

Sources of Law

By reading the above texts we saw that the complexity of Private International Law is to some extent attributable to its origins and the nature of the relevant sources of law. As discussed before, the first task in any case with a foreign element is to identify the relevant rules and – if no harmonised substantive private law is applicable – its sources concerning international jurisdiction and choice of law: The first task is to identify the relevant rule and its source. Taking this preliminary PIL step is, however, not as easy as one might think: Not only are the sources of PIL rules spread across a broad national, regional and international spectrum; the same is true for the relevant substantive private law sources.

Harmonised substantive private law: *European Community sources*

Anyone who has studied the law of obligations in a given EU Member State will know that the majority of the substantive rules are rules of national, domestic law, i.e. the law of that particular State. So far only a few sub-areas within the private law of obligations have been harmonised into regional European Union law. Most of these sub-areas relate to selected subjects within consumer contract law, as well as parts of product liability law. *These harmonised substantive private law sources prevail over any PIL rules.*

Harmonised substantive private law: *international sources*

Because there is no global legislator of private law, the harmonisation of substantive commercial law proceeds very slowly at international level, since States have to enact and ratify individual treaties harmonising distinct areas of private law. The most significant of these treaties is the **United Nations Convention on Contracts for the International Sale of goods (CISG)** currently applicable in some 70 Contracting States worldwide. *These internationally harmonised substantive private law sources prevail over any PIL rules.*

Conflict of Laws: *European Community Sources*

When we change our focus from private substantive law to conflicts of laws, our starting point changes too: although private international law consists of national law to a certain extent (i.e. each sovereign State has its own private international law), European harmonised regulations and international conventions govern many significant

private international law topics, such as jurisdiction, choice of law in contract and tort, as well as recognition and enforcement of foreign judgments.¹ To help deal with the increasing volume of international activity across State boundaries within the European Union, the Member States have relinquished a significant portion of their sovereignty for the good of the larger community: This has led to an increasing number of European conflict rules which apply in almost all Member States. Most important examples are the Rome I Regulation regulating the law to be applied in EU Member State courts in contractual matters, whereas the Rome II Regulation deals with the law applicable in matters relating to tort. Another key example of such harmonisation is the Brussels I Regulation on International Jurisdiction. *These European Conflict of Law sources prevail over any national PIL rules (where applicable).*

Conflict of Laws: *International Sources*

Other significant conflict of law sub-topics are regulated by international (worldwide) treaties and instruments, e.g. the Hague Convention on the law applicable in international sales (currently in force in five EU Member States). *Internationally harmonised Conflict of Law sources prevail over any European and national PIL rules.*

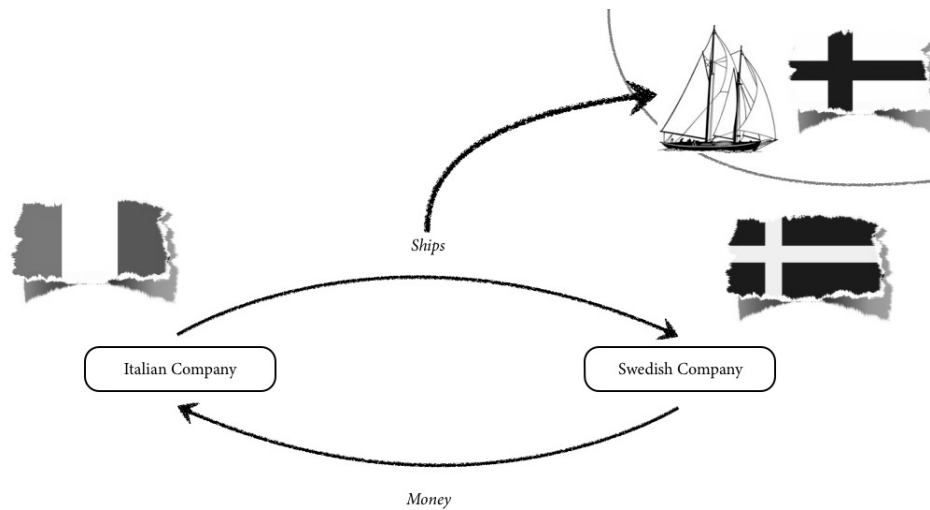
Connecting Factors

When a given PIL rule leads to the conclusion that a court in a given State is competent to adjudicate a private law dispute with an international element, that decision can usually be traced to the existence of a certain connection – the existence of one or more **connecting factors** – which serves to provide a legally sufficient link between the forum State (and its courts) on the one hand and the parties and circumstances of the particular case on the other. Similar connecting factors are also at work when a competent court in a given State decides to choose and apply the substantive law of that State or a different State. A closer examination of the role played by the connecting factors might be helpful, since this aspect of Conflict of Laws provides the underlying core for many Conflict of Laws issues in lectures which follow. To help bring this

¹ *Nevertheless, even in this age of increasing globalization and EU harmonisation, the individual Member States still retain a measure of PIL sovereignty, especially as regards the jurisdiction of national courts in case of non-EU defendants and also as regards the recognition and enforcement by EU Member States of decisions rendered by non-EU Member State courts.*

preliminary discussion a bit more down to earth, we will work on the concrete Case 3.

The facts are as following:

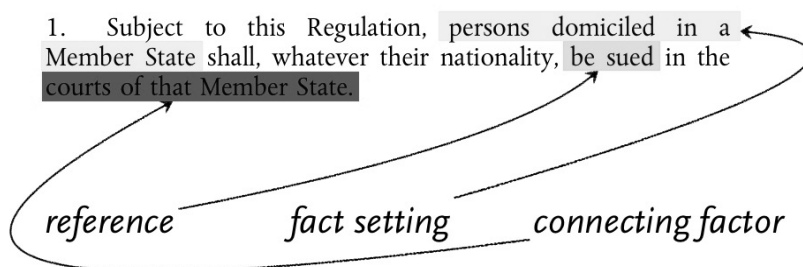


A Swedish company and an Italian company enter into a contract of sale. According to this contract, the Italian company shall deliver ships and the Swedish company shall pay a certain purchase price. Thus, the Italian company is the seller; the Swedish company is the buyer. The Italian company shall deliver the ships not to Sweden but to Finland. The contract of sale contains neither a jurisdiction agreement nor a choice of law agreement. The Italian company delivers the ships to Finland. However, the Swedish company refuses to pay on the grounds that the ships are not in accordance with what was agreed. The Italian company argues that they are exactly in accordance with what was agreed and insists that the Swedish company is obliged to pay the purchase price. The Swedish company, on the contrary, still refuses to pay. Where could the Italian company sue (internationally competent court) and which law is applicable?

Jurisdiction

Since the defendant in this case is domiciled in an EU Member State (Sweden) and there is no jurisdiction agreement, the issue as to which court can exercise jurisdiction in this situation is governed by the Brussels I Regulation: Article 2 embodies the **general jurisdiction**; according to this provision, persons domiciled in a Member State shall be sued in the country of their domicile. We can break down the jurisdictional rule into its key component parts.

Article 2



Rule	Art. 2 Brussels I
PIL Issue	International Jurisdiction of Courts
Reference	<i>shall be sued</i>
Fact setting	<i>person domiciled in a Member State</i>
Connecting Factor	<i>in the courts of that Member State</i>

In our case, the defendant is the Swedish company. For the present purpose, according to art 60, the defendant company is domiciled in Sweden. Hence, in accordance with Article 2, Swedish courts have general jurisdiction in this case. Let's now turn to Article 5 Paragraph 1 of the Brussels I Regulation. This Paragraph provides for a special jurisdiction for disputes which arise from contracts.

Rule	Art. 5 para 1 lit (b) first and second limb Brussels I
PIL Issue	International Jurisdiction of Courts
	<i>(Reference: "be sued")</i>

para 1 lit (a)	
Fact Setting:	<i>"place of performance of the obligation in question"</i>
Connecting Factor:	<i>"in the courts of that Member State"</i>

Is concretised by [hence, it is a **subsidiary reference**]

Para 1 (lit b) first limb	
Fact setting:	<i>"the sale of goods"</i>
Connecting factor:	<i>"place where the goods were delivered"</i>

Accordingly, the claimant may opt for bringing proceedings at the place of performance. As to the sale of goods, the place of performance is defined as the place where the goods were delivered or should have been delivered. In our case, the goods were delivered to Finland. Thus, Finland is the place of performance and this means that

the Italian company may opt for bringing proceedings not in Sweden but in Finland. In other words, it is left to the Italian company to decide whether it wishes to sue the Swedish company in Sweden under Article 2, or whether it wishes to sue in Finland under Article 5. Swedish courts have general jurisdiction under Article 2, Finnish courts have special jurisdiction under Article 5. Assuming the Finnish court does indeed declare itself competent, we already elaborated that the procedure conducted by the Finnish Court will be governed by its domestic law (*lex fori*).

Choice of Law

Given its international competence, the Court will have to determine that it has the power to **apply rules of substantive contract law**, so as to determine the rights and obligations of the parties in this contractual context, i.e. adjudicate the merits of the Italian company's claim against the Swedish company.

- **International Convention – Substantive Law:** A contract of sale exists and, hence, it must be examined whether or not the contract falls under the United Nations Convention on Contracts for the International Sale of Goods, 1980.²
- **International Convention – PIL rules:** EU Member States which have ratified the 1955 Hague Convention on the law applicable to the international sales of goods apply this Convention and not the Rome I Regulation to resolve 'sales conflicts' in non-consumer sales.³
- **European Regulation:** Since the rules on harmonised international substantive law and the rules on harmonised international conflict rules are not applicable, the Rome I Regulation will apply to contractual obligations.

Rules in the Absence of Choice

As submitted, the contract of sale does not contain a choice of law agreement and indeed the parties may never have given any thought to the matter at the time when the contract was made – neither the terms of the contract nor the circumstances of the case provide a clear (or reasonably certain) indication of the parties' choice. In all such situations, the forum court will need to revert to the relevant default rule in the regulation so as to fill the resulting contractual 'gap' and designate the substantive contract law which the court will then apply. Although the Regulation contains a number of

² We have a contract about ships and such contracts do not fall under this CISG.

³ However, the possibilities of application of the Hague Convention are rather limited: To date only Argentina, the Czech Republic, The Netherlands, Slovakia and Moldova have signed the Convention.

special default choice-of-law rules designed for application in particular contractual contexts (e.g. employment contracts or consumer contracts), the general – and clearly most important – default provision is set forth in art 4.

Rule	Art. 4 Rome I Regulation
PIL Issue	applicable law to contracts
Reference	<i>"the law applicable to the contract"</i>
Fact setting	<i>"sale of goods"</i>
Connecting Factor	<i>"law of the country where the seller has his habitual residence"</i>

Under subparagraph (a) of art 4 (1) of the Regulation, a contract for the sale of goods shall be governed by the law of the country where the seller has his/her habitual residence. In sharp contrast with the original Convention scheme, art 4 (1) of the regulation establishes a series of **single contact "fact settings"** (one contact for each significant contract type) and makes each such **fact-setting-test** decisive for the law applicable under the contract concerned. Where the contract cannot be categorised as being one of the types specified in art 4(1) or where its elements fall within more than one of the specified types, it is governed by the law of the country where the party required to effect the performance which is characteristic of the contract has his/her habitual residence.

Rule	Art. 4 para 1 Rome I Regulation
PIL Issue	applicable law to contracts
Reference	<i>"shall be governed"</i>
Fact setting	<i>"the contract "</i>
Connecting Factor	<i>"where the party required to effect the characteristic performance of the contract has his habitual residence"</i>

In our case, we have a contract of sale. The Italian company shall deliver ships; the Swedish company shall pay the purchase price. Hence, the Italian company is the characteristic performer. Thus, according to the Rome I Regulation, Italian law governs the substance of the dispute. The same would apply if the Italian company sues in Sweden because – as a Member State – the Rome I Regulation applies as well.

Safety Valve

There is, to be sure, a 'safety valve' or 'escape clause' (so termed in para. 20 of the Preamble) in art 4 (3).

Rule	Art. 4 para 3 Rome I Regulation
PIL Issue	applicable law to contracts
Reference	"shall be governed"
Fact setting	"the contract manifestly more closely connected with a country "
Connecting Factor	"law of manifestly more closely connected country"

This escape clause is a narrow one: where it is clear from all circumstances that the contract is *manifestly* more closely connected with a country other than indicated in para (1) or (2), the law of that other country shall apply.

Literature for November 8, 2011:

- *Re Maldonado* [1953] 2 All ER 1579,
- *Print Concept GmbH v GEW (EC) Ltd* [2001] EWCA Civ 352 (Court of Appeal),
- *Land Rover Exports Ltd v Samcrete Egypt Engineers and Contractors SAE*, Court of Appeal December 21, 2001
- ECJ 17-6-1992, Case C-26/91, *Jakob Handte & Co GmbH v Traitements Mécano-chimiques des Surfaces SA*, *European Court Reports* 1992, I-03967
- ECJ 6-10-1976, Case 12/76, *Industrie Tessili Italiana Como v Dunlop*, *European Court Reports* 1976, 1473,
- ECJ 20-2-1997, Case C-106/95, *Mainschiffahrts-Genossenschaft eG (MSG) v Les Gravières Rhénanes SARL*, *European Court Reports* 1997, I-00911.