

Choosing the Law that Applies

Common European Rules

The exportation of goods or the provision of services in the European Union will involve the legal systems of different states. There are two aspects to this matter. The first aspect concerns which particular country's laws apply. The second aspect relates to which country's courts may or must hear disputes which may arise. Disputes can be heard in one country (say England) to which the law of another country (say Ireland) applies. In this case Irish law would have to be proved to the English court.

European Union law has put common rules in place in relation to the laws applicable in contract disputes and in relation to which courts have power to hear them. If the parties involved in an international sale or service do not specify which law applies to their contract and which country's courts will hear disputes which may arise, certain default rules apply. Where consumers are involved, disputes must be heard by the consumer's home court.

The so called "Rome Convention" applies to contracts where there is a choice of law between different countries. The Rome Convention takes precedence over all the rules in European Union States so as to provide uniformity. Any sale or supply of goods and services will involve a contract.

A consumer is generally entitled to be sued in his own state. This rule will override what is stated in a contract. This entitlement will have to be claimed by the consumer if proceedings are issued in another state. There are certain exclusions for particular types of dispute e.g. relating to foreign property. The general rule does not apply to such matters as property, trust, wills, succession and companies.

The general principle in non-consumer matters (which would apply in dealings between businesses) is that parties to a contract can expressly or impliedly chose the law

governing the contract. If there is no express choice of the applicable law, the contract will be governed by the law of the country which is most closely connected to it.

Prior agreement in non-consumer cases

A choice of a particular law may be implied where the one country's standard form of contract applies, where there are previous dealings between the parties, where there is a choice of a particular court to hear the dispute, where there is reference to a particular legal position or whether there is an express choice in related transactions between the same parties.

Although parties are allowed to choose a foreign law (the law of a third country) as applicable where all the relevant circumstances occur or are related to a particular country, it is not possible to avoid the "mandatory" rules of the country concerned. In this context "mandatory" rules mean rules of public policy or (typically consumer protection laws) which are designed to protect the public or some public interest.

It is possible to choose contract rules that will apply in the context of prospective disputes or in the context of prospective arbitration but it is not possible to choose the laws of another country to avoid the criminal or consumer protection law of a particular state in which performance of the contract takes place.

Applicable Law where no prior agreement

If a contract does not state which country's law shall apply, the contract is to be governed by the law to which it is most "closely connected". It is presumed to be most closely connected to the country where the party who has to perform the aspects of the contract which is the "characteristic performance" of the particular transaction or contract is habitually resident or his its central administration. In this context, "characteristic performance" means delivery of goods, the granting of right to use particular item, provisions of service or banking. It does not refer to the payment of money.

Where arbitration clauses provide for arbitration in a specified place, circumstances may indicate that the law of that country should be the applicable law.

The characteristic performance presumption does not apply if it appears in the circumstances that if the contract is more closely connected with another country. This allows an element of discretion as to where it is felt the particular circumstances do not sit comfortably with the above presumptions.

Mandatory Rules

"Mandatory rules" mean rules which cannot be contracted away. These are usually consumer protection type laws prescribed for the protection of the public in a particular country. Where contract is connected to one country only, the parties cannot restrict the application of the mandatory rules of that country. Neither can the parties restrict the application of the mandatory rules of the place where the dispute is held.

In addition where a law chosen in a contract is incompatible with the public policy of the courts where the matter is being heard, the courts can refuse to enforce the rules of law the parties have chosen.

Special rules are often applicable for the protection of consumers. A consumer is a person who is acting outside his trade or business. This will generally mean he is acting in a personal capacity. The consumer will be entitled to the protection of the mandatory rules in the country of its habitual residence if the contract was concluded in that country, if the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising or if he has taken all necessary steps for the conclusion of the contract in that country. This will also be the case if the contract was for the sale of goods and he travelled from that country to another country provided the journey was arranged by the seller for the purpose of inducing the consumer to buy

In the above circumstances, the applicable law must be the law of the habitual residence of the consumer. This rule does not apply to a contract of carriage or the supply of services which are to be supplied wholly outside the country of habitual residence.

Where a right to use property, land or buildings is involved, the contract is most closely connected to the country in which the property is situate. Where land and buildings are in any way concerned, the law of the country in which the property is situate is mandatory in relation to formal requirements and validity.

Miscellaneous

There are special rules for employment contracts. They will be governed by the law of the country in which the employee habitually carries out the work. This is the case even if he is temporarily employed in another country. If the employee does not habitually carry out his work in one country, the law of the country in which the place of business by which he is engaged is situated will apply unless it appears in the circumstances as a whole that the contract is more closely connected with another country.

Where a civil wrong (e.g. negligence or intentional damage to property) is involved, the general rule is that the applicable law is the law of the country in which the event constituting the civil wrong occurred. There are more complicated rules where the matter concerned occurs in different countries.

English courts will not enforce a contract to break the laws of a foreign friendly state where performance is illegal by the law of the place where it is to be performed. Therefore, where parties enter a contract for a sale knowing it deliberately breaks the laws of another country, the English courts would not generally enforce it.

The Courts of one country will not generally enforce directly or indirectly revenue laws and penal laws, or administrative laws of another country. Courts of one country do not enforce the criminal laws of another country. An act committed abroad is not generally punishable.

This Guide is intended as an overview and broad outline of the matters covered in it. Its purpose is to inform and raise awareness. We are happy to offer specific legal advice on particular circumstances. This Guide should not be relied on as a substitute for comprehensive legal advice with reference to the particular circumstances.

While we have taken care in the preparation of this publication, we do not accept legal liability as a result of any reliance placed on anything in this Guide. The reader should rely only on specific legal or taxation advice.

© Paul McMahon Lavelle Coleman 2009