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# Rome I Regulation

## Choice of law

## Absence of Choice of law

## Slovak Case law

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## Material scope of Rome I Regulation

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- ▶ „*This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.*“ (Art. 1/1)
- ▶ What is „*a conflict of laws*“?
  - ▶ A foreign/international element
  - ▶ also a situation where the parties choose the applicable law while all other elements relevant to the situation are located in a country other than the country whose law has been chosen – long disputed, different approach by the Slovak national doctrine and the Rome I regulation
- ▶ What is „*a contractual obligation*“?
  - not defined in the Rome I Regulation
  - the notion of a contractual obligation varies from one Member State to another and should be understood as an autonomous concept
  - the substantive scope and the particular provisions of Rome I Regulation should be interpreted in consistence with Brussels I (rev) and Rome II Regulation
  - CJ EU case law on the notion of „contractual obligation“



## Material scope of Rome I Regulation

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### ▶ The following shall be excluded:

- ▶ revenue, customs or administrative matters;
- ▶ status or legal capacity of natural persons;
- ▶ obligations arising out of family relationships including maintenance obligations;
- ▶ obligations arising out of matrimonial property regimes and wills and succession;
- ▶ obligations arising under bills of exchange, cheques and promissory notes;
- ▶ arbitration agreements and agreements on the choice of court;
- ▶ questions of legal personality and internal functioning of companies (see Czech Supreme court: 29 Cdo 2842/2013);
- ▶ obligations arising out of dealings prior to the conclusion of a contract (*culpa in contrahendo* – falls under Rome II)
- ▶ and other (see Art. 1/2).



## Relationship with existing international conventions - Article 25 Rome I

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*„1. This 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.*

*2. However, 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 this Regulation.“*



## Universal application – Article 2 Rome I

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*„Any law specified by this Regulation shall be applied whether or not it is the law of a Member State.“*



## Exclusion of renvoi - Article 20 Rome I

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*„The application of the law of any country specified by this Regulation means the application of the rules of law in force in that country other than its rules of private international law, unless provided otherwise in this Regulation.“*



## Applicable law to contractual obligations

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- ▶ **Groundstone – freedom to choose the applicable law:**
- ▶ „*A contract shall be governed by the law chosen by the parties.*“ (Art. 3/1)
  
- ▶ Why would someone want to choose foreign law? (compared to jurisdiction)
  
- ▶ Is it possible to choose non-state rules (UNIDROIT principles...)?
  - ▶ „(13) *This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.*“ ...meaning: applicable only within the dispositive norms of otherwise applicable State law (the parties can not derogate from jus cogens – peremptory norms)
  - ▶ *Why is the choice of soft law limited?*



## Applicable law to contractual obligations

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- ▶ What are the conditions for the choice of law?
  - ▶ „*The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case*“ (Art. 3/1)
  - ▶ *Autonomous interpretation? Lex causae / lex fori? Valid if included in standard terms of contract? Slovak case law – see later.*
  - ▶ *Doctrine of separability.*
- ▶ Is the choice of court automatically a choice of law of the court?
  - ▶ „(12) *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.*“
- ▶ Is it possible to choose law of more than one state?
  - ▶ „*By their choice the parties can select the law applicable to the whole or to part only of the contract.*“ (Art. 3/1) – „*Mosaikbetrachtung*“



## Applicable law to contractual obligations

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- ▶ What are the restrictions of the choice of law
    - ▶ „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.“ (Art. 3/3) – prohibition of **circumventing of national mandatory rules**
    - ▶ „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“ (Art. 3/4) – prohibition of circumventing of EU regulations
    - ▶ **contracts with weaker party**: contracts for carriage of passenger (Art. 5/2), consumer contracts (Art. 6/2), insurance contracts (Art. 7/3), individual employment contracts (Art. 8/1) – will be addressed later
    - ▶ **Overriding mandatory** (imperative) provisions, **ordre public**
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## Applicable law to contractual obligations in absence of a choice - system

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- ▶ **Applicable law in the absence of choice:**
  - ▶ there are **4 specific types of contract** with special rules (protection of the weaker party): contracts for carriage (Art. 5), consumer contracts (Art. 6), insurance contracts (Art. 7), individual employment contracts (Art. 8)
  - ▶ if it is none of these 4 contracts, Art 4 applies:
    - ▶ Art.4/1 contains rules for **8 other types of contract**, („Strong“ assumptions of closest connection)
    - ▶ If **none or multiple contract types** – Art 4/2: party providing characteristic performance
    - ▶ Art. 4/3: Closest connection prevails (escape clause)
    - ▶ Art 4/4: if impossible, closest connection applies (residual clause)
  - ▶ **Relation between Art 4 subs 1-3, sequence of application**
  - ▶ **Art 4 RRI:**
    - ▶ aimed at reducing discretion – compared to Rome Convention,
    - ▶ significant for the interpretation of escape clause
    - ▶ One law to rule them all!
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Art 4/1. To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:

- ▶ (a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; (*definition of goods? Software? Shares?*)
- ▶ (b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence; (*lease/rent? Medical / lawyer services?*)
- ▶ (c) a contract relating to a right *in rem* in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated; (*definition of immovable? Attached things?, iura in re aliena – pledge? interpretation in line with art. 24 Birev, prevails over Consumer related regulation in art. 6, except timeshare*)
- ▶ (d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country (*2 berliners, contract has been terminated less than 6 M?*);
- ▶ (e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence; (*cooperation contract – franchisor develops the concept, franchisee operates it*)
- ▶ (f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
- ▶ (g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined; (*ebay?*)

## Applicable law to contractual obligations – Mixed and innominate contracts

- ▶ Art 4/2 „Where the contract **is not covered** by paragraph 1 or where the elements of the contract would be **covered by more than one** of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where **the party required to effect the characteristic performance of the contract has his habitual residence.**“ (Art. 4/2)
- ▶ „(19) In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its **centre of gravity.**“
  - ▶ „Internal“ (contract immanent) consideration!
  - ▶ Assumption that the seat of the party with the characteristic performance is the closest connection factor:
    - ▶ At the time the contract has been concluded
    - ▶ Sale of immovable combined with the obligation to render services?
    - ▶ Synallagmatic obligations? Mixed contracts – economic perspective (which performance is the more important?)?
    - ▶ Protective regulation shall prevail!

## Applicable law to contractual obligations – Escape clause and residual rule

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### ▶ „ESCAPE CLAUSE“ (Art. 4/3):

- ▶ „Where it is clear from all the circumstances of the case that the contract is **manifestly more closely connected** with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply.“
- ▶ „(20) In order to determine that country, account should be taken, inter alia, of whether the contract in question has a very close relationship with another contract or contracts.“
- ▶ External consideration (relation of contract to outside circumstances)!

- ▶ Residual rule: „Where the law applicable **cannot be determined** pursuant to paragraphs 1 or 2, the contract shall be governed by the law of the country with which it is **most closely connected**.“ (Art.4/4)
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## Overriding mandatory provisions

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### ▶ Article 9:

- ▶ „1. 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 this Regulation.
- ▶ 2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
- ▶ 3. Effect may be given to the overriding mandatory provisions of the law of the country where 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. 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.“

### ▶ **Slovak case study: I. publication of contracts, 2. consumer law**

- ▶ C-184/12 „Unamar“
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## Public policy of the forum

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- ▶ Article 21
  - ▶ „*The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.*“
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## Slovak case law (case study)

### 1. Validity of contracts?

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#### ▶ *Article 10*

#### ▶ **Consent and material validity**

- ▶ 1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
  - ▶ ....
  - ▶ What is material validity? Actio pauliana?
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## 2. Slovak Supreme court, file nr. 2 M Cdo 16/2014

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- ▶ Consumer contract (loan), czech creditor
  - ▶ Choice of law in standard terms of contract: - Czech law
  - ▶ Prescription period Commercial law (4Y) – Civil law (3Y)
  - ▶ 2nd instance: Interpreting Czech law, civil law prevails
  - ▶ Supreme court: Interpreting Czech law was wrong – according to Czech SC
  
  - ▶ Reaction: Amendment of Slovak Act on PIL: § 9 (3) *If the parties to a consumer contract choose a law that offers the consumer less protection than Slovak law, their relations are governed by slovak legal order*
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*Thank you for your attention.*

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