Chapter 2
Conflict of Laws

2.1 Introduction

In any case which involves a foreign element it may prove necessary to decide which system of law is to be applied, either to the case as a whole or to a particular issue or issues. Such foreign elements may be constituted by the central administration or headquarters of each of the parties being located in different countries or by the fact that the site is located in a country different from the home country of either of the parties.

The identification of the appropriate law may be viewed as involving a three-stage process: (1) characterisation or classification of the relevant issue; (2) selection of the rule of conflict of laws which lays down a connecting factor for that issue; and (3) identification of the system of law which is tied by that connecting factor to that issue.[1] In practise, in particular at pre-contract stage, the approach should be a bit more sophisticated, as such:

- Identification of the forum (which is either stipulated or not)
- Identification of the applicable set of conflict of laws rules (determined by the seat of the forum)
- Characterisation or classification of the relevant issue (contract issue, pre-contract issue, tort issue, power of attorney issue, formal requirement issue, etc.)
- Selection of the rule of conflict of laws which lays down a connecting factor for that issue
- Identification of the system of law which is tied by that connecting factor to that issue

At a first stage the jurisdiction of a court must be determined. The conflict of laws rules of this court shall be applied to decide which system of law is to be applied.

---

[1] See Macmillan Inc v. Bishopsgate Investment Trust Plc [1996] 1 WLR 387, 391–2 per Staughton LJ; *Raiffeisen Zentralbank Österreich AG* v. *Five Star Trading LLC* ("*The Mount I*") [2001] QB 825 at 840B to 841B.

A.-V. Jaeger and G.-S. Hök, *FIDIC-A Guide for Practitioners*,
DOI 10.1007/978-3-642-02100-8_2, © Springer-Verlag Berlin Heidelberg 2010

At a second stage the judge or the presumed judge is likely to commence by asking himself what is the nature of the problem which confronts him. In other words he must classify the "cause of action" in order to determine the applicable conflict of laws rule. This way has been explained by Cheshire and North (North and Fawcett 2005, p. 36) as follows:

> This "classification of the cause of action" means the allocation of the question raised by the factual situation before the court to its correct legal category. Its object is to reveal the relevant rule for the choice of law. The rules of any given system of law are arranged under different categories, some being concerned with status, others with succession, procedure, contract, tort and so on, and until a judge, faced with a case involving a foreign element, has determined the particular category into which the question before him falls, he can make no progress, for he will not know what choice of law rule to apply. He must discover the true basis of the claim being made. He must decide, for instance, whether the question relates to the administration of assets or to succession, for in the case of movables left by a deceased person, the former is governed by the law of the forum, the latter by the law of the domicile. Whether undertaken consciously or unconsciously, this process of classification must always be performed. It is usually done automatically and without difficulty.

Once the proper conflict of laws rule has been identified that connects the question identified by classification of the cause of action to a particular system of law, this being referred to as the "connecting factor", the applicable system of law which is tied by the connecting factor must be applied. Finally the judge shall identify which set of rules from or part of that system should be applied to determine the dispute. If a contractual cause of the action has been identified the following principles of the so called Rome Convention (or as of the 17 December 2009 on the so-called Regulation EC/593/2008 of the European Parliament and the Council of 17 June 2008 on the law applicable to contractual obligations, also referred to as Rome I Regulation) shall apply:

2.2 Nature of the Cause of Action

As a first step the relevant cause of action must be identified and qualified in order to determine the applicable choice-of-law rule of the forum. Contractual claims must be considered according to the proper law of the contract. If the relevant cause of action has the nature of a claim in tort then the lex loci commissi applies. Questions concerning the property as to movables and immovables follow the lex situs rule.

Under the new Rome II Regulation which has come into force 11 January 2009, c*ulpa in contrahendo* is an autonomous concept and should not necessarily be interpreted within the meaning of national law. It should include the violation of the duty of disclosure and the breakdown of contractual negotiations. Article 12 of the Regulation covers only non-contractual obligations presenting a direct link with the dealings prior to the conclusion of a contract. This means that if, while a contract is being negotiated, a person suffers personal injury, Article 4 of the Rome II Regulation or other relevant provisions of this Regulation should apply.

2.3 Pre-contractual Stage

According to Article 8 Rome Convention (compare art. 9 Rome I Regulation) 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 the Convention if the contract or term were valid. Thus in principle the answer to the question of whether a call for tenders is an offer or an invitation ad offerendum will depend on the presumptive proper law of the contract. Another issue is whether the procurement rules of a state which invites tenderers to submit offers fall within this regime. It is suggested that procurement rules as to how to procure a contract for works have the nature of procedural rules relating to the conduct of public bodies and authorities. If so, the law of the state applies according to the *auctor regit actum* principle. Whether substantial procurement law prevails over the proper law of the contract, if this is different to the proper law of the contract, depends on the nature of the substantial rules. In most cases substantial procurement law, such as German budget law and related ordinances according to which German public bodies shall incorporate the VOB/B in any construction contract will not have the nature of mandatory law within the meaning of art. 7 Rome Convention (compare Art. 8 Rome I Regulation), although of course German public bodies are in principle bound to it. German courts are reluctant to apply Article 7(2) Rome Convention. It is a common position that Article 7(2) Rome Convention is not in itself a conflict of laws rule. It presupposes the existence of a rule which is mandatory irrespective of the law otherwise applicable. Examples where the German legislator has expressly ruled that a provision has this nature are extremely rare (for example Section 130(2) German Cartle law). If there is no such express rule the test is whether according to its purpose and telos it has the nature of a rule which is mandatory irrespective of the law otherwise applicable. This is a matter of interpretation of law. According to the German authorities the concerned rule must be legitimised by public interest concerns. It is not sufficient that the concerned rule aims to protect individual interests.[2] Whereas public procurement procedure rules are aimed to ensure a fair procurement procedure in the interest of both, the public body and the bidders, substantial law aims to balance risks and duties. Hence German public budget law is not aimed at ensuring fair and non-discriminatory conditions of competition for suppliers. It is aimed at an efficient use of public funds in order to ensure value for money on public procurement financed out of general taxation.[3] Competition of suppliers becomes used in order to achieve this result but it is not the purpose of budget law.[4]

[2] BAG [2003] IPRax 258, p. 261.

[3] BVerfG, decision from 13 June 2006; file no. 1 BvR 1160/03.

[4] BVerfG, decision from 13 June 2006; file no. 1 BvR 1160/03.

2.4 Proper Law of the Contract

On the 17 December 2009 the Rome I Regulation will replace the Rome Convention. The United Kingdom and Ireland have opted to adhere to the Rome I Regulation. The Rome Convention therefore remains applicable only in cases which involve Denmark.

2.4.1 Rome Convention

At the present time in most European countries the proper law of the contract has to be determined in accordance with the so called Rome Convention. The Rome Convention has the force of law in the United Kingdom pursuant to Section 1 and Schedule 1 of the *Contracts (Applicable Law) Act 1990* and in Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Italy, Luxemburg, Portugal, Sweden and Spain. Subsequently Estonia, Latvia, Poland, Malta, Slovenia, Hungry, Cyprus, Lithuania, Czech, Slovakia adhered. Its relevant provisions are as follows.

Article 3 (Freedom of Choice) provides:

> 1. A contract shall be governed by the law chosen by the parties. The choice must be expressed 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 for the whole or a part only of the contract.

Under a FIDIC contract the parties usually choose the applicable law to the contract. This is what is suggested by Sub-Clause 1.4 and what usually happens by indication of the relevant law in the Appendix to Tender. However sometimes the parties to the contract ignore the fact that a country is split in different jurisdictions, such as is the case in the United Kingdom or the United States of America. In those cases the relevant jurisdiction instead of the relevant country must be indicated in order to determine the applicable law in a precise way, leaving no room for ambiguities.

In the absence of an express or implied choice of law by the parties, article 4(1) of the Rome Convention provides that the contract shall be governed by the law of the country with which it is most closely connected. Article 4(2) provides that, subject to the provisions of article 4(5), it shall be presumed that the contract 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 the conclusion of the contract, his habitual residence, or, in the case of a body corporate or unincorporated, its central administration. Article 4(5) provides that article 4(2) shall not apply if the characteristic performance cannot be determined. Article 4(5) further provides that the presumptions in paragraphs (2), (3) and (4) shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country. Articles 4(3) and (4) have no application to the present case. They make provision for particular presumptions in relation to certain specified contracts.

Article 4 (Applicable Law in the absence of choice) provides:

1. To the extent that 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 with which it is most closely connected . . .
2. Subject to the provisions of paragraph 5 of this Article, it shall be presumed that the contract 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 un-incorporate, its central administration. However, if the contract is entered into 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.
3. . . .
4. . . .
5. Paragraph 2 shall not apply if the characteristic performance cannot be determined and the presumptions of paragraphs 2, 3 and 4 shall be disregarded if it appears from the circumstances as a whole that the contract is more closely connected with another country.

However there is no unanimous position which prevails worldwide. Under the traditional conflict of laws rules in Florida (USA), it is well settled that "matters bearing on the validity and substantive obligation of contracts are determined by the law of the place where the contract is made (lex loci contractus),"[5] whilst Colorado has adopted the "most significant relationship" approach of the Restatement (Second) of Conflict of Laws for resolving questions in contract cases.[6] In some jurisdictions such as in France the place where the works were carried out is the preferred most significant relationship in contract cases (Rémy-Corlay 2001, p.670; Glavinis 1993, note 646 et seq.).

It has been decided to replace the Rome Convention by a new EC Regulation, also referred to as the Rome I Regulation. The Regulation aims at converting the Rome Convention on the law applicable to contractual obligations into a Community Regulation and to modernise some of its rules. A final draft of the Rome I Regulation is already available. According to the new Regulation 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. To the extent that the law applicable to the contract has not been chosen, a contract for services shall be governed by the law of the country where the service provider

[5] Jemco, Inc v. United Parcel Service, Inc, 400 So.2d 499 (Fla.3d DCA 1981), review denied, 412 So.2d 466 (Fla.1982); Lincoln P. Tang-How, d/b/a Tang How Brothers, General Contractors v. Edward J. Gerrits, Inc and others 961 F.2d 174.

[6] Wood Bros. Homes, Inc v. Walker Adjustment Bureau 198 Colo 444, 601 P.2d 1369 (1979).

has his habitual residence. However, where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than where the service provider has his habitual residence, the law of that other country shall apply. Thus in principle the legal situation does not change in substance. It is however worth to note that the new Regulation does not exclude the option to choose a non state body of law such as the European Principles of Contract law or the Unidroit Principles on commercial contracts.

Sometimes mandatory rules do exist the respect for which is regarded as crucial by a country for safeguarding 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. This type of rules prevails over the proper law of the contract. A good example for this type of rule is the French decennial liability according to art. 1792 et seq. French Civil Code, having been adopted by act of parliament in a number of other jurisdictions, such as Algeria, Angola, Belgium, Egypt, Luxemburg, Malta, Morocco, Spain, Romania, Tunisia, and the United Arab Emirates. The decennial liability has been enacted in order to guarantee the structural stability of building works, which is legitimised by public interest concerns. Whichever law the parties have agreed to apply to their contract, the decennial liability of the country where the site is located will apply.

2.4.2 Rome I Regulation

The Rome I Regulation slightly changes the existing conflict of laws rules as to contractual relationships. However, in principle the legal situation will be upheld.

According to Article 3 Rome I Regulation the parties to a contract may choose the applicable law. Consideration 13 of the new Regulation provides for a new option by stating that the Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention. Hence it will be possible to submit the contract to the Unidroit Principles for commercial contracts or the European Principles of Contract Law (EPCL). Although it has already been said by Prof. Molineaux (1997, p. 55 et seq.), that the FIDIC forms of contract are widely used and that their dissemination has already developed a degree of commonality or construction *lex mercatoria*, it is submitted that it will not be sufficient to refer to the FIDIC form of contract as such as they do cover all of the legal questions arising from a construction contract (Fig. 2.1).

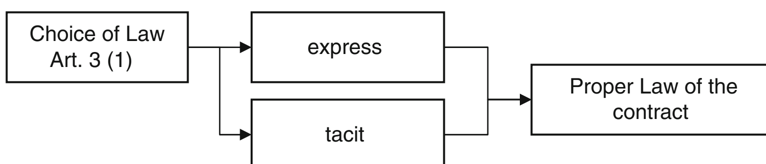

Fig. 2.1 Choice of Law

If the Parties did not choose the proper law of the contract, Article 4 Rome I Regulation applies. Therein a new system for the purposes of the determination of the proper law of the contract has been established, which distinguishes between nominate and innominate contracts. The proper law of the contract as to all types of contracts having been listed in Article 4 paragraph 1 Rome I Regulation shall be the one which has been ruled accordingly. In the case of an innominate contract 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 paragraph 2 Rome I Regulation). 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 Article 4 paragraphs 1 or 2, the law of that other country shall apply. Finally, if the proper law of the contract cannot be determined pursuant to Article 4 paragraphs 1 or 2 Rome I Regulation, the contract shall be governed by the law of the country with which it is most closely connected.

As to construction contracts and consultancy agreements this will have the following effect:

According to Consideration no. 17 of the Rome I Regulation as far as the applicable law in the absence of choice is concerned, the concept of "provision of services" and "sale of goods" should be interpreted in the same way as when applying Article 5 of Regulation (EC) No 44/2001 in so far as sale of goods and provision of services are covered by that Regulation. By consequence all construction contracts and consultancy agreements will have the nature of a service agreement (Kropholler 2005, Art. 5 note 44) and they will be governed by the law of the country where the service provider has his habitual residence. Whether it will be possible to deviate from this rule depends on the merits of the case. If the contract is manifestly more closely connected to a country other than that indicated in Article 4 paragraphs 1 or 2 Rome I Regulation, it is still possible to apply the law of that country. In line with the famous German author Savigny it would be still possible to argue that a construction contract has its natural centre of gravity in the country

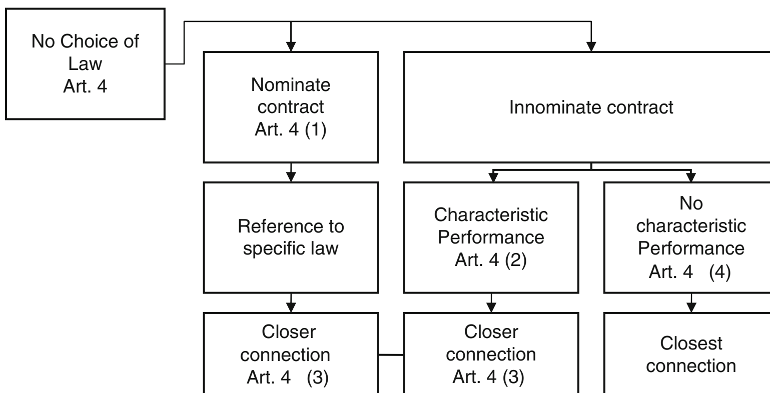

Fig. 2.2 Choice of Law without consent

where the works have to be executed. By the way it cannot be completely ignored that more or less all Civil law countries derive their concepts of a contract of letting and hiring from Roman law according to which the locator let the work to the conductor (locatio conductio operis) which meant that the employer placed the site in the hands of the contractor on which he was to expend his labour. This was and is still a main characteristic of a contract for works. To some extent the French decennial liability (see Art. 1792 et seq. Code Civil) shows that the place of working creates a particular responsibility for the stability of the structure also in order to protect the public. This finding constitutes the justification for this type of liability and underlines what Mr. Savigny said (Fig. 2.2).

2.5 Tort Law

In particular in construction cases the proper law of the contract governs only a part of the relevant causes of actions. Site accidents and other events need to be handled as well. However, although the principle of the *lex loci delicti commissi* is the basic solution for non-contractual obligations in virtually all the member States of the EU, the practical application of the principle where the component factors of the case are spread over several countries varies. In England one of the purposes of the Private International Law (Miscellaneous Provisions) Act 1995 was to make provision for choice of law rules in tort and delict, and the relevant provisions are contained in Part III (sections 9–15). The main purpose of Part III is to abolish the common law rules of double actionability, established in *Phillips v. Eyre* (1870) LR 6 QB 1 and developed by the House of Lords in *Boys v. Chaplin* [1971] AC 356, and the exceptions to it discussed in *Boys v. Chaplin* and *Red Sea Insurance Ltd v. Bouygues SA*,[7] and to establish a new general choice of law rule. The effect of the double actionability rule was, in short, that in order to bring proceedings in England in respect of a tort committed abroad, the acts or omissions of the defendant had to be actionable as a tort in England and actionable in the foreign country in which the tort was committed. Today where the cause of action has resulted from allegedly tortious conduct in a foreign country, it is no longer necessary for the case to be based on a tort actionable in England. The English courts must apply wider international tests and respect any remedies available under the "Applicable Law" or *lex causae* including any rules on who may claim and who the relevant defendant may be.

The first stage is for the court to decide where the tort occurred which may be difficult if relevant events took place in more than one state. Section 11(2) distinguishes between:

- Actions for personal injuries: This is the law of the place where the individual sustained the injury.

[7] (1995) 1 AC 190.

- Damage to property: this is the law of the place where the property was damaged.
- In any other case, this is the law of the place in which the most significant element or elements occurred.

In Germany the test for a cause of action resulting from allegedly tortious conduct with foreign elements is where the person who is liable to the injured party has committed the unlawful act. However art. 40 Introductory Law of the Civil Code lays down the so-called restricted *Ubiquitätsprinzip* (principle of ubiquity), according to which the injured party has the right, up to the final oral hearing in the court proceedings of first instance, to choose the law of the country where the loss was sustained instead of the law of the country where the person who is liable has acted, which best serves its interests.

Where a French Court qualifies the cause of action as a tort issue, the applicable law should be the law of the country where the tort was committed. French cases usually define the *lex loci delicti* as the place where the injury occurs. The French Cour de Cassation has held that the *lex loci delicti* should be the place where the injury initially occurs, whether or not tortious acts may have taken place elsewhere.[8]

However, Regulation EC/846/2007 of the European Parliament and of the Council on the law applicable to non-contractual obligations (Rome II) will change the conflict of law regime within all Member States of the EU except Denmark. According to Article 4(1) Rome II Regulation, coming in force on 11 January 2009, unless otherwise provided for in the Regulation, the law applicable to a non-contractual obligation arising out of a tort/delict shall be the law of the country in which the *damage occurs* irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur. Recital 11 declares that, since the concept of a non-contractual obligation varies from one Member State to another, for the purposes of the Regulation "non-contractual obligation" should be understood as an autonomous concept.

For the avoidance of doubt the Regulation makes it clear that the law applicable should be determined on the basis of where the *damage occurs*, regardless of the country or countries in which the indirect consequences could occur. Article 4(1) Rome II Regulation makes applicable "the law of the country in which the damage occurs irrespective of the country in which the event giving rise to the damage occurred and irrespective of the country or countries in which the indirect consequences of that event occur." Accordingly, in cases of personal injury or damage to property, the country in which the damage occurs should be the country where the injury was sustained or the property was damaged respectively.

However two exceptions have to be kept in mind according to Article 4(2) and (3):

[8]Cour de Cassation, Première chambre civile, 11 mai 1999.

Where the person claimed to be liable and the person sustaining damage both have their habitual residence in the same country at the time when the damage occurs, the law of that country shall apply. Thus if an employee of the Contractor suffers an injury, and both originate from the same country, the law of the common country of origin will apply.

Where it is clear from all the circumstances of the case that the tort/delict 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. A manifestly closer connection with another country might be based in particular on a pre-existing relationship between the parties, such as a contract, that is closely connected with the tort/delict in question.

2.6 Quasi Contracts

Besides tort law remedies another cause of action may be interesting for contractors. It may happen that the Engineer or the Employer will instruct the Contractor to carry out works even though there is not yet a contractual basis. Again it may happen that an amendment to the contract is null and void for different reasons. Thus if works have been carried out without a clear contractual background, the question arises whether the Contractor is nevertheless entitled to a payment. If the cause of action is a claim for restitution there is no claim in contract. In English law it is clear that a claim for restitution is a separate and distinct cause of action from a claim in contract. In *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd* [1943] AC 32 at 61 Lord Wright stated:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are generically different from remedies in contract or in tort, and are now recognised to fall within a third category of the common law which has been called quasi-contract or restitution.

In *Westdeutsche Bank v. Islington* Lord Browne-Wilkinson stated:[9]

> The common law restitutionary claim is based not on implied contract but on unjust enrichment: in the circumstances the law imposes an obligation to repay rather than implying an entirely fictitious agreement to repay: *Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd.* [1943] AC 32, 63–64, *per* Lord Wright; *Pavey & Matthews Pty Ltd v. Paul* (1987) 162 CLR 221, 227, 255; *Lipkin Gorman v. Karpnale Ltd* [1991] 2 AC 548, 578C; *Woolwich Equitable Building Society v. Inland Revenue Commissioners* [1993] AC 70. In my judgment, your Lordships should now unequivocally and finally reject the concept that the claim for moneys had and received is based on an implied contract. I would overrule *Sinclair v. Brougham* on this point.

[9] Westdeutsche Bank v. Islington L.B.C. [1996] AC 669, 710E.

The proper law of an obligation to restore the benefit of an enrichment obtained to another person's expense is the presumptive proper law of contract if it arises in connection with a contract.[10]

From 11 January 2009 onwards, when the Rome II Regulation comes into force, unjust enrichment cases will be treated according to art. 10 of the Rome II Regulation. If a non-contractual obligation arising out of unjust enrichment, including payment of amounts wrongly received, concerns a relationship existing between the parties, such as one arising out of a contract or a tort/delict, that is closely connected with that unjust enrichment, it shall be governed by the law that governs that relationship.

2.7 Choice of Law as to Extra-contractual Claims

The new Rome II Regulation lays down choice of law rules for torts and restitutionary obligations. It is designed to complement the Rome I Regulation and the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations. It can be seen that, under art. 4(3) of the Rome II Regulation, a tort claim may in some cases be governed by the law which applies to a contract between the same parties, concluded before the events constituting the tort occurred, on the basis that the tort claim is manifestly most closely connected with the country whose law governs the contract.

Further art. 14 of the Rome II Regulation enables parties to reach an agreement, choosing the law applicable to a tort claim between them, except in respect of claims for unfair competition, restriction of competition, or infringement of an intellectual property right. Pursuant to art. 14(1) of the Rome II Regulation, the agreement may be entered into after the event giving rise to the damage has occurred. However, and this is completely new, where all the parties are pursuing a commercial activity, and the agreement is freely negotiated, the agreement may also be entered into before the event giving rise to the damage has occurred. The requirement of commercial activity appears to exclude agreements entered into with a consumer or an employee. As under art. 3 of the Rome I Regulation, the choice must be expressed or demonstrated with reasonable certainty by the circumstances of the case, and is not to prejudice the rights of third parties (such as liability insurers). Art. 14(2) specifies that where all the elements relevant to the situation at the time when the event giving rise to the damage occurs are located in a country other than the country whose law has been chosen, the choice of the parties is not to prejudice the application of provisions of the law of that country which cannot be derogated from by agreement. Finally art. 14(3) of the Rome II Regulation adds that where all the elements relevant to the situation at the time when the event giving

[10] Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd [1943] AC 32.

rise to the damage occurs are located in one or more of the EC Member States, the parties' choice of a law other than that of a Member State is not to 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. Parties commonly include choice of law clauses to govern the contractual aspects of a dispute (e.g., breach of a warranty or obligation). An adjusted Sub-Clause 1.4 for a choice of law clause could be as such:

This Contract *and any non-contractual obligations arising out of or in connection with it* shall be governed by and construed in accordance with the law of the country or other jurisdiction) stated in the Appendix to Tender.

The aforementioned clause broadens the scope of the provision and includes non-contractual claims (e.g., a cause of action that arises out of a breach of a representation or a cause of action that arises out of the quantum principle).

2.8 In Rem Claims

Finally both of the parties are interested in knowing who is or becomes the owner of materials and equipment being delivered to the Site. The actual transfer or disposition of property is, in principle, a matter for the legislature and courts of the jurisdiction where the property *is situate*. In English and German private international law, the law of a country where a thing is situate *(the lex situs)* determines whether the thing is to be considered a movable or an immovable. As to the validity of a transfer of a tangible movable and its effect on property rights, the position in English conflict of laws is as follows:

The validity of a transfer of a tangible movable and its effect on the proprietary rights of the parties thereto and of those claiming under them in respect thereof are governed by the law of the country where the movable is at the time of the transfer *(lex situs)*. A transfer of a tangible movable which is valid and effective by the law of the country where the movable is at the time of the transfer is valid and effective in England. This Rule, long established beyond challenge, rests on a line of authority dating back to the leading case of Cammell v. Sewell (1860) 5 H&N 728.[11]

2.9 The Importance for Choice of Law Issues

Usually the parties determine the proper law of the contract in the Appendix to Tender. By doing this the parties accept that all of the complementary and supplemental statutory rules and implied terms which are included in the governing law will be incorporated in the contract. Complementary rules and implied terms may

[11] Air Foyle Ltd & Anor v. Center Capital Ltd [2002] EWHC 2535 (Comm) (03 December 2002).

either have the nature of mandatory or non mandatory rules or implied terms. Thus the parties who are not fully informed about the proper law of the contract will sometimes incorporate terms which they would not have incorporated if they had prior knowledge of them. Skill and care must therefore be taken to identify the complementary rules of the contract before the contract is executed. A second issue arises if and when the proper law of the contract comprises general risk allocation rules which are not known by one of the parties and probably not reflected in the intended standard form of contract. An example of this is the German rule concerning subsoil conditions. According to German law the Employer bears the risk of unforeseen subsoil conditions, which may have an impact on the understanding of Sub-clauses 4.10, 4.11 and 4.12. Finally the Parties may encounter the issue that the proper law of the contract remains silent as to critical points of the contract. If for example the proper law of the contract is one which belongs to the Islamic law family, it is fundamental to know that Islamic law in principle does not time bar any remedies at law. Thus the post contractual liability does not end unless statue law stipulates otherwise. As an example, in Iran time bar (statute of limitation) was objectionable to religious figures who argued that in Islamic law rights did not expire. In response, when it was incorporated in the Iranian Civil Code, the provision was written so as to avoid the concept of expiration: it merely says that beyond the specified time the court would not hear the claim.

It is critical to understand that choice of laws' issues are not only technical legal problems which may remain open to be discussed by lawyers in the event of disputes. It must be clear at tender stage which law will be applicable to the contract and to other causes of actions. Otherwise a complete risk assessment and the Contractor will not:

(a) Have satisfied himself as to the correctness and sufficiency of the Accepted Contract Amount, and
(b) Have based the Accepted Contract Amount on the data, interpretations, necessary information, inspections, examinations and satisfaction as to all relevant matters referred to in Sub-Clause 4.10 [*Site Data*]

as supposed by Sub-Clause 4.11. The reason for this lays in the applicable law and its characteristics. Any choice of law includes the whole of the law which has been chosen. This means that all of the applicable rules whether imposed by statute or by cases law or by usage will apply to the contract or the legal relationship in question. The proper law of the contract usually includes either implied terms as is the case in anglo-saxon jurisdictions or so called non mandatory but complementary rules. Whether the parties would have included such complementary rules in the event that they would have disclosed them before making their contract or not is not at all important. Only those rules which have been excluded either expressly or impliedly can not be relied on. Thus if the parties to the contract have ignored the characteristics of the proper law of the contract disputes are more probable to arise than otherwise. The applicable law may bring matching effects on the contract altering its character and causing and imbalance in the relationship of the parties (Bunni 2005, p. 22). In other words, the applicable law is obviously one of the most

important facts which must be taken in consideration for the purposes of the calculation of the tender price.

The applicable law may include:

- Special risk allocation features, for example as to the ground conditions: In some jurisdictions the risk for unforeseen ground conditions may become allocated to the Contractor in others it may become allocated to the Employer
- Rules governing the termination by convenience as is the case in Germany
- Particular post contractual liabilities such as the decennial liability in Algeria, Angola, Belgium, Egypt, Luxemburg, Malta, Morocco, Romania, Tunisia, United Arab Emirates
- Particular remedies for incorrect tender data, which can be excluded by waiver clauses
- Particular provisions as to the protection of the contractor and in particular subcontractors, such as duty of the employer to provide a payment security on request of the contractor or the possibility of subcontractors to recover payment from the employer in the event that the main contractor should refrain to pay the subcontractor
- Particular requirements to provide insurance cover as it is the case in countries which have adopted the French decennial liability
- Special causes of action in the event of changed circumstances
- Limitation rules which provide for a much longer post contractual liability for latent defects than expected
- A variety of remedies in the event of defective work, such as a claim to remedy defects (specific performance) or the right to make deductions from the contract price
- Particular features which may constitute a waiver of claims for defective works
- Differing contract interpretation rules, allowing for example to consider pre contract negotiations or simply forbidding them

FIDIC does not exclude to rely on the proper law of the contract. Instead it presupposes that the parties to the contract are bound by the proper law of the contract and other applicable law. FIDIC even refers to remedies and claims under the applicable law by ruling that claims in connection with the contract and under the contract shall be dealt with equally.Each jurisdiction is a single and particular legal framework. Different jurisdictions often offer different solutions to the same issues. Although the results may sometimes be analogous, they may also at times be contradictory. Misunderstandings are commonplace. It is therefore strongly recommended to undertake legal research on a case by case basis and to ascertain the whole legal background of the contract. It is critical to learn about the local court practice, about local usages and experiences. Law is not a logical science. Instead it consists of the common conviction of a given community as to how daily life and trades shall be ruled and handled. Legislation and case law is an expression of this common conviction on an appointed day. Thus, with time, it may change.

Law is composed of different sections. A whole legal system consists of public law, procedural law and substantive private law. Within public law lies administrative

law which denotes a whole section of law whose rules deal with two aspects in the relationship between authorities and the public (Bunni 2005, p. 26). The first aspect is the protection of individuals against infringements of their legal rights which most commonly have a constitutional basis. The second aspect is the requirement of an effective operation of the public service (Bunni 2005, p. 26). This part of administrative law has much impact on construction developments. Zoning law and building regulations are part of it. To some extent the law of procurement procedures for public works and even the award of contracts for public works were put under the regime of administrative law. Within its territory of origin public or administrative law usually applies to everybody but sometimes particular law exists which governs the way of life and the business of foreigners. It may then require special permissions and licences for doing the business or even requiring permissions for being in the country. Sub-Clause 1.13 requires the Contractor to comply with the Laws. To some extent this is self explanatory but to some extent it goes further than this, because the fact that the Contractor accepts to comply with laws is binding on him as a contractual obligation.

2.10 Compliance Rules

In the field of international construction the proper law of contract may be different from the local law to be applied at the site. Sub-Clause 1.13 of all of the FIDIC Books 1999 edition provides that the Contractor shall comply with the Laws, which means that all local laws ruling safety and health issues as well as quality issues must be met. It may prove difficult to identify the Laws. It is therefore critical to rely on Sub-Clause 2.2 according to which the Employer shall provide reasonable assistance to the Contractor by obtaining copies of the Laws which are relevant to the Contract but are not readily available. As the obligation is qualified as "reasonable" and the Employer being in the position to give assistance it is doubtful whether the Employer must give comprehensive and correct information. Again it must be doubted that Sub-Clause 2.2 will reduce the Contractor's obligation to comply with the Laws.

It is quite common for the law to require the parties to obtain a permit needed to allow the Contractor to commence the works. According to Sub-clause 1.13 the Employer owes a duty to obtain such permits, including the duty to make a proper application, requiring the deposit of appropriate drawings.

Illustration: In the Canadian case of *Ellis-Don Ltd v. The Parking Authority of Toronto* (1978) 28 BLR 98. Ellis-Don was a contractor engaged to build a parking facility for the Authority. Ellis-Don contended that the Authority had failed to obtain the excavation permit needed to allow Ellis-Don to commence the excavation works shortly after award of contract, causing delay. The Authority's argument that Ellis-Don should have been aware at tender stage that no permit had been issued and that it would not be issued until Ellis-Don prepared detailed shoring

drawings was rejected. The court held that the Authority was under the obligation to make a proper application, including the deposit of appropriate drawings. It was held implicit in the wording of the contract that the Authority was to have obtained the required building permits at least as soon after the signing of the contract as to allow Ellis-Don to commence work when it was ready.

References

Bunni NG (2005) FIDIC forms of contract, 3rd edn. Blackwell, Oxford
Glavinis P (1993) Le contrat international de construction. GLN Joly Editions, Paris
Kropholler J (2005) Europäisches Zivilprozessrecht, 8th edn. Recht und Wirtschaft, Heidelberg
Molineaux C (1997) Moving toward a Lex Mercatoria - A Lex Constructionis. J Int Arb 14:55
North P, Fawcett JJ (2005) Cheshire and North's private international law, 13th edn. Oxford University Press, Oxford
Rémy-Corlay P (2001) Tribunal de Grande Instance Poitiers, 22.12.1999. Rev Crit Dr Intern Priv 670

http://www.springer.com/978-3-642-02099-5

FIDIC - A Guide for Practitioners
Jaeger, A.-V.; Hök, G.-S.
2010, XXXVI, 446 p. 41 illus., 20 illus. in color.,
Hardcover
ISBN: 978-3-642-02099-5