdiction is not restricted by any requirements that the subject matter or the defendant or its assets should have any connection with the DIFC. Moreover the court below was correct to follow the approach adopted in *X1 and X2 v Y1 and Y2*. Thus, the Court of Appeal has firmly established that the enforcement of awards within the DIFC does not require personal jurisdiction over the award debtor, by way of factors such as his residence or possession of assets within the DIFC territory. An objection based on forum non conveniens was also rejected, since the DIFC Courts have exclusive jurisdiction for

[35] Case No. ARB 002-2013.
[36] Article 42 proivdes: "An arbitral award, irrespective of the State or jurisdiction in which it was made, shall be recognised as binding within the DIFC and, upon application in writing to the DIFC Court, shall be enforced subject to the provisions of this Article and of Articles 43 and 44."
[37] Article 5(A)(1)(E) states that the DIFC Courts "have jurisdiction over any claim in accordance with DIFC Laws and DIFC Regulations."

the determination of the question whether an award should be recognised and enforced in the DIFC.

It is also clear that the effect in main Dubai of an order by the DIFC Court in favour of the enforcement of an award within the DIFC is a matter that must be resolved by the main Dubai courts. In particular, the DIFC Court of Appeal noted that:

> If in due course the matter is left to be raised before the courts of Dubai (which are the courts of the seat) the question whether the bar on considering the merits of the DIFC order before the execution judge would also inhibit the Dubai courts from ruling on a challenge to the validity of the underlying award is a matter for the Dubai courts and is a matter on which we have heard no argument.

It is clear that a DIFC order in favour of a main Dubai award should not prevent the main Dubai courts from exercising their supervisory jurisdiction over an arbitration seated in main Dubai. On the other hand, if the award is from an arbitration seated in a country outside of the UAE but which is a party to the New York Convention, there is much to be said for the argument that a DIFC order in favour of the award should preclude objections to enforcement from being raised in main Dubai courts, since such objections would necessarily be based on provisions of the Convention and would have been available in the DIFC proceedings.

Enforcement of External Judgments

External judgments are judgments given by a court of a country outside of the UAE. In speaking of the main UAE, we refer to the territory of all the emirates except Dubai.

Enforcement of external judgments in the main UAE and main Dubai

A party seeking to enforce a foreign judgment in the UAE can do so through the main UAE courts, the main Dubai courts, or the DIFC courts, although in practice it is difficult to achieve enforcement in the main UAE or main Dubai courts, and this is relatively

untested in the DIFC courts. The main UAE courts and the main Dubai courts apply different considerations from those applied by the DIFC courts in determining whether to recognise and enforce foreign judgments from countries with which the UAE has no treaty.[38] Under the relevant local legislation, the main UAE courts and the main Dubai courts will not enforce a foreign judgment if they had or would have had jurisdiction themselves over the matters in dispute. As the main UAE courts and the main Dubai courts have broad jurisdiction over matters concerning citizens and foreigners who maintain residence in the country, it has historically been difficult to meet this test. To date, it does not appear that any English judgments have been successfully enforced in the main UAE or main Dubai.

Enforcement of external judgments in the DIFC

Foreign judgments can be enforced by the DIFC Courts in accordance with the Rules of the DIFC Courts (DIFC Court Rules). In accordance with Article 7(6) of the Judicial Authority Law and Article 24(1)(a) of the DIFC Court Law (Law 10/2004), the DIFC courts have jurisdiction to ratify any judgment of a recognized foreign court for the purposes of any subsequent application for enforcement in the courts of main Dubai.

The enforcement of a recognized foreign money judgment within the DIFC against a defendant with assets located in the DIFC should be relatively straightforward. This is especially so for such judgments from England, because in January 2013 a non-legally binding Memorandum of Guidance as to Enforcement was signed between the DIFC Courts and the English Commercial Court to facilitate mutual enforcement, taking into account certain conditions, of money judgments issued in the two jurisdictions. It is also possible to enforce foreign judgments of a more complex nature, such as injunctions and

[38] See Saloni Kantaria, "The Enforcement of Foreign Judgments in the UAE and DIFC Courts", [2014] 28/2 Arab Law Quarterly 193–204.

freezing orders, in the DIFC courts, again subject to certain conditions. The enforcement of a foreign judgment in the DIFC courts can be procured by filing a claim for a judgment debt or a declaration. The claim can be filed either under Part 7 of the DIFC Court Rules, which is the more common procedure for commencing claims, or alternatively by way of a Part 8 claim, if the claim is unlikely to involve a substantial dispute of fact. Any resulting judgment issued by the DIFC Courts is effective and binding on any parties with a presence in the DIFC.[39]

In *DNB Bank ASA v Gulf Eyadah Corporation*,[40] Ali Al Madhani J declared that the DIFC courts have jurisdiction to recognise and enforce a foreign judgment within the DIFC territory. Such jurisdiction exists in all cases, and there need not be any other connection with the DIFC territory with respect to the defendant's residence or the subject matter involved. But the declaration by the DIFC courts that a foreign judgment is recognised or enforceable within the DIFC territory is not designed to have any effects outside of that territory. It does not count as a DIFC judgment for the purpose of recognition or enforcement in main Dubai.

Enforcement of DIFC judgments

Enforcement of DIFC judgments can be examined under the following headings:

(a) enforcement of DIFC judgments in main Dubai;

(b) enforcement of DIFC judgments in main UAE; and

(c) enforcement of DIFC judgments in an external country.

Enforcement of DIFC judgment in main Dubai

Judgments and orders made by the DIFC courts can be converted into a main Dubai court judgment through a fairly straightforward and routine procedure that was initially set out

[39] Tarek Shrayh, *Enforcing Foreign Judgments in Dubai*, published in Al Tamimi Law Update, November 2013 [Accessed: June 17, 2015].
[40] CFI-043-2014.

in a non-binding protocol.[41] In accordance with Article 7(2) of Dubai Law 12/2004 (the Judicial Authority Law), DIFC court judgments, decisions and orders may be enforced through the main Dubai courts if three conditions are satisfied:

(a) they must be final and executory;

(b) they must be legally translated into Arabic and

(c) they must be certified by the DIFC courts for execution and have a formula of execution affixed by the courts.

It is also required that the final judgment must be translated into Arabic and that the enforcing party must obtain an execution letter from the DIFC courts addressed to the execution judge in the main Dubai courts. The procedure makes it clear that the execution judge in the main Dubai courts has no jurisdiction to review the merits of the judgment. DIFC judgments should be enforced in the Dubai Courts in the same way as judgments delivered by the main Dubai courts.

The procedure now in effect is that the DIFC court judgment, order or decision is "converted" into a judgment of the main Dubai courts, which can then subsequently be enforced under any enforcement treaties to which the UAE is a party. There are numerous examples of judgments and orders having been enforced between the DIFC and the main Dubai courts. DIFC court orders that have been so enforced include interim orders, such as freezing orders (*Mareva* injunctions).[42]

[41] Under the terms of a 2009 Protocol of Enforcement between the main Dubai courts and the DIFC courts and confirmed in Dubai Law 16/2011, Article 7(3)(c).

[42] In *Mohammed Usman Saleem v Oasis Crescent Capital (DIFC) Ltd and HSBC Bank Middle East Ltd* (CFI – enforcement no. 002/2008), a branch of HSBC Bank located outside of the DIFC and in main Dubai was ordered to freeze the amount of AED 70,809 in the account of the judgment debtor. In this case, a letter of execution was issued by the DIFC courts to the main Dubai courts.

Enforcement of a DIFC judgment in main UAE

It may be noted that, to enforce a DIFC judgment within the UAE, but outside of Dubai, the enforcement has to go through a process called "referral", as stipulated by Article 221 of the Federal Civil Procedures Law, which provides as follows:

> a. The competent execution judge shall refer the judgment or order to the execution judge for the area in which the judgment or order is sought to be enforced, and provide the latter with all the legal papers required for execution.
>
> b. The execution judge to whom the referral is made shall take all the decisions necessary to execute the referral and shall rule on procedural objections relating to the execution raised before him, and his appealable decisions shall be subject to appeal before the court of appeal in his area.
>
> c. The execution judge who has carried out the execution shall inform the competent execution judge who made the referral of what has happened, and shall transfer to him any items or other property received by him as a result of the sale of things attached.
>
> d. If the execution judge to whom the matter has been referred finds that there are legal reasons precluding the execution, or if it is impossible for him to execute for any other reason, he must notify the competent execution court thereof.

It is generally supposed that, for this purpose, the main Dubai execution judge counts as the "competent execution judge" with regards to DIFC judgments. However, Article 7(2) of Dubai Law 12/2004, as amended by Law 16/2011, now provides that, "where the subject matter of execution is situated outside the DIFC, the judgments, decisions and orders rendered by the Courts and the Arbitral Awards ratified by the Courts shall be executed by the competent entity having jurisdiction outside the DIFC in accordance with the procedure and rules adopted by such entities in this regard …". According to some legal scholars, following the coming into force of this amendment, DIFC court judgments, decisions and orders can be sent directly from the DIFC Courts for execution by the local "competent entity" within the UAE, without having to go through the main

Dubai execution judge as part of the process of "referral" established by Article 221 of the Federal Civil Procedures Law. However, so far, this possibility of enforcing a DIFC court judgment outside of Dubai and within the UAE is untried and untested. In any event, the DIFC courts have concluded Memoranda of Understanding (MOUs) with the courts in the Emirate of Ras Al Khaimah and the UAE Federal Ministry of Justice, which are expected to assist in the enforcement of DIFC judgments, decisions and orders within the main UAE.

Enforcement of DIFC judgments in external countries

Constitutionally, the DIFC courts form part of the Dubai court system, and DIFC court judgments, either themselves or once converted into Dubai court judgments, are enforceable in each of the seven Emirates that make up the UAE and in any country with which the UAE has a reciprocal enforcement treaty in place. These include the countries of the Gulf Cooperation Council (Bahrain, Kuwait, Oman, Qatar, and Saudi Arabia); the Riyadh Convention states (the GCC states plus Algeria, Djibouti, Iraq, Jordan, Lebanon, Libya, Mauritania, Morocco, Somalia, Sudan, Syria, Tunisia and Yemen); and Tunisia, France, India and China under bilateral treaties.[43] Further, DIFC judgments can be enforced internationally through reciprocal arrangements with many common law courts overseas, including the English Commercial Court, the Federal Court of Australia, the New South Wales Supreme Court, the High Court of Kenya (Commercial and Admiralty Division), and the Supreme Court of Singapore.[44]

Where a relevant treaty is in place between the UAE and the target jurisdiction, enforcement will be governed by the terms of that treaty. In contrast, if there is no

[43] See Patrick Bourke and Dominic Hennessy, *Could the recent guidance agreed between courts in England and the Dubai International Financial Centre provide a gateway to reciprocal enforcement of court judgments in the Gulf?*, available online at http://www.theoath-me.com/s/deconstructing-the-new-mog [Accessed: June 17, 2015].

[44] DIFC Court press release dated 15 February 2015, available online at difccourts.ae/new-innovation-difc-courts-enhances-dubais-position-world-leader-dispute-resolution/ [Accessed: June 17, 2015].

relevant treaty, enforcement will depend on the laws of the state in which the judgment creditor is seeking enforcement.[45] However, to enforce a DIFC judgment in any member state of the GCC, at present it is generally assumed that the judgment must first recognised by the main Dubai court before attempting enforcement outside of the UAE, since the establishment of the DIFC is comparatively new, and an external court may be unfamiliar with its courts and their judgments. The practice may change in the future after many external courts have recognised the DIFC courts and their role in the Dubai legal system.[46]

On the other hand, the DIFC courts have already respected a judgment issued in a GCC member state seeking enforcement in the DIFC. Thus, in *Farroq Al Alwia v Lloyds TSB Bank PLC and Credit Suisse AG*[47], the DIFC court ordered the respondents to comply with a judgment issued by the Bahraini family court.

A new mechanism for enforcement

The DIFC Courts adopted a new mechanism on 16 February 2015 concerning the enforcement of DIFC judgements by issuing Practice Direction No. 2 of 2015 on the Referral of Judgment Payment Disputes to Arbitration.[48] The Practice Direction is now fully in force.

The new mechanism is designed to allow the parties to enforce their judgment by obtaining through the DIFC-LCIA Arbitration Centre an arbitral award declaring its enforceability and then seeking to enforce the award abroad under the New York Convention. The Practice Direction essentially seeks to allow creditors to enforce through arbitration payment judgments issued by the DIFC courts against non-compliant debtors

[45] See Article 7 of Law 12/2004.
[46] See the DIFC Courts Enforcement guide, p.14; available online on: difccourts.ae/wp-content/uploads/2014/04/ENFORCEMENT-GUIDE-2015.pdf. [Accessed: June 10, 2015].
[47] Execution order No: 02 /12 of 19 January 2011.
[48] Available online on the official website of the DIFC Courts at difccourts.ae/difc-courts-practice-direction-no-2-2015-referral-judgment-payment-disputes-arbitration [Accessed: June 15, 2015].

that have failed to comply with the terms of the judgments voluntarily. The main benefit envisaged will be the enhanced enforceability of "judgment-converted-awards" under international enforcement instruments typically applicable to international arbitration awards, such as the 1958 New York Convention on the recognition and enforcement of foreign arbitral awards. A secondary objective of the Practice Direction is to encourage settlement of payment disputes prior to escalation to arbitration in view of the deterrent effect of the enhanced global enforceability of a DIFC judgment converted award.[49]

Generally, in international disputes, the party who obtains a successful judgment seeks enforcement of the judgment or award and needs to have confidence that the judgment or award obtained will be enforceable. The new mechanism introduced by the DIFC Court is designed to enable the parties to enforce their judgement or award globally. The new mechanism is based on the idea that the parties who choose DIFC jurisdiction or fall under its jurisdiction should include a clause in their contract concerning enforcement. The clause should expressly indicate the parties' intention that, in the case of a dispute concerning enforcement, the parties will refer such disputes to the DIFC-LCIA Arbitration Centre. For example, parties based in the UK and Australia can agree in writing to submit disputes concerning their contract to the jurisdiction of the DIFC courts and add a further clause that, upon obtaining a successful judgment, the successful party can approach the DIFC-LCIA Arbitration Centre seeking an award from the Centre that confirms the enforceability of the DIFC court judgment. After obtaining such an award, the winning party can seek its enforcement through the Australian court under the New York Convention, to which Australia is a party.

It may be noted that, if parties who agreed in writing to bring their disputes to the DIFC courts failed to include a clause to resolve disputes concerning enforcement through the

[49] Gordon Blanke, "DIFC Courts Practice Direction No. 2 of 2015: Adopted at Last!", published in Kluwer Law on 31 March 2015.

DIFC-LCIA Arbitration Centre, then they have the option to make use of the new mechanism by subsequently agreeing in writing to resolve the enforcement dispute through the Centre, even after the judgment on the merits has been issued. But it seems to the present writer that this option will rarely be useful, since the losing party is unlikely to make a subsequent agreement to resolve the issue through the DIFC-LCIA Arbitration Centre, when a judgment against him on the merits has already been issued. Thus, it seems desirable that the clause recommended by the court choosing DIFC jurisdiction should contain an additional section on the resolution of disputes concerning enforcement through the DIFC-LCIA Arbitration Centre. It could also be suggested that the DIFC legislator should amend its law and establish a new provision concerning enforcement by which the parties who agree on DIFC court jurisdiction should be taken to have also agreed that any issue concerning enforcement should be resolved through a DIFC-LCIA Arbitration, unless they specifically excluded such a further agreement.

It is worthy of emphasis that, if the winning party seeks enforcement through the DIFC-LCIA Arbitration Centre, the panel will resolve only the enforcement dispute without considering the merits of the case, as the merits have already been decided by the court. It seems that the main objective of the new mechanism concerning the enforcement of DIFC judgements is to improve the enforcement of judgments worldwide, and the Practice Direction will not contribute anything in relation to the enforcement within the UAE, as the DIFC judgment will be enforced within the UAE without any difficulties.

Despite the enthusiasm with which the Practice Direction has been met in certain quarters, it seems to the present writer that the new mechanism will not succeed in enabling DIFC judgments to be enforced in external countries under the New York Convention, for the following reasons.

(1) The system of international arbitration, including the New York Convention (NYC) 1958, rests on a premise that arbitration resolves "disputes" arising out of a defined legal relationship between the parties, such as substantive claims with respect to a particular contract or tort.[50] A confirmatory award, which is effectively what Direction No 2 will ultimately achieve, does not raise a real issue for the arbitrator to determine, because the merits of the dispute have already been dealt with in the court judgment. Therefore, DIFC court judgments confirmed in accordance with Direction No. 2 are unlikely to be considered as awards that fall within the meaning of the New York Convention 1958.

(2) Moreover, a court invited to enforce such an award might well refuse to do so on the basis of a general principle of private international law relevant to the interpretation of the NYC that there cannot be an exequatur on an exequatur (an enforcement order on an enforcement order).[51]

(3) Another potential objection is that either the confirmatory award purports merely to declare the judgment enforceable within the DIFC, in which case it has no impact on the enforceability of the judgment abroad, or it purports to declare the judgment enforceable everywhere, in which case it conflicts with the exclusive jurisdiction of the courts of a country to control enforcement within their territory, and this conflict renders the subject-matter of the award non-arbitral, or its recognition and enforcement contrary to public policy, within the meaning of Article V(2) of the NYC.

(4) If the UAE could succeed in this manoeuvre, other states would also do so, and the NYC would produce effects that no-one envisaged and few want. The result would be that numerous countries would consider withdrawing from the NYC until it is amended to prevent such manoeuvres.

[50] See articles I and II of the NYC 1958.
[51] See Dicey, Morris and Collins, *The Conflict of Laws*, 15th edition, para 14-205.

A more promising method of improving the enforcement of DIFC judgments globally is for the UAE, through its federal government, to accede to the Hague Convention 2005 on Choice of Court Agreements.[52] It could do so either after becoming a member of the Hague Conference or without joining the Conference, since Article 27 of the Convention permits accession by non-member counties. Moreover, in view of Article 28, such accession could either be with respect to the UAE territory as a whole or be confined to the DIFC alone. The Convention entered into force between the European Union (except for Denmark) and Mexico on 1 October 2015. It has also been signed by the United States and by Singapore, and thus there is some reason to hope that they will eventually ratify and then apply the Convention.

The Convention regulates the direct jurisdiction of the courts of the contracting states in the context of exclusive jurisdiction clauses and provides for the recognition and enforcement between the contracting states of judgments given in accordance with such clauses.[53] By Article 1(1), the Convention applies in international cases to exclusive choice of court agreements concluded in civil or commercial matters. Article 1(2) states that, in relation to direct jurisdiction, a case is international, unless the parties are resident in the same Contracting State, and the relationship of the parties and all other elements relevant to the dispute, apart from the location of the chosen court, are connected only with that State. By Article 1(3), a case is international where recognition or enforcement of a foreign judgment is sought. Article 19 permits a State to declare that its courts may refuse to determine disputes to which an exclusive choice of court agreement applies if,

[52] For a brief analysis of the Convention, see Peter Stone, *EU Private International Law* (Second Edition, Edward Elgar Publishing, 2010), pp. 181-86 and 252-54. This analysis is omitted from the Third Edition (2014).

[53] For exclusions with respect to recognition and enforcement between different EU Member States and savings in relation to other treaties, see Article 26.

except for the location of the chosen court, there is no connection between that State and the parties or the dispute.

The meaning of "exclusive choice of court agreement" is addressed by Article 3(a), which defines such a clause as an agreement concluded by two or more parties that designates, for the purpose of deciding disputes which have arisen or may arise in connection with a particular legal relationship, the courts of one Contracting State or one or more specific courts of one Contracting State, to the exclusion of the jurisdiction of any other courts. Article 3(b) adds that a choice of court agreement that designates the courts of one Contracting State, or one or more specific courts of one Contracting State, must be regarded as exclusive, unless the parties have expressly provided otherwise. Article 3(c) insists that an exclusive choice of court agreement must be concluded or documented either in writing or by some other means of communication that renders information accessible so as to be usable for subsequent reference. Article 3(d) adds that an exclusive choice of court agreement that forms part of a contract must be treated as an agreement independent of the other terms of the contract and that the validity of the exclusive choice of court agreement cannot be contested solely on the ground that the substantive contract is not valid.

Several matters are excluded from the scope of the Hague Convention 2005 by Article 2. These include consumer contracts; contracts of employment; family matters; wills and succession; insolvency; proprietary rights in and tenancies of land; the validity, nullity, or dissolution of legal persons, and the validity of decisions of their organs; the validity or infringement of intellectual property rights other than copyright and related rights; the validity of entries in public registers; the carriage of passengers and goods; marine pollution, limitation of liability for maritime claims, general average, and emergency

towage and salvage; anti-trust (competition) matters; liability for nuclear damage; claims for personal injury brought by or on behalf of natural persons; and tort claims for damage to tangible property that do not arise from a contractual relationship. But under Article 2(3), proceedings are not excluded from the Convention application where these matters arise merely as a preliminary question and not as an object of the proceedings. Under Article 2(4), arbitration and related proceedings are excluded from the scope of the Convention. Under Article 2(5)-(6), proceedings are not excluded from the scope of this Convention by the mere fact that a State, including a government, a governmental agency or any person acting for a State, is a party thereto; however, the Convention does not affect privileges and immunities of States or of international organisations with respect to themselves and their property.

Under Article 21, a State that has a strong interest in not applying the Convention to a specific matter may declare that it will not apply the Convention to that matter. The State making such a declaration must ensure that the declaration is no broader than necessary and that the specific matter excluded is clearly and precisely defined. On approving the Convention, the European Union made a declaration under Article 21 excluding its application of the Convention to insurance contracts, subject to exceptions similar to those specified by Articles 15 and 16 of the Brussels I Regulation,[54] but no such reservation has been made by Mexico.

Although (as explained) a wide range of matters are excluded from the scope of the Convention, the exclusions do not seem to have much significance in relation to the DIFC, since the Convention is applicable to transnational contracts that involve trade or

[54] See Annex I to EU Council Decision 2014/887.

financial services, and it is these which are important in relation to the operation of the DIFC as a global centre of business activity.

With regard to direct jurisdiction, Article 5(1) ensures that the court or courts of a Contracting State designated in an exclusive choice of court agreement have jurisdiction to decide a dispute to which the agreement applies, unless the agreement is null and void under the law of that State; and, by Article 5(2), such a court cannot decline to exercise jurisdiction on the ground that the dispute should be decided in a court of another State.[55] Conversely, Article 6 requires a court of a Contracting State other than that of the chosen court to suspend or dismiss proceedings to which an exclusive choice of court agreement applies. This negative obligation is subject to five exceptions: when the agreement is null and void under the law of the State of the chosen court; when a party lacked the capacity to conclude the agreement under the law of the State of the court seised; when giving effect to the agreement would lead to a manifest injustice or would be manifestly contrary to the public policy of the State of the court seised; when, for exceptional reasons beyond the control of the parties, the agreement cannot reasonably be performed; and when the chosen court has decided not to hear the case.[56]

By Article 8(1) of the Convection, a judgment given by a court of a Contracting State designated in an exclusive choice of court agreement must be recognised and enforced in other Contracting States in accordance with the Convention, and recognition or enforcement may be refused only on the grounds specified in the Convention. By Article

[55] Article 5(3) makes savings in favour of rules on jurisdiction related to subject matter or to the value of the claim; and for rules on the internal allocation of jurisdiction among the courts of a Contracting State. It insists, however, that, where under such rules the chosen court has discretion as to whether to transfer a case, due consideration should be given to the choice of the parties.

[56] See also Article 7, which excludes interim measures of protection from the Convention, so that the Convention neither requires nor precludes the grant, refusal or termination of interim measures of protection by a court of a Contracting State, and does not affect whether or not a party may request or a court should grant, refuse or terminate such measures.

8(3), a judgment must be recognised only if it has effect in the State of origin and must be enforced only if it is enforceable in the State of origin. By Article 8(4), recognition or enforcement may be postponed or refused if the judgment is the subject of review in the State of origin or if the time limit for seeking ordinary review has not expired; but such a refusal does not prevent a subsequent application for recognition or enforcement of the judgment. By Article 8(2), except as regards such review as is necessary for the application of the provisions of the Convention, there must be no review of the merits of the judgment given by the court of origin. Moreover, the court addressed will be bound by the findings of fact on which the court of origin based its jurisdiction, unless the judgment was given by default.

The grounds for refusing recognition or enforcement are dealt with in Articles 9-11 of the Convention. Thus, under Article 9(a), a judgment may be rejected if the agreement on jurisdiction was null and void under the law of the State of the chosen court, unless the chosen court had determined that the agreement was valid. By Article 9(b), a judgment may be rejected if a party lacked the capacity to conclude the agreement on jurisdiction under the law of the requested State.[57] Other grounds for rejection relate to inadequate notification of the defendant; fraud in connection with a matter of procedure; incompatibility with the forum's public policy; non-compensatory damages; conflicting judgments; and incidental rulings on excluded matters.

The procedure for obtaining recognition or enforcement is addressed by Article 13-15 of the Convention. In general this is remitted to the law of the requested State.

[57] For other cases in which recognition and enforcement may be refused, see the Hague Convection under Article 9-11. Available online: www.hcch.net/index_en.php?act=conventions.text&cid=98(accessed on 12th September, 2015).

Summary

The DIFC enactments respect the freedom of contracting parties to choose the law governing their contracts subject only to a saving in favour of the forum's public policy. However, some confusion may have arisen from an unfortunate decision, which may be interpreted as indicating that a choice of UAE law to govern the contract cannot be effective in the DIFC. In the absence of an express choice, the court will apply directly the default rule, which subjects the contract to DIFC internal law, since no place is made in the DIFC legislation for a governing law ascertained by reference to an implied choice or a closest connection.

The recent expansion of the jurisdiction of the DIFC courts will increase the number of cases that will be decided there. As a result, conflicting claims to jurisdiction between the DIFC courts and the main Dubai courts are emerging especially with regard to employment law. Such conflicts give rise to undesirable uncertainty for litigants.

The effectiveness of the DIFC legal order as a globally significant provider of dispute-resolution services is to a large extent dependent on the global enforceability of its judgments and awards. While awards in arbitrations seated in the DIFC will obtain widespread respect under the New York Convention 1958, the enforceability of judgments given by DIFC courts is problematic in relation to the many countries that have no relevant treaty with the UAE. Moreover, the recent attempt to enhance the enforceability of judgments by converting them into arbitral awards declaring their enforceability seems doomed to failure. A more promising manner of addressing this problem might be for the UAE to become party (on behalf of the DIFC at least) to the Hague Convention 2005 on Choice of Court Agreements.

Chapter 7 - Conclusions

This thesis has analysed the rules on choice of law with respect to contract rules under European Union legislation and under the UAE Civil Code. The main aim was to consider how the UAE rules might usefully be reformed by interpretation or amendment, especially with regard to points on which the UAE law is unclear, and for this purpose to make use of the Rome I Regulation as an example of modern and widely accepted solutions. In addition, because of the importance of the DIFC as a developing centre of international commerce, the thesis examines the choice of law rules that have been adopted in the DIFC. In addition, the thesis has also considered other related aspects of private international law in the DIFC, such as judicial jurisdiction, arbitration, and enforcement of judgments and awards.

The current chapter is divided into three parts. The first part presents some of the main findings of this research. The second part suggests a proposed draft of choice of law rules, designed for adoption by way of amendment to the CTC, in the light of the examination of the rules contained in the Rome I Regulation. The final part will be divided into two sections: the first relating to choice of law rules under DIFC law and the second focusing on other aspects of the private international law rules under DIFC law.

Part 1 – Some Main Findings

In chapter 3, the main rules on choice of law with respect to contracts specified by the Rome I Regulation and the CTC were examined. In both cases, the choice of law provisions allow the parties to choose the governing law expressly. However, the rules adopted under the CTC are silent on a few matters, such as whether the parties' freedom to choose the governing law extends to allowing them to change the governing law at any

time; the permissibility of splitting the law that governs the contract; the permissibility of choosing an otherwise unconnected law; and the permissibility of choosing a non-territorial law. These doubtful points under the CTC have been dealt with under the Rome I Regulation. To resolve these matters under the CTC, the judge can refer to its Article 23, which allows him to refer to general principles of private international law to resolve matters not specifically addressed by the CTC.

With regard to implied choice, both enactments recognise the parties' freedom to choose the governing law impliedly. However, the Rome I Regulation restricts this freedom, as it requires that such choice must be clearly demonstrated, while under the CTC, there is no such explicit restriction on the discovery of an implied choose of law. Thus, the Emirati judge can take advantage of this flexibility and take a broader view of implied choice of law in order to escape from the default rules and introduce a closest connection rule. Factors that can be used as an indication of an implied choice can be identified in the Rome I Regulation and the case law thereon. However, under the CTC, there are no examples of these factors. Therefore, the UAE judge can rely on Article 23 of CTC as enabling him to refer to the Rome I Regulation to identify factors that may indicate an implied choice of law.

The default rules in the absence of an express or an implied choice under the Rome I Regulation seem to operate better than the default rules under the CTC. This is especially the case with respect to the second UAE default rule, which refers to the law of the country of contracting as applying where the parties have different domiciles. The application of this rule can lead in some situations to results unexpected by the parties. Therefore, it would be more sensible to interpret this rule in a narrow sense, so as to confine it to situations in which the place of contracting is unambiguous and thus more likely to have a substantial connection with the contract.

Chapter 4 focused on exceptions to the operation of the proper law of a contract. One of these exceptions under both the Rome I Regulation and the CTC relates to personal capacity. The capacity of an individual under the Rome I Regulation is largely remitted to the conflict rules of the forum country. However, the capacity of the individual under the CTC is governed by the law of his nationality.

Another exception relates to the capacity of companies. Under the Rome I Regulation, this matter is again remitted to the forum's conflict rules. In contrast, the CTC subjects the capacity of companies to the law of the country in which the company has its actual main administrative centre, but it makes an exception if the company carries out an activity in the UAE and then subjects its capacity to the UAE internal law.

Another matter in which the Rome I Regulation differs from the CTC is in the rules concerning formalities. Under the Rome I Regulation, it is sufficient, with regard to formalities, to comply with the law of the place in which a party or agent was present at the time of the negotiations through which the contract was concluded. In contrast, under the CTC, there are no special rules in relation to formalities, and they are subject to the general rules on choice of law for contracts. It has also been found that there are no explicit rules concerning the application of overriding mandatory rules in the CTC. Therefore, to apply such rules of the lex fori, the UAE court can adopt a wide interpretation of the public policy proviso specified by Article 27. In contrast, the Rome I Regulation makes specific provision for the application of overriding mandatory rules.

In chapter 5, the choice of law rules in relation to certain types of contract (consumer, insurance, and employment contracts), in which one party is in a weaker position, were examined. It has been found that there are no special rules in the CTC concerning choice of law in relation to such contracts. The general rule of choice of law in contracts under

Article 19 will be applied. Thus, a consumer contract will be governed by the law chosen by the parties, and, in the absence of such choice, the normal default rules will be applied. Similarly, employment and insurance contracts will be subject to the general choice of law rules under Article 19 of the CTC, since no special provisions dealing with such contracts are included therein.

In contrast, the Rome I Regulation explicitly subjects certain consumer contracts to the law of the consumer's habitual residence or at least gives overriding effect to protective provisions contained in that law. The Rome I Regulation also subjects some insurance contracts to the law of the country in which the risk is located and in general subjects employment contracts to the law of the country in which the employee carries out his work for the employer or at least gives overriding effect to protective provisions of that law.

Despite the fact that, in the UAE, there are no special provisions concerning choice of law for these contracts, the UAE legislator has included some provisions in the substantive law of consumer contracts to offer protection to the weaker party in certain situations. Similarly, the UAE legislator has included some provisions in the substantive law of employment and insurance to protect the weaker party in particular circumstances. To make these mandatory provisions effective in appropriate transnational cases, there is a need to adopt special choice of law rules for such contracts and to ensure that the protective provisions are regarded as overriding mandatory provisions and given priority as such or under the public policy proviso.

Part 2 – A Suggested Amendment to the CTC

In light of the findings in this thesis, it is useful to offer a draft of an amending enactment designed for adoption by the UAE legislator so as to make appropriate amendments to the CTC. This thesis proposes the following draft enactment.

We Khalifa Bin Zayed Bin Sultan Al Nahyan,

President of the United Arab Emirates State,

Pursuant to the perusal of the provisional 2 Constitution and Federal Act no. 1 of 1972, concerning the Jurisdictions of the Ministers and the Powers of the Ministers and the amending Acts thereof, and Federal Act no. 5 of 1985, concerning the Civil Transactions Code and the amending Acts thereof, and

Acting upon the proposal of the Minister of Justice and the approval of the Council of Ministers and the ratification of the Federal Supreme Council,

Have promulgated the following Act

Article 1

The Civil Transactions Act shall be amended by substituting a new version of Article 19 and adding an Article 27(2) so as to make better provision as to the law applicable to contractual obligations, as follows:

"**Article 19**

(1) The rights and obligations of the parties under a contract shall be determined in accordance with the proper law of the contract, ascertained as follows.

(2)(a) The proper law shall be the law of the country which the parties have chosen as the law governing the contract by means of an express agreement, or of an agreement which is clearly implied from the terms of the contract and the other circumstances of the case.

(b) The said choice may be made at any time; but a choice made after the conclusion of the contract shall not adversely affect the existing rights of third parties under the law previously applicable.

(c) The choice must be of the law of a single country and must be designed to apply to the whole of the contract. It shall not be possible to choose different laws to govern different parts of the same contract.

(d) A party may rely on the law of his residence at the time of contracting to show

that he did not agree to a choice of law proposed by the other party, where in the circumstances it would clearly be unreasonable to determine his consent to the alleged choice in accordance with the law allegedly chosen.

(3)(a) When there is no effective choice in accordance with paragraph 2 above, the proper law shall be that of the country to which the contract has its closest connection determined by reference to all of the circumstances that existed and were known to the parties at the time of contracting..

(b) For this purpose, unless the contrary is clearly demonstrated, the following presumptions as to closest connection shall be applied:
(i) where the contract is a consumer contract, that the contract is most closely connected to the country in which the consumer was resident at the time of contracting; otherwise,
(ii) where the contract is a contract of employment, that the contract is most closely connected to the country in or from which the employee was expected to carry out all or most of his work for the employer under the contract; otherwise,
(iii) where the contract is a contract of insurance, that the contract is most closely connected to the country in which the risk was located; otherwise,
(iv) where the parties were resident in the same country at the time of contracting, that the contract is most closely connected to that country; otherwise,
(v) where the contract is for the transfer or creation of proprietary rights in immovable property, that the contract is most closely connected to the country in which that property is located; otherwise,
(vi) that the contract is most closely connected to the country in which the party who is bound to carry out the performance which is characteristic of the type of contract in question was resident at the time of contracting.

(4) With regard to formalities, a contract shall be regarded as valid if it complies in form with the requirements of its proper law, or with those of a country in which a party, or an agent of a party, was present at the time of the negotiations that led to the conclusion of the contract, and in or from which he was acting in those negotiations.

Article 27

(2) Where a matter is subject to foreign law under the provisions of this Chapter, effect shall nonetheless be given to overriding mandatory rules of UAE internal law in cases in which the situation is connected to the UAE territory in such a manner as to give rise to a strong interest of the UAE in the application of the relevant mandatory rule in the circumstances of the case. This applies, in particular, to mandatory rules that are designed to protect a party to a contract, who is regarded as having weaker bargaining power than the other party, such as a consumer, an employee, or in certain cases, an insurance policy-holder.

The draft Article 19 is concerned with choice of law with respect to contracts. It allows the parties to choose the governing law for their contract expressly. In the absence of an

express choice, the court may determine an implied choice of law from the terms and circumstances of the case.

Moreover, the draft Article permits a subsequent choice of law after the contract was concluded, but such agreement does not adversely affect third party rights. The draft also insists that the governing law must be the law of a single country, which will govern the contract as a whole. The parties are not allowed to split the law that governs the contract.

The draft permits a party to invoke the law of his residence to show that he did not agree to a choice of law suggested by the other party, in circumstances in which it would clearly be unreasonable to determine his consent to the supposed choice in accordance with the law supposedly chosen.

The draft ensures that, in the absence of an express or implied choice of law by the parties, the applicable law should be the law of the country that is most closely connected to the contract. The determination of such choice must be made based on the all of the circumstances relating to the contract of which the parties had knowledge at the time of contracting. Further, to increase certainty and predictability, it provides various rebuttable presumptions as to closest connection and places them in order of priority.

Thus, the draft will usually subject an employment contract, in the absence of an express or an implied choice, to the law of the country in which the employee was expected to carry out all or most of his work for the employer under the contract. This presumption is also designed to offer the employee protection, since he is regarded as a weaker party in such a contract. Similar policies underlie presumptions for consumer contracts in favour of the law of the consumer's residence and for insurance contracts in favour of the location of the risk.

More generally, in cases in which the parties have a common residence at the time of contracting, there will be a presumption in favour of the law of the country of the common residence. Otherwise, there is a presumption in favour of the law of a country in which immovable property is located in the case of a contract involving the transfer or creation of proprietary rights in such property. The final presumption refers to the law of the residence of the party whose performance is characteristic of the type of contract involved such as the seller in the case of a sale of goods.

The last provision of the draft Article 19 is concerned with formalities, as the CTC has no existing provision concerning formalities. The draft aims to adopt a relaxed approach to formalities leaning towards validity. Thus, it upholds the validity of a contract that shall be considered valid if it complies with the formal requirements of its proper law or with those of a country in which a party, or an agent of a party, was present at the time of the negotiations that led to the conclusion of the contract and in or from which he was acting in those negotiations.

The draft addition to Article 27 is concerned with the application of overriding mandatory rules of the lex fori. Since no provision specifically deals with this matter in the existing CTC, the draft provides a separate basis for the application of such rules independent of the public policy proviso. It will apply in the cases in which the situation is connected to the UAE territory in such a way as to give the UAE a strong interest in the application of its mandatory rules in the circumstances of the case. It is explicitly provided that this may apply to mandatory rules that are intended to protect a party to a contract, who is regarded as having weaker bargaining power than the other party; such as a consumer, an employee, or in certain cases an insurance policyholder.

Part 3 – The DIFC

Choice of law in contract in the DIFC

DIFC law respects the parties' freedom to choose the law governing their contract. This right is ensured by several DIFC enactments subject to a proviso in favour of DIFC public policy.

However, there is some case law which suggests that the DIFC law prohibited the parties from choosing the law of the main UAE to govern their contract in view of on an article in the legislation that establishes the DIFC. The DIFC should reconsider the interpretation of this article and recognise that its aim is to prevent the DIFC judge from applying the UAE law by default and to empower the DIFC to establish its own commercial and civil laws.

There is no provision for an implied choice of law under the DIFC provisions. Therefore, in the absence of an express choice of law, the default rules will be applied. These simply subject the contract to DIFC internal law, which includes an enactment containing rules derived partly from the Vienna Convention on the international sale of goods. Where no other solution is available, as a last resort, the DIFC judge can use English law to fill any gap found or to answer any question that has not been covered by the DIFC Laws. Thus, English law has a supplementary role in relation to DIFC law.

Other aspects of private international law in the DIFC

Initially, the jurisdiction of the DIFC courts was limited to certain cases specified by the DIFC law which involved various connections with the DIFC territory. However, recently the jurisdiction of the DIFC courts has been expanded so as to allow any parties who wish to litigate in the DIFC to create jurisdiction by agreement.

With regard to arbitration in the DIFC, the Arbitration Law is based on the UNCITRAL Model Law, which is the accepted international standard for a modern statutory arbitration system. Moreover, the DIFC has established the DIFC-LCIA Arbitration Centre, which will have a great positive impact for the UAE and for Dubai in particular to make it an attractive international financial and commercial centre.

The DIFC courts have recently accepted jurisdiction to ratify any arbitral award, even if the parties, their assets, and the subject of the dispute have no connection to the DIFC territory. This feature is attractive for parties who succeed in arbitral proceedings, since ratification in the DIFC will be shorter and faster than elsewhere in the UAE.

The DIFC courts have only the power to enforce judgments within the DIFC territory. Thus, enforcement of a DIFC judgment elsewhere in the UAE is subject to the general rules of enforcement under UAE law. However, such enforcement should not involve any serious difficulty.

In the case of a conflict of judgments between DIFC courts and main Dubai courts, the legislator has been silent on this issue. It is suggested that the matter should fall under the jurisdiction of the court of cassation and that the jurisdiction of the court of cassation should be extended in this respect by amendment. It seems difficult to subject the issue to the jurisdiction of the Federal Supreme Court, as the conflict is between judgements between two courts of the same emirate.

In contrast to enforcement elsewhere within the UAE, the enforcement of a DIFC judgment outside of the UAE will be subject to all relevant treaties and to the law of the country addressed. The new mechanism designed to improve the enforcement abroad of DIFC judgments by way of converting the judgment into an arbitral award seems likely to be beset with difficulties for the various reasons that have been explained in chapter 6.

Since the UAE and particularly the DIFC are seeking to offer an attractive environment for investors, it is suggested that the UAE should accede to the Hague Convention 2005 on Choice of Court Agreements, which would have a significant impact in improving the enforceability of DIFC judgments in countries outside of the UAE.

The problems that are raised and discussed herein concerning the choice of law may be resolved in light of suggested amendments to the CTC rules. Regarding the DIFC, various areas of private international have been examined, and the DIFC may examine the discussed issues and consider the solution suggested. Issues such as the jurisdiction between the main Dubai courts and the DIFC courts need to remain under review until a law is established by the legislator to eliminate this issue by establishing the jurisdiction of each court and the solution to jurisdiction conflicts. Future research could examine areas such as the application of Islamic rules to Islamic business and its relationship with the DIFC legal system.

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