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Italy: The Rome Convention: Different Approaches

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Article by [Marco Pistis](#)

Abbateciani Studio Legale e Tributario



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The rules of conflicts of law for contractual obligations vary from country to country and there are very different approaches to how to solve the problem of which law should be chosen. Furthermore the differences between various types of contracts complicate the situation: a mechanical choice of law rule, for example, may be welcome for a contract to sell, or a contract of employment or a contract for the carriage of goods by sea. On the other hand, the same mechanical rule may give rise to a lot of problems in matters concerning offer and acceptance, capacity of parties, contractual formalities or illegality¹. For this reason almost every legal system approaches the problem of conflict of laws in the contractual field with flexibility and sensitivity both to the different circumstances of the contract and to the situation which has arisen between the parties².

In this particular field, in recent times, America has made a very interesting contribution in following a modern idea on choice of law and introducing the concept of "governmental analysis" in order to solve the problem of which law should apply in case of conflict in contract matters³.

The basic principle of interest analysis requires an opinion of the court to ascertain the content of the different related laws in order to find the purposes of these laws and, in consequence of this, to decide whether or not a State has a legitimate interest with reference to those particular facts⁴. If only one State has a real interest in deciding the matter there is a fake conflict of laws and the law of that State must obviously apply.

The leading case for the application of this theory was *Babcock v. Jackson*⁵ that provides a very good illustration of how this doctrine works. In this tort case both the plaintiff and defendant were New York residents and had a car accident in Ontario and the conflict was between a law of the latter created to prevent collusive claims against insurer companies and a New York law concerning the compensation of plaintiffs. It was said that there was a false conflict of laws because Ontario was not concerned with protecting defendants or insurers from New York while New York was interested in compensation⁶. Even though this was clearly a tort case and the governmental interest analysis was been first introduced in torts, this particular doctrine has been applied in United States in many other fields of the conflict of laws, included contracts.

Since its inception European experts have been fascinated by this new doctrine, the chief merit - which is remarkable flexibility. The development of interest analysis in United States is due to the particular political and geographic situation where it can be considered not only an attractive theory but also a pragmatic response to practical difficulties. However there is a lack of consistency in the courts finding the purpose of a foreign law and, even when this purpose has been discovered, there may be no objective truth in deciding whether the respective States have an interest in having their law applied⁷. Another problem arises when neither State is interested, in other words in a "zero interest case"⁸. On the other hand when only one State is interested the theory works well and its flexibility offers a wider range of solution to practical problems. According to the father of governmental interest analysis the approach is mostly about the study of the process of construction and interpretation of statutes and American lawyers are very comfortable with the concept of sociological jurisprudence⁹.

However this theory works much better in a federal State than in an international context where a common lawyer could be asked to interpret a civil law statute.

Sociological jurisprudence and the pragmatic approach in America have convinced their lawyers that certainty has been over evaluated and that flexibility must be the key to solving the problem of conflict of laws but this will hardly convince continental lawyers due to the inevitable lack of uniformity, certainty and predictability caused by fully accepting this point of view.

As a matter of fact the English approach to the conflict of laws in contracts has always been very different. In order to respond to changes in international trade English courts started to develop the concept of party autonomy as the basis of choice of law in this matter¹⁰. The principle of party autonomy was born in the nineteenth century and developed in the twentieth century and stated that the law chosen by the parties or presumably chosen by the parties should govern a contract. The principle of party autonomy can be seen "as the conflict of laws aspect of freedom of contract or of the market economy"¹¹. The principle of party autonomy, however,

has been well accepted also in civil law countries all around Europe and the only issue that caused some difficulties was the burden of parties' freedom of choice. Lord Wright in *Vita Food Products Inc. v. Unus Shipping Co.* stated that "connection with English law is not as a matter of principle essential"¹².

However in some cases courts were prepared to draw an inference in relation to the choice of the parties about the governing law of a contract. Bowen L.J. in *Jacobs v. Credit Lyonnais* said that this particular approach was adopted in order to apply "sound ideas of business, convenience, and sense to the language of the contract itself, with a view to discovering from it the true intention of the parties"¹³. While the presence of a jurisdiction or arbitration clause in a particular country could infer the choice of the parties about the law governing the contract the presence of such a clause has not always proved conclusive¹⁴. In *Compagnie Turisienne de Navigation SA v Compagnie d'Armement Maritime*¹⁵ Lord Wilberforce stated that an arbitration clause "must be treated as an indication, to be considered together with the rest of the contract and relevant surrounding facts".

Only in cases of absence of choice, whether express or implied, have the English courts determined the law of the contract by choosing the law that, with reference to the particular transaction, had the closest and most real connection¹⁶. However courts, in relation to the test of the objective presumed intention, had previously expressed a similar idea¹⁷ and the line between these two analogous interpretations was frequently blurred¹⁸. Theoretically, in the absence of choice which was considered to be the first test, as a second test a court had to rely on the search for the inferred intention of the parties and only as a third choice it had to rely on the search for the closest and most real connection. However, due to the fact that the test for the inferred intention and the close connection often merged into each other in practice a similar result could be obtained by moving straight forward to the application of the second test and, even most frequently, the courts moved directly from the first to the third stage¹⁹.

The Privy Council, adopted the concept of the objective test of the "closest and most real connection" in 1950, in *Bonython v Commonwealth of Australia* following the studies of Cheshire²⁰.

In *Re United Railways of the Havana and Regla Warehouse Ltd*²¹ it was stated that there are particular characteristics to be taken into consideration such as: the place of contracting, the place of performance, the places of residence of the parties, the place of business of the parties and the nature and the subject-matter of the parties.

One of the most important cases in this field, *The Assunzione*²², provides very useful clarification of the balance between the various arguments made by the courts in order to choose the proper law of the contract. This was a case concerning a contract for the carriage of wheat shipped between the French and Italian Government and the charterers were French grain merchants. The Italian owners of the ship did not know that the agreement was between the two governments and the contract was negotiated between Italian and French brokers by correspondence. The contract was formally concluded in Paris and was written in the English language and in an English standard form but freight and demurrage were payable in Italian lire. The courts stated unanimously that Italian law was the proper law of the contract mostly due to the fact that both parties had to perform in Italy²³.

This was briefly the position of the common law in force in England for the conflict of law in contractual obligations before 1991 and is still the position in many Commonwealth countries²⁴ based on the theory, in absence of choice, of the closest and most real connection.

The common law rule survived until 1990 when The Contracts (Applicable Law) Act 1990 gave effect in United Kingdom to the Rome Convention on the Law Applicable to Contractual Obligations²⁵. The Rome Convention originated in 1967 in a suggestion by the Benelux countries to work together with experts from Europe in the codification, unification and regulation of the rules of the conflict of laws in the then European Union. After the successful conclusion of the Brussels Convention on jurisdiction and enforcement of judgements in civil and commercial matters in 1968, an expert group, expressly authorized by the Committee of Permanent Representatives of the Member States, started to work to the modification of the rules concerning the law applicable to contractual and non-contractual obligations. The Convention was finalised in a special meeting in the Council of the European Communities in Rome in June 1980 and opened for signatures several days later, on 19 June 1980 but was signed by United Kingdom only in 1981 and ratified by it in 1991.

The 1990 Act has been widely criticised in United Kingdom: "The Act replaces one of the great achievements of the English judiciary during the last 140 years or so, an achievement which produced an effective private international law of contracts, was recognized and followed in practically the whole world and has not at any time or anywhere led to dissatisfaction or to a demand for reform"²⁶.

According to Mr. Vogelaar, the Director-General for the Internal Market and Approximation of Legislation the principle scope of the Convention was to strengthen confidence in the stability of legal relationships and to facilitate agreements on jurisdiction along with the applicable law.²⁷

The explanatory report of Professors Mario Giuliano and Paul Lagarde published in the *Official Journal* has a special status in the interpretation of the Convention in matters referred to the European Court. In fact, in an appended Protocol, which has never been brought into effect in the United Kingdom, there is a provision that gives the European Court jurisdiction to rule on the interpretation of the Convention. In consequence of this, any issue of interpretation that has not been referred to the European Court must be solved with reference to the principles set down by the relevant decisions of the European Court.

Following article 1(1) the Rome Convention applies to "contractual obligations in any situation involving a choice between the laws of different countries". It is not within the scope of this essay to focus on the details of how and when the rules of the Convention apply or to explore the numerous exceptions to the rule but it is proposed that a further examination of the rules for the determination of the applicable law be made.

The rules of the Convention for the choice of law are based on the principle of the "freedom of choice" in accordance, as we have seen, with the background of the common law theory and recent American doctrine. In fact, article 3 (1) of the Convention, entitled "Freedom of Choice" states: "A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty 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".

As we have seen this provision is not so different from the provisions of the common law based on the basic principle of party autonomy that started to become part of English law in the nineteenth century when it turned out to be accepted that an express stipulation of the governing law was a *prima facie* presumption of the intention of the parties²⁸. In the United States the principle of party autonomy came later and was opposed by Professor Beale with the objection that the freedom of choice "involves permission to the parties to do a legislative act"²⁹. However, these days the doctrine of party autonomy is well accepted also in United States, provided at least that the law chosen by the parties has some relationship to the parties themselves or the transaction involved and provided that some important rules concerning the forum or the law are not avoided³⁰. Even in England, the principle became firmly entrenched only in 1970 when Lord Reid stated: "Parties are entitled to agree what is to be the proper law of the contract"³¹.

The Rome Convention embraces this principle.

The main difference between the Rome Convention and the old approaches is that the former allows the choice of law which has no connection to the transaction. The combined effect of Article 1(1) and Article 3(1) is that parties may choose a law of a country that has no connection with them or the contract and the courts of Contracting States must give effects to that choice.

A difficult problem arises when it is necessary to determine which are the words in the contract that can be considered an express choice with reasonable certainty. In this particular matter, attention must be paid to all the circumstances of the case enabling the courts to look at the practical realities: merchant practices, the choice of standard forms used world wide and developed in particular countries where a particular expertise has been recognized³² and also the previous course of dealing between the parties. In *Egon Olderdorff v Libera Cop. (No. 2)*³³, the use of an English standard form and the presence in the contract of an arbitration clause referring to the court of London was considered enough to demonstrate the choice of English Law.

As per Article 3(1) the parties can decide that a particular law applies only to a part of the contract and this allows the so-called *dépeçage* that is technically a splitting of the contract between different legal systems³⁴.

After apparently following the ideas of the former common law rules, the Rome Convention picks up some of the new concept of the American theory of the "interest of involved states" providing an exception to the "freedom of choice" with the so-called "mandatory rules". In fact, Section 3 (3) of the Rome Convention states: "The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign tribunal, shall not, where all the other elements relevant to the situation at the time of the choice are connected with one country only, prejudice the application of rules of the law of that country which cannot be derogated from by contract, hereinafter called 'mandatory rules'".

English lawyers are not very familiar with the concept of "mandatory rules" and these words seem to be used in two different senses under the Rome Convention³⁵ following the analogous distinction between the French idea of *ordre public interne* and *ordre public international*. In French legal doctrine there is a distinction between *dispositions imperatives* and *lois de police*. The latter operates on the field of private international law and the first covers situations that the parties cannot derogate from in domestic matters³⁶. In other words Article 3(3) prevents the party escaping particular rules that, due to the nature of the facts, "ought" to apply³⁷ and Morse has observed that, by virtue of this provision, the parties may not internationalise a domestic agreement to avoid mandatory rules³⁸.

However the language used in the formulation of Article 3(3) is not very precise with particular reference to the explanation of the "elements relevant to the situation at the time of the choice". It is likely that some facts, which are connected with another legal system, cannot be considered "relevant". If an Italian company hires an Italian worker for work to be carried out in a firm in Italy and the contract states that the law applicable is the French law could it be considered "relevant" that the worker has been working for two years in Paris in the past? Even if the relevance is referred to the "time of the choice" there are some cases where the term can be considered ambiguous³⁹.

Another controversial point is the definition of mandatory rules in Article 3(3) that is followed by the uncontroversial words "hereinafter called mandatory rules". Notwithstanding the analysis of Article 7(2) shows a clear lack of consistency:

"Nothing in this Convention shall restrict the application of the rules of the law of the forum in a situation where they are mandatory irrespective of the law otherwise applicable to the contract".

It seems clear that this avoids the precise definition of the "mandatory rules" and it seems also clear that refers to the *lois de police*

(this term is in fact used in the French version) and not to mere *dispositions imperatives*⁴⁰. The English text in particular, if compared with the French version, is not very clear however the rules of the above-mentioned article are the rules that have to apply in spite of any consideration about the choice of law rules of the forum.

With reference to Article 7(2) and the example above, we have to define a range of different situations:

- the contract is domestic to Italy that is the forum state but the parties have chosen the French law as the applicable law: the Italian *dispositions imperatives* will apply by virtue of Article 3(3) and also "international mandatory rules" will apply by virtue of Article 7(2);
- the contract is domestic to Italy but the parties have chosen the French law as the applicable law to the contract: articles 3(3) and 7(2) will apply;
- the contract has connections with Italy that is the forum State, with France and England. What if the parties have chosen the English law as the law applicable to the contract? It is not disputable that the "international mandatory rules" of the Italian forum will apply by virtue of article 7(2). But what if there is a conflict between the English and the Italian mandatory rules? And what if the English mandatory rules are contrary to the Italian *public policies*? Most writers would say that the rule of the forum should prevail but there is a clear lack of certainty and predictability in this field.

The ideas of American writers have been followed in order to give more flexibility to the rules of the Convention and the mandatory rules concept seems to have more than one similarity with the governmental interest analysis theories but the results are not very satisfactory.

In the case of the application of the mandatory rules of third states the doubts are even more and the English point of view, explained in the 1999 edition of *Dicey and Morris* is extreme: "Mandatory rules which are not part of the law of the forum or of the applicable law are not normally applied by the English court"⁴¹.

The provision of the Convention where the mix between the common law rules and the American governmental analysis theory can be considered a recipe for uncertainty and confusion is Article 7(1) that states:

"When applying under this convention the law of a country, effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract. In considering whether to give effect to these mandatory rules, regard shall be had to their nature and purpose and to the consequences of their application or non-application".⁴²

The text of the Rome Convention, as we have seen, speaks of "another country with which the situation has a close connection" but the Explanatory Reports speaks of a connection "between the contract as a whole and the law of a country other than that to which the contract is submitted" increasing the confusion for the interpretation of the article.

In United Kingdom there was strong opposition to Article 7(1) and the English scholar Sir Peter North showed a firm position on that:

"Article 7(1) was a recipe for confusion, in that a judge might feel obliged to steer his way through three possibly mutually inconsistent sets of mandatory rules; for uncertainty, an uncertainty which freedom to choose the applicable law is intended, in the business community, to avoid; for expense, in that proof of the mandatory rules of all relevant connected foreign laws might be called for, and for delay, in that Article 7(1) might provide the means of delaying litigation inordinately, with a fear that it might frighten potential arbitration and litigation away from United Kingdom"⁴³. However, because of the opposition to this particular provision the United Kingdom made a reservation with reference to Article 7(1) that is not in force in the United Kingdom.⁴⁴

The references to the "closest connections" come out in Article 4(1) of the Rome Convention that states:

"To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country which it is most closely connected". However the most dubious and innovative approach is the presumption described in Article 2(2) that states:

"... it shall be presumed that the contact is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession, that country shall be the country in which the principal place of business is situated or, where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated".

The object of this doctrine should be to link the contract to the most connected law but also in this case its acceptance has been subject to criticism because it was difficult to apply and was considered too narrow to include most type of bilateral contracts of confidence. It was definitely not considered an effective method of determining the system of law that was most closely connected⁴⁵.

In conclusion, it can be said that the Convention seems to include most of the aspects of the American and English common law

points of view in a combination that creates uncertainty and confusion. Further the rules are too narrow and rigid to take an advantage of the flexible characteristics of both American and common law rules. It may well have been better to choose one of the two theories and to follow it: sometimes, when there is an attempt to take the best of everything, the results are not at all satisfactory.

Footnotes:

- 1 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 319.
- 2 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 320.
- 3 J. J. Fawcett, "Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?" (1982) 31 ICQL 150.
- 4 J. J. Fawcett, "Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?" (1982) 31 ICQL 150.
- 5 *Babcock v Jackson* 191 NE 2d 179 (1963).
- 6 J. J. Fawcett, "Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?" (1982) 31 ICQL 150 at 151.
- 7 See J. J. Fawcett, "Is American Governmental Interest Analysis the Solution to English Tort Choice of Law Problems?" (1982) 31 ICQL 150 at 153 and Weintraub, *Commentary on the Conflict of Laws* (1971) at 201-202. See also *Heath v Zellmer*, 151 NW 2d 664 at 675.
- 8 See *Neumier v Kuehner* 285 NE 2d 454 (1972).
- 9 See Brainerd Currie, *Selected Essays on Conflict of Laws* (Durham N.C., Duke Univ. Pr., 1973)
- 10 Lawrence Collins, *The Conflict of Laws* (London, Dicey and Morris, 2000) at 1196.
- 11 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 321.
- 12 *Vita Food Products Inc. v. Unus Shipping Co* [1939] AC 277 at 290.
- 13 *Jacobs v. Credit Lyonnais* (1884) 12 QBD 589.
- 14 See, for instance, *Compagnie Turisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572.
- 15 *Compagnie Turisienne de Navigation SA v Compagnie d'Armement Maritime SA* [1971] AC 572.
- 16 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 323. See also, for an explanation of the concept of "center of gravity" of a contract *Auten v Auten*, 124 NE 2d 99 (NY Cas, 1954).
- 17 See, for example, *Lloyd v Guibert* (1865) LR 1 QB 115 or the more recent *R. v International Trustee* [1937] AC 500.
- 18 Lawrence Collins, *The Conflict of Laws* (London, Dicey and Morris, 2000) at 1197.
- 19 See *Armadora Occidental SA v Horace Mann Insurance Co.* [1977] 1 WLR 520
- 20 Lawrence Collins, *The Conflict of Laws* (London, Dicey and Morris, 2000) at 1197. See also G.C. Cheshire, *Private International Law* (4th ed., Oxford, Clarendon Press 1952) at 312. See also for the concept again of the "most real connection" *Boissevain v Weil* [1949] 1 KB 482 at 490.
- 21 *Re United Railways of the Havana and Regla Warehouse Ltd* [1960] Ch 52 at 91.
- 22 *The Assunzione* [1954] P. 150.
- 23 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 324.
- 24 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 324.
- 25 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 324.
- 26 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 325 citing Mann (1991) 107 LQR 353.
- 27 See the citation in the Giuliano-Lagard Report, [1980] OJ C282.
- 28 *Jacobs v Crédit Lyonnais*, (1884) 12 QBD 589 at 600.
- 29 See Lawrence Collins, *The Conflict of Laws* (London, Dicey and Morris, 2000) at 1217 citing Professor Beale.
- 30 See Lawrence Collins, *The Conflict of Laws* (London, Dicey and Morris, 2000) at 1217.
- 31 *Withworth Street Estate v James Miller and Partners Ltd* [1970] AC 583 at 603.
- 32 See for example the recognized expertise of the English law in marine insurance in *Amin Rasheed Shipping Corp. v Kuwait Insurance Co.* [1984] AC 884.
- 33 *Egon Olderdorff v Libera Cop. (No. 2)* [1996] 1 Lloyd's Rep. 380.
- 34 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 329.
- 35 David McClean, *Morris: The Conflict of Laws* (London, Sweet & Maxwell Ltd, 2000) at 330.
- 36 David McClean, *Perspectives on Private International Law at the Turn of the Century*, (The Hague, Boston. London, Martinus Nijhoff Publishers, 2000) at 214.
- 37 David McClean, *Perspectives on Private International Law at the Turn of the Century*, (The Hague, Boston. London, Martinus Nijhoff Publishers, 2000) at 214.
- 38 C.G. Morse, "The EEC Convention on the Law Applicable to Contractual Obligations", (1982) 2 YBEL 107 at 124.
- 39 David McClean, *Perspectives on Private International Law at the Turn of the Century*, (The Hague, Boston. London, Martinus Nijhoff Publishers, 2000) at

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40 David McClean, *Perspectives on Private International Law at the Turn of the Century*, (The Hague, Boston. London, Martinus Nijhoff Publishers, 2000) at 215.

41 Lawrence Collins, *The Conflict of Laws* (London, Dicey and Morris, 1999) para 1-051. See also *Lemenda Trading Co. Ltd. V African Middle East Petroleum Co. Ltd.* [1988] QB 448.

42 The rule comes from Article 19 of the Swiss Federal Act and the Swiss influence in this field is remarkable.

43 Peter North, *Contract Conflicts: the EEC Convention on the Law Applicable to Contracts*, (Amsterdam-Oxford, North-Holland, 1982)

44 See section 2(2) of The Contracts (Applicable Law) Act 1990.

45 Peter North, *Contract Conflicts: the EEC Convention on the Law Applicable to Contracts*, (Amsterdam-Oxford, North-Holland, 1982) at 186-187, 209.

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