AMERICAN UNIVERSITY OF ARMENIA

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LL.M. Program

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TITLE

Buying from Online Retailers: Issues of Applicable Law and Enforcement

Which law is applicable for dispute resolution when buying from online retailers? Which courts have jurisdiction over the case?

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Abstract

Expanded use of the Internet, credit cards and online/mobile banking led to development of e-commerce through all the world, including Armenia. A probable outcome of buying online might be getting an improper product or a defective item, or paying more than initially was planned (as the shipping cost is calculated depending on the weight of the product), or a difference might be between the product in the picture and what you actually get.[1] In Armenia, most often people do nothing, or maybe contact the seller and negotiate whether it is possible to return the product and get refunded. But what should one do in case the seller refuses to refund after a negotiation? According to which law is the dispute going to be resolved? To which court the case should be brought?

With the adoption of new technologies, nowadays buyers can select the products from the website of the seller, where the price, delivery conditions or payment methods are already mentioned and conclude a contract over the Internet. The parties can agree over the governing law of the contract by including a specific clause in it. Otherwise, for the contracting parties to the United Nations the Convention on Contracts for the International Sale of Goods (CISG) might apply. Currently, two-thirds of countries in the world involved in international trade, are contracting parties to the CISG 1980, including China and the US[2]. So, in case of absence of applicable law clause, default rules of CISG apply. But CISG was adopted in 1980, which is much before the electronic commerce has started, so some new regulations were needed to certain electronic transactions. Therefore, the United Nations Convention on the Use of Electronic Communications in International Contracts was adopted in 2005 to complete CISG.

As has been noted, there are more and more people involved in e-commerce year by year, and this is the reason why this field needs special regulations to apply for securing the transactions concluded over the Internet and for protection of the rights of both buyers and sellers.

[1] Ամենակարևորը ինտերնետային գնումների մասին, available at https://www.abcfinance.am/lifesituations/online-shopping.html

[2] Faye Fangfei Wang, Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China, Second Edition 2014

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LIST OF ABBREVIATIONS

UN	United Nations
CISG	UN Convention on Convention on Contracts for the International Sale of Goods
UN Convention	United Nations Convention on the Use of Electronic Communications in International Contracts
UCITA	Uniform Computer Information Transactions Act
UNCITRAL	The United Nations Commission on International Trade Law
Brussels Regulation	Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012
Rome I Regulation	Regulation (EC) No 593/2008) of the European Parliament and of the Council of 17 June 2008

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"The customer pays his money and gets a ticket. He cannot refuse it. He cannot get his money back. He may protest to the machine, even swear at it. But it will remain unmoved. He is committed beyond recall. He was committed at the very moment when he put his money into the machine."

Lord Denning, Thornton v. Shoe Lane Parking1

INTRODUCTION

The process of buying and selling online is called e-commerce and with the development of new technologies, new opportunities for its development occur and challenge the existing legislation to have new regulations for safe online commercial activities/transactions, for protection of data privacy and, which is not less important, for dispute resolution.

There actually were some attempts of concluding an ecommerce transaction since 1971. For example, for a long time it was considered that the first e-commerce transaction was concluded in 1971 between a student at Stanford and MIT.[3] The product sold was a pot on the Arpanet (Advanced Research Projects Agency Network). But later it was decided that this can't be considered as an e-commerce transaction as money wasn't exchanged online, the network was used to arrange the meeting only.

The second attempt was in 1984. A 74-year-old British woman used a Videotex (a TV connected to telephone lines) for purchasing some products for her store, such as eggs, margarine, etc. But, as the money was paid in cash, this transaction was also later considered not to be e-commerce, because an e-commerce transaction stipulates online payments using credit cards.

And in 1994 the first true e-commerce transaction took place. That was when a 21-year-old entrepreneur, Dan Kohn sold a CD of Sting's album using his website for

[3] 'What Was the First Thing Sold on the Internet?', available at https://www.smithsonianmag.com/smart-news/what-was-first-thing-sold-internet-180957414/

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purchasing the item and credit card for paying for that product. That was the first ever transaction, where the credit card used for paying was protected with encryption technology, and therefore is considered to be the first ever e-commerce transaction.[4]

So, e-commerce transactions started after 1994 and are spread nowadays throughout all the world. Fast developing technologies allow the secure provision of services, selling or buying products and paying for them using personal data and credit cards. Though, in some cases disputes may arise, for example, when getting a defective or improper item, or may in very rare cases not get it at all. The paper is aimed to provide solutions for such cases, by at the same time by discussing both the process of conclusion of the contracts and dispute resolution issues.

Expanded use of the Internet, credit cards and online/mobile banking led to development of e-commerce also in Armenia. Many Armenian companies started to use their websites or mobile applications for selling their products. Armenian legislation regulates e-commerce in the country in accordance with the requirements of Eurasian Economic Unit. This field is being regulated by:

- Civil Code of RA (Private International Law)
- The Law on Trade and Services
- The Law on Consumer Rights Protection

Both the number of Armenian online retailers is continuously growing, and many Armenians prefer to buy from international online shops, by concluding cross-border contracts. In these cases, usually party autonomy applies, so the parties are free to choose which law should govern the contract and is applicable for dispute resolution, and also which courts have jurisdiction to hear the case. But in cases when the clause is not included in the contract, then the following international conventions apply:

- The Rome I Regulation (Regulation (EC) No 593/2008) of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (sets out which law is used to interpret contracts with an international element)
- United Nations Convention on Contracts for the International Sale of Goods (CISG) (in case of absence of applicable law clause, default rules of CISG apply, CISG

[4] 'You'll Never Guess What The First Thing Ever Sold On The Internet Was', available at https://www.fastcompany.com/3054025/youll-never-guess-what-the-first-thing-ever-sold-on-the-internet-was

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applies to contracts for the international sale of tangible goods where the parties' places of business are in different states, but does not apply to service contracts between parties)

- United Nations Convention on the Use of Electronic Communications in International Contracts (applies to an electronic contract between parties, whose places of business are in different states, and unlike CISG, includes the sale of goods and services)
- Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels 1 Bis Regulation) (sets out jurisdiction and the recognition and enforcement of judgments in civil and commercial matters)

There are two kinds of e-commerce transactions: B2B (business to business) and B2C (business to customer), where both have the same formality, but usually B2B transactions are subject to international trade regulations, as cross-border transactions are usually made between legal entities, while B2C transactions are subject national and regional regulations.[5] The paper is aimed to give a definition of electronic contracts, discuss how they are created, when they are considered to be signed and concluded, common ways of sending an offer and accepting it, as well as such an uncommon way as sending an offer using by SMS and whether it can work out in Armenia, the errors that can arise while concluding electronic contracts and whether or not these errors make the contract null. Further, the issue of applicable law to the contract will be examined. Such questions as party autonomy and regulations applicable in case of absence of the clause will also be discussed, and the issue of how the place of conclusion of the contract is defined in case of electronic contracts and how the country of residence affects the law governing the contract. Moreover, the issues of jurisdiction and enforcement of the judgement will be included in the paper, particularly which courts have jurisdiction to hear the case, including general jurisdiction, special and exclusive jurisdiction, and whether the traditional rules of determining the jurisdiction are sufficient in case of electronic contracts. What is parallel litigation, which court have priority to hear the case, how can the parties benefit in cases more than one court is authorized to hear the case. These questions are going to be discussed in the Paper, providing not only the laws and regulations applicable, but also by bringing examples of how in practice such cases are solved.

[5] Faye Fangfei Wang, Law of Electronic Commercial Transactions, Contemporary Issues in the EU, US and China, Second Edition 2014

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As regulation of e-commerce is now an expanding subject and is not much examined, understanding the issues connected with the choice of law and jurisdiction are of highest importance. Hence the paper will mostly focus on discussing these issues both on international level and in Armenia. Also, the main subject of examination will be B2C transactions, where the interests of consumers will be protected.

CHAPTER 1

Formation and features of electronic contracts

The International Chamber of Commerce refers to 'electronic contracting' as 'the automated process of entering into contracts via the parties' computers, whether networked or through electronic messaging'.[6]

1.1 Means of concluding the contract

Commonly contract concluding consists of two parts: making an offer and accepting it. In case of electronic contracts, the same rule applies, the offer is made using computing systems and it is accepted the same way, and therefore is signed online. Generally, there are two common ways of making an electronic contract: e-mails and clickwrap, depending on each of these two, the process of making an offer and accepting it may differ.

The first and most popular method of making electronic contracts is by e-mails, which is considered to be the digital equivalent of postbox. The offer is being sent from the seller's outbox to potential buyer's mailbox, and then the buyer replies to that e-mail with the intention to buy the item, and if in the end the offer is accepted, the contract is being considered to be concluded. However, there should be some necessary conditions, such as quantity, price, terms and conditions, etc. clearly mentioned in the e-mails sent, so that the contract is considered concluded. For example, in Rosenfeld v. Zerneck case in New York the Supreme court recognized the contract concluded via e-mails as acceptable way of concluding

[6] General Usage for International Digitally Ensured Commerce (GUIDEC) Version II, International Chamber of Commerce (ICC). Available at: http://www.iccwbo.org

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the contract, though the plaintiff's claim was rejected, as a few necessary terms were absent in the e-mail[7].

Another question may arise, considering the possibility of effectively concluding contracts via e-mails. That is whether it's possible to consider the offer send and accepted via an SMS as an electronic contract. Well, logically this should be considered as a valid method, because there is actually not so much formal or functional difference between e-mails and short messages. And this logic is proved by a South African case Jafta v. Ezemvelo KZN Wildlife, where the Labour Court of South Africa concluded that 'an SMS is as effective a mode of communication as an email or a written document'.[8] In case of Armenia, Article 450, point 3 of the RA Civil Code provides that 'A contract may be entered into in a written form upon signature of parties through drawing up a single document, as well as through exchanging information or a communication (document) via means of postal, telegraphic, facsimile, telephone, electronic or other communication which make it possible to confirm its authenticity and accurately establish that it comes from the contracting party. When concluding a contract via means of electronic communication, unless other requirements regarding the form of such contract are prescribed by law, an electronic document not protected by an electronic digital signature shall have the same legal effect as any document signed by hand by a given person.'[9] So, it becomes clear that the issue of concluding contracts through SMS in Armenia is connected with the possibility of sender identification and the only question here is whether the name and surname mentioned in the SMS would be considered as a method of establishing whether or not the sender is the party to the contract. However, when adding some identification information to the messages sent, such as ID card number, or tax identification number for companies, can make the short message sent be an equivalent to the offer, and when accepted in a proper way, can be considered to be a contract. Notwithstanding the possibilities used to identify the sneder as a party to the contract, the article itself provides with the assumption that a contract may be concluded via SMS, when saying '… through exchanging information or a communication (document) via means of postal, telegraphic, facsimile, <u>*telephone*</u>, electronic or other communication …'[10].

[7] Rosenfeld v Zerneck, available at http://www.internetlibrary.com/pdf/Rosenfeld%20v%20Zerneck.pdf
[8] Jafta v. Ezemvelo KZN Wildlife (D204/07) [2008] ZALC 84; [2008] 10 BLLR 954 (LC); (2009) 30 ILJ 131 (LC) (1 July 2008).
[9] RA Civil Code, Article 450 (3)
[10] RA Civil Code, Article 450 (3)

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The second form of concluding electronic contracts online is by using webwrap or clickwrap. Usually it contains a list of products with such details, as what it consists of, how much it costs, shipping details, terms and conditions, etc., which in this case is an offer. The visitor has the opportunity to examine the products listed and purchase one by one click. The order is being placed after the buyer accepts the terms and conditions and provides necessary personal data, such as name and surname, adress, credit card details, etc. The contract is displayed on the monitor, and in most cases it is also being sent by an e-mail, where the purchased item, quantity, price, delivery details are also included. After the sutomer puts a check in the box and agrees to the terms, the contract is being concluded.

There is also another way of concluding electronic contracts, which is called a shrink-wrap agreement. This method is not much used, as it usually concerns software products, and is used in software license agreements. The particularity of it is that the terms and conditions are visible only when the product is already purchased and when it is being installed, so this means that one can see them only after one already purchased and paid for the product. There are no exact judicial opinions over this cases in the world, but there are some regulations that provide with solutions for such cases. For example, according to the Uniform Computer Information Transactions Act (UCITA) in US, if the purchaser doesn't have an opportunity to examine the terms and conditions before purchasing and paying for the product, then one should have the opportunity to return it to the seller.[11] In this case it's like balancing the obligations and resposibilities of both buyers and sellers.

As for the effectiveness of the contract, if there are gaps in communication, like for example, technical issues or mistakes, the contract can't be concluded. Notwithstanding the distance issue, the procedure of concluding electronic contracts is designed in a way, that provides with effective communication opportunities. For example, in case of Entores v. Miles Far East Corp[12] the judgement of the Court of Appeal, given by Lord Denning had the approach, that the communication is over the distance, i.e. in case, when two people try to make a contract shouting while crossing the river, no contract will be concluded until the acceptance is possible to be heard by the offeror. However, Armenian legislation does not accept oral contracts for such transactions. Article 1281, point 2 stipulates that 'a foreign economic transaction in which even one of the participants is a citizen or legal person of the

[11] Uniform Computer Information Transactions Act (UCITA), Section 209
[12] Entores v. Miles Far East Corp [1955] 2 QB 327; [1955] 2 All ER 493.

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Republic of Armenia shall be made, regardless of the place of conclusion of the transaction, in written form.'[13]

1.2 Elements of the contract

No matter in which way the contract is concluded there are some important elements for formation of the contract, such as time and place, the parties' residence country, etc.

As has been already mentioned e-contracts are concluded online and for such contracts private international law applies, according to which the applicable law is decided, which usually has territorial connection. For example, according to Article 1281 of RA Civil Code 'The form of a transaction shall be determined by the law of the state where it is concluded. However, a transaction concluded abroad may not be recognized as invalid as the result of nonobservance of form if the requirements of the law of the Republic of Armenia were observed.'[14] In case of electronic contract the place of conclusion is impossible to identify, so for such cases Article 460 of the same code stipulates the following 'if the place of conclusion of a contract is not indicated in it, the contract shall be recognized as concluded in the place of residence of the citizen or the place of location of the legal person who sent the offer.'[15] Therefore, it's also important to determine also the place of the seller's residency or location.

Another important element is the time of conclusion of the contract. The UN Convention provides with the definition, similar to the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Electronic Commerce, that aims at 'achieving an equitable allocation of the risk of loss of electronic communications'.[16] This means, that the time of effective comunication is important, that is when the adressee is capable of getting an e-mail or be communicated by the electronic address provided by the addressee. Different legal systems have different approach towards determining when a contract is considered concluded, and also there is an approach that the time shouldn't affect determining the law governing the contract. For example, according to the UNCITRAL, the time of conclusion of the contract should not have any impact on law applicable to it.[17] One of

[13] RA Civil Code, Article 1281 (2)
[14] RA Civil Code, Article 1281
[15] RA Civil Code, Article 460
[16] Explanatory Note 2007, p. 61.
[17] Report of the Working Group on Electronic Commerce on the Work of its 42nd session (Vienna, 17–21 November 2003) (A/CN.9/546), p. 103 (hereafter 'A/CN.9/546').

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the UNCITRAL conventions, UN Convention on the Use of Electronic Communications in International Contracts, offers the application of the concepts traditionally used in international and domestic law, such as ‘dispatch’ and ‘receipt’ of communication.[18] Particularly, according to Article 10(1) of the UN Convention ‘the time of dispatch of an electronic communication is the time when it leaves an information system under the control of the originator or of the party who sent it on behalf of the originator’[19]. At the same time according to the Article 15(1) of the UNCITRAL Model Law on Electronic Commerce ‘the time of dispatch of an electronic communication is the time when it enters an information (processing) system outside of the control of the originator or of the person who sent the data message on behalf of the originator.’[20]

With the developement of new technologies new opportunities arise to make some usual processes automated, easier and more comfortable for use. So, when trying to compare electronic mail with postal mail, the following differences are becoming obvious:

1. In comparison with postal mail the electronic one is very quick. It would take more that a day to send the postal mail, while it takes severel minutes in case of electronic ones. By being so quick this makes the communication more effective.
2. It's easy to understand not only when the offer was sent, but also when it was actually received by the offeror.
3. The automated responses of system. Electronic mails provide with the opportunity of immediately getting an answer to the offer, until it is being accepted. This short messages help to understand whether or not because of any technical issue the e-mail wasn't delivered. The might contain the following idea, for example, whether the message has been sent, or delivered, or read, or maybe it failed to be delivered. The most important feature is that this kind of messages are delivered immediately, so you know the exact moment when the message is read, or you are immediately aknowledged that there is a failure and resend it.

The new technologies in this case provide both sellers and buyers with convenient, consistent and certain communication.

[18] Explanatory Note 2007, p. 59.
[19] UN Convention, Article 10(1)
[20] Article 15(1) of the UNCITRAL Model Law on Electronic Commerce

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1.3 Errors in electronic communication

It’s obvious that a common issues connected with electronic contracts should have technical character. However, besides technical issues that can affect the communication, some other mistakes may also occur at the time of making the contract. Depending on the type of the mistake, the outcome may be different. It is commonly known that there are three types of mistakes: common mistakes, mutual mistakes and unilateral mistakes.[21] Mistakes should be fundamental so as the contract is considered to be void.[22]

Common mistakes are those connected with the subject matter, its quality and quantity, identity of ownership or the possibility of performance. Some of these mistakes may make the contract void, depending on their mportance for mutual agreement, but for example the quality of the subject matter would not. A mistake should be 'fundamental' for making the contract void. Article 25 of the CISG provides that ‘A breach of contract committed by one of the parties is fundamental if it results in such detriment to the other party as substantially to deprive him of what he is entitled to expect under the contract, unless the party in breach did not foresee and a reasonable person of the same kind in the same circumstances would not have foreseen such a result.’[23]

There is another type of mistakes, called misrepresentation which is a misleading or false statement of fact. There are three types of misrepresentation:

- fraudulent, which means depriving someone of a legal right and is considered to contain unfair or unlawful acts,
- negligent, which is harm done to people generally through the failure of another to exercise a certain level of care, usually defined as a reasonable standard of care,[24]
- innocent, which means that initially there wasn't any intention of misrepresenting.

Article 14 of the UN Convention on the Use of Electronic Communications in International Contracts comments an ‘error in electronic communications’ as:

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[21] Common mistake is also known as bilateral mistake and occurs when both parties make the same mistake. Mutual mistake occurs when the two parties mean different things. Unilateral mistake occurs when one of the parties is mistaken about some fundamental fact and the other party knows or should know this.

[22] The Great Peace Shipping Ltd v. Tsavliris Salvage (International) Ltd [2002] 3 WLR 1617.

[23] CISG, Article 25

[24] Tort Law, available at https://www.investopedia.com/terms/t/tort-law.asp

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‘1. Where a natural person makes an input error in an electronic communication exchanged with the automated message system of another party and the automated message system does not provide the person with an opportunity to correct the error, that person, or the party on whose behalf that person was acting, has the right to withdraw the portion of the electronic communication in which the input error was made if:

(a) The person, or the party on whose behalf that person was acting, notifies the other party of the error as soon as possible after having learned of the error and indicates that he or she made an error in the electronic communication; and

(b) The person, or the party on whose behalf that person was acting, has not used or received any material benefit or value from the goods or services, if any, received from the other party.

2. Nothing in this article affects the application of any rule of law that may govern the consequences of any error other than as provided for in paragraph 1.’[25]

So, this article provides with two possibilities of withdrawing the portion of electronic communications in which an input error was made:

1. This article concerns only errors that occur in transmissions between a natural person and an automated message system when the system does not provide the person with the possibility to correct the error.[26]
2. The error was made under the conditions of:

‘(a) notifying the other party of the error as soon as possible after having learnt of it, and

(b) not having used or received any material benefit of value from the goods or services.’[27]

CHAPTER 2

Commercial Dispute Resolution

2.1 Jurisdiction and Tactical Litigation

International commercial disputes before civil courts generate distinctive issues of principle and policy. The process of concluding online transactions challenged the existing regulations in determination of Internet jurisdiction and applicable law of the conctract.

[25] Article 14 of the UN Convention on the Use of Electronic Communications
[26] Explanatory Note 2007, p. 74.
[27] The UN Convention 2005, Article 14.

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Jurisdiction is the authority/ right granted to the court to try/ hear the case and rule on legal matters over certain types of legal cases. For EU Member States for jurisdiction defining the Brussels Regulation is used. According to Article 25 of the Recast Brussels Regulation parties of a contract have freedom to include a provision in it that will specify which courts have jurisdiction to hear the case (more than one forum may be mentioned).[28] For employing such clause, which at the same time would make the court procedure more effective, the following four questions shall be answered before the court defining:[29]

1) Venue issue: Where should a claimant sue? And where should the defendant bring his counter-claim?
2) Enforcement issue: Will the judgement of a court in one country be enforceable in another country?
3) Regulation: How the venue and enforcement issues can be regulated by the parties by employing jurisdiction and applicable law clauses?
4) Fairness: Will any party have an unfair advantage in case the proceedings concerning cross-border transaction occurs in a non-optimal court?

While the first two questions are subject to regulation by international conventions, the last two are the consequences of the parties' choice. If that choice is reasonable, then no enforcement or fairness issue would arise.

Cross-border transactions are subject to regulation by both Private International Law and international Conventions. The Civil Procedure Code of Armenia has the following regulation of jurisdiction issue for the cases with a foreign element:

Article 431 provides that

'1. The courts of the Republic of Armenia try cases in which foreign citizens participate, if the defendant has place of residence or is located in the territory of the Republic of Armenia.

2. The courts of the Republic of Armenia are also entitled to try civil cases with participation of foreign citizens, if:

1) there is an agreement to that effect between the citizen or legal entity of the Republic of Armenia and the foreign person,

(…)'[30]

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[28] Brussels Regulation, Article 25
[29] Richard Fentiman – Theory and Practice of International Commercial Litigation
[30] Civil Procedure Code of RA, Article 431

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So, if there is an initial agreement between the parties that the jurisdiction of RA applies, then courts of RA will be capable to hear the case with a foreign element. However, Armenian legislation does not limit the parties to give another country's court an authority to try the case.

For civil and commercial cases in the EU the Brussels I Regulation applies (EC No. 44/2001).[31] When applying Recast Brussels Regulation, three important things must be discussed:

• Domicile.

The domicile is important, because according to it the jurisdictional issues are being defined. For example, Article 4(1) stipulates that 'persons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State' and 'persons who are not nationals of the Member State in which they are domiciled shall be governed by the rules of jurisdiction applicable to nationals of that Member State.[32]

While it is a common opinion, that a party should have only a single domicile, actually Article 63(1) of the Recast Brussels Regulation provides that 'a company or other legal person or association of natural or legal persons is domiciled at the place where it has its:

(a) statutory seat,

(b) central administration; or

(c) principal place of business.'[33]

So, it's obvious, that an entity may be domiciled in up to three EU Member States simultaneously, or it can also have domiciles both within the EU and outside it. However, a person not domiciled in a Member State may be sued in a Member State in certain cases, specified in Articles 6 (1) of the Recast Brussels Regulation. But the following should also be considered, that in this case the Regulation will not apply, and the and jurisdiction will be defined under national rules of the forum. And the opposite may also take place: a person domiciled in a Member State may be sued in another Member State in cases specified in Article 7 of the Recast Brussels Regulation.

[31] Council Regulation on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matter (hereafter the 'Brussels I Regulation'); see Council Regulation (EC) No. 44/2001, 22 December 2000, OJ L 012, 16 January 2001, p. 1. Available at: http://europa.eu.int/ eur-lex/pri/en/oj/dat/2001/l_012/l_01220010116en00010023.pdf

[32] The Brussels Regulation, Article 4

[33] The Brussels Regulation, Article 63(1)

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• Special jurisdiction

Usually disputes are being resolved in the country, where the entity is domiciled, however in case of commercial disputes the ones can be resolved not only in the courts of domicile, but also in ones connected to the subject matter of the dispute.

Articles 7 – 9 of the Regulation, headed 'special jurisdiction', provide that in case of contractual claim those courts have jurisdiction to try the case, where the performance of the obligations in question should take place. In our case (sale of goods) Article 7(1) of the Brussels Regulation stipulates the following: 'in the case of the sale of goods, the place in a Member State where, under the contract, the goods were delivered or should have been delivered'.[34]

• Hague Convention on Choice of Court Agreements

Some countries have signed The Hague Convention on Choice of Court Agreements 2005, but at this time it has been ratified only by Mexico and the EU (except Denmark), so it concerns jurisdiction issues between only those two entities for the time being.[35] Parties under this Regulation should have an agreement, where the specific courts are chosen, and the other courts not included in this agreement should stay the proceedings. That is, the choisce of court according to this Convention is exclusive

2.2 Hierarchy of the Norms of Recast Brussels Regulation and Exclusive Jurisdiction

It is a common thing that for the same case different articles of a regulation may stipulate different solutions. So for preventing such cases, the Brussels Regulation provides with the following hierarchy of norms:

Art 24

Art 26

[34] The Brussels Regulation, Article 7 (1)

[35] Hogan Lovells, "Jurisdiction and Governing Law Rules in the European Union", available at https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2017-general-pdfs/jurisdiction-and-governing-law-rules-in-the-european-union-2016.pdf

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Art 25 (exclusive)

Arts 4⇔ 7 ⇔ 25 (non-exclusive)

Article 6

In the scope of Recast Brussels Regulation Article 24 has a priority over the others and gives courts an 'exclusive jurisdiction' over certain categories of dispute, which means that regardless of what the parties have agreed, these disputes should be tried in only one jurisdiction. The court that has jurisdiction under Article 24 is the only court that can hear the case. Thus, any other court shall deny jurisdiction in case the court of another Member State has jurisdiction under Article 24.

The next Article in this hierarchy is Article 26, which stipulates that 'apart from jurisdiction derived from other provisions of this Regulation, a court of a Member State before which a defendant enters an appearance shall have jurisdiction.'[36] Entering an appearance means that the party agrees to the jurisdiction of the court, where the other party has sued. This Article does not apply only in the cases when the defendant claims that only that the court where the claimant has sued does not have jurisdiction to hear the case or when another court has exclusive jurisdiction by virtue of Article 24.

Article 25 provides with party autonomy for jurisdiction agreement. According to Article 25 'If the parties, regardless of their domicile, have agreed that a court or the courts of a Member State are to have jurisdiction to settle any disputes which have arisen or which may arise in connection with a particular legal relationship, that court or those courts shall have jurisdiction, unless the agreement is null and void as to its substantive validity under the law of that Member State. Such jurisdiction shall be exclusive unless the parties have agreed otherwise.'[37] The Article not only gives freedom of choice to the parties, but also limits the jurisdiction to only one court, which makes the procedure of applying to the court more certain.

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[36] The Brussels Regulation, Article 26
[37] The Brussels Regulation, Article 25

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For it to be more visualized, the following flow chart is provided, which best describes how to apply the Recast Brussels Regulation.[38] By following the steps in the chart it can easily be defined which Article of the Regulation is applicable for that certain case.

In the chart the scope of the Recast Regulation (green boxes) and the most important provisions of the Regulation are presented. For example, as it was already mentioned above, Article 24 gives courts 'exclusive jurisdiction' over certain categories of dispute, which means that regardless of what the parties have agreed only a certain court has jurisdiction over the case. At the bottom of the chart, in orange boxes, the basic provisions are mentioned, which apply only when other overriding provisions do not. In grey boxes there are provisions concerning ‘domicile’ of a party and ‘special jurisdiction’.

[38] Hogan Lovells, “Jurisdiction and Governing Law Rules in the European Union”, available at https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2017-general-pdfs/jurisdiction-and-governing-law-rules-in-the-european-union-2016.pdf

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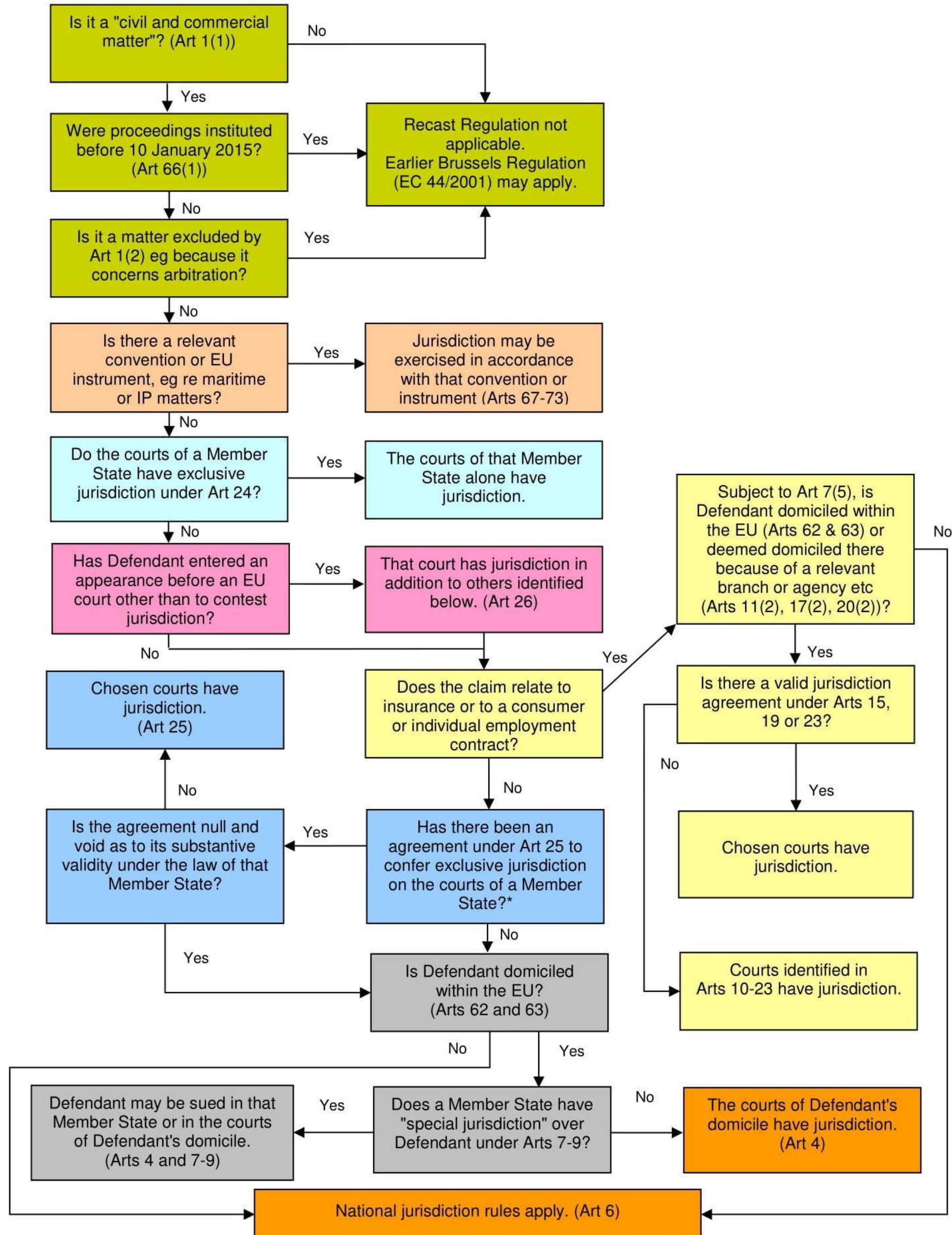

To sum up, a court has to have certain grounds of jurisdiction in order to be able to hear the claim. And in specific cases more than one court may be authorised to try the case. The proceedings in two or more courts, where the same parties or/and same or similar objects

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(same legal purpose) and/or same or similar grounds (same legal and factual basis) present is called parallel proceedings.

Article 180 of Civil Procedure Code of RA stipulates that 'the first instance court of the Republic of Armenia at any stage leaves the action without trial, if:

(…) 2) there is a proceedings in the same or another court or artbitrary between the same persons, on the same object and on the same grounds, (…)'[39]

Article 182 of Civil Procedure Code of RA provides that ' the first instance court of the Republic of Armenia at any stage declines the case, if:

(…) 2) there is already an enacted judgment on the case between the same persons, on the same object and on the same grounds, which has come into effect. (…)'[40]

So these two article provide with the possibility to manipulate among courts, because in the event another country's court will accept the case, a tactical claimant may sue there to obtain advantage in the case. And this manipulation is called tactical litigation.

Recast Brussels Regulation also regulates parallel proceedings, so that to prevent the irreconcilable judgments which compete for enforcement (conflicting judgments). Articles 29 and 33 of the Brussels Regulation provide solutions for certain cases with the same parties, same cause of action, as a common rule by giving a priority to the court first seised. For cases containing related actions Articles 30 and 34 apply, so that to prevent the inconsistent judgment within the EU regime. According to Article 30, the court first seised has a priority over the others, however, it gives some discretion to the courts. It provides that 'where related actions are pending in the courts of different Member States, any court other than the court first seised *may* stay its proceedings.'[41], which actually means that there is no obligation to stay the proceedings and the Regulation leaves it to the discretion of that court to decide.

In case of parallel exclusive jurisdiction Article 31 of the Brussels Regulation applies and regulates in a way, that ' where actions come within the exclusive jurisdiction of several courts, any court other than the court first seised shall decline jurisdiction in favour of that court'[42], by applying a common rule of giving priority to the court first seised.

When there is a jurisdiction agreement designating a certain court: in cases of Articles 29 and 30 one can simply sue in a court which may have jurisdiction and overcome the

[39] Civil Procedure Code of RA, Article 180
[40] Civil Procedure Code of RA, Article 182
[41] The Brussels Regulation, Article 30
[42] The Brussels Regulation, Article 31

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jurisdiction agreement based on the fact that under such articles the court first seised has priority.

But the issue is different in case of Article 31(2). This does not solve the problem because:

(a) the designated court has to be seised;

(b) does not cover non-exclusive jurisdiction agreements.

This Article does not prevent from the risk that a tactical claimant may avail itself of the financial disadvantage that the defendant has, and sue in more than one court.

2.3 Recognition and Enforcement of Foreign Judgments and Arbitral Awards

As it was already dicussed in the previous paragraph, certain foreign courts may have a jurisdiction to hear the case and render a judgment. However, having obtained a judgment in the foreign court is not enough, as the judgment has to be also a subject to recognition and enforcement.

Recognition and enforcement is usually governed by a treaty signed between the two states, based on which the courts in the target state recognize and enforce the judgment. These treaties are too important, because they regulate the enforceability foreign judgments and compatability with the logal legislation.

The rules on recognition and enforcement are set out in the Civil Procedure Code of Armenia. Article 434 of the Code provides that 'serving of notice, recognition and enforcement, other matters relating to international litigation are done according to international conventions signed by Republic of Armenia' and that 'foreign procedural rules can be applied if envisaged by the respective convention'.[43]

The recognition of arbitral awards is subject to regulation by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958 New York Convention). Armenia is also a party to that Convention. The Convention is aimed at recognition and enforcement of foreign arbitral awards for preventing certain risks, at the same time by providing a space to refuse the enforcement, if otherwise the recognition would be in conflict with the legislation the country of enforcement.

[43] Civil Procedure Code of RA, Article 434

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For the purpose of ensuring some risks the Civil Procedure Code of RA provides with state immunity article, by limiting the enforcement of judgments connected with the property situated in Armenia[44]. However, while the article limits the enforcement of the judgments, it should not limit the judgment rendering.

CHAPTER 3

Applicable law for Internet-related disputes

Applicable law is the law chosen for dispute resolution. Usually this choice is connected with the choice of jurisdiction and these two important dispute resolution issues are being discussed and provided in the contract in accordance with each other. As it was already mentioned there is party autonomy, that is the parties have freedom to choose both applicable law and the jurisdiction. The time and location of the contract are important for deciding these, and generally the law of the country where the contract is concluded is the governing law of the contract.

In Amenia, according to the Article 1284.1 of RA Civil Code, parties have freedom to choose the applicable law, and if no choice of applicable law clause is included in the contract, then according to the Article 1285 of RA Civil Code in case of a contract of purchase and sale, the law of the state, where the seller has residency applies.[45]

For EU countries in case of applicable law issue solving there is a convention which regulates the governing law. The Rome I Regulation is intended to establish consistency with the Brussels I Regulation with regard to the relationship between jurisdiction and choice of law. The Regulation does not specifically concern electronic contracts, however provides the provisions that regulate choice of law issue.

According to the Article 1 of the convention 'shall apply to contractual obligations in any situation involving a choice between the laws of different countries.'[46] The most important provisions are Article 3 and 4, as Article 3 concerns the applicable law chosen by the parties, that is party autonomy, and is aimed to strenghten the freedom of parties. The article provides that 'the choice shall be made expressly or clearly demonstrated by the terms

[44] Civil Procedure Code of RA, Article 432
[45] RA Civil Code, Article 1284, 1285
[46] The Brussels Regulation, Article 1

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of the contract or the circumstances of the case'. Moreover, the parties to the contract can change the applicable law agreed at any time by concluding another contract, as provided in the Article 3(2) of the regulation, or may also apply certain law to the certain part of the contract.

So, for the cases where no law is mention the law identification should consist of the following steps:

Firstly, it is necessary to characterize the issue that is before the court, the question regarding the interpretation of the contract.

Secondly, the court must identify the 'connecting factor' for the issue in question. That is to identify the rule of conflict laws that ties the issue before the court to a particular legal system.

Thirdly, after the connecting factor is already defined the court must apply it, so that to identify the applicable legal system.

The matters of procedure are governed by lex fori, that is the law of the country where the claim is brought. The court determines whether the question is of substance or procedure. This identification process by EU courts is done through Rome 1 Regulation, which applies to civil and commercial matters, with exception of the cases involving conflict of laws.[47] In case of this regulation again, as in the case of Brussels Regulation, the article providing with the party autonomy (Article 3 of Rome 1 Regulation) prevails.

At the same time the Article 4 is considered to deal with cases when no law is mentioned. According to the Article 4(1) 'the law of the country where it is most closely connected applies.'[48]

Contracts frequently contain different obligations, so the parties must have freedom to subject the different obligations to different laws. This is known as 'splitting the applicable law'.[49]

The Rome I Regulation (Article 4) has preserved the rule in the Rome Convention whereby the applicable law is the law of the place where the party performing the service characterising the contract has his habitual residence.[50] It provides that:

[47] Article 1(1) of Rome 1 Regulation
[48] The Rome I Regulation, Article 4 (1)
[49] J. Hill (2005) International Commercial Disputes in English Courts, 3rd edn (Oxford and Portland, OR: Hart), p. 481.
[50] The Rome I Regulation 2008, Article 4(1).

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‘(a) a contract of sale shall be governed by the law of the country in which the seller has his habitual residence; (…)’[51]

So, this article fully covers all the possible cases with no applicable law clause mentioned in the contract, so that before entering into contract one knows the certain outcome. It’s important to have such specific provisions for each case, so that even when not using the opportunity of party autonomy clause employment, parties’ rights and obligations are protected.

In case of buying or selling online, with regard to applicable law in electronic contracts, to determine the applicable law in the absence of choice two steps are necessary:

1. The first one is to determinethe seller’s habitual residence, as it has already been mentioned. For identifying it Article 19 of Rome 1 Regulation applies, which stipulates that ‘the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.'[52]
2. Secondly, if the seller’s habitual residence cannot be determined, the court will identify the characteristic performance of the contract and determine the law which is most closely connected to the contract.[53]

According to Article 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.’[54] But what is considered under ‘most closely connection’? For example, in Apple Computer Corps v Apple Computer Inc [2004] EWHC 748 (Ch) all circumstances of the case can be taken into account “without identifying any limit to the categories of circumstances which could be taken into account”[55]. That is, as at common law, the language of the contract, its currency, place of performance, location of the contracting parties’ places of business, the negotiations, etc. should be taken into account for deciding the closest connection.

[51] The Rome I Regulation 2008, Article 4(1)(a).
[52] The Rome I Regulation 2008, Article 19
[53] The Rome I Regulation 2008, Article 4(3)
[54] The Rome I Regulation 2008, Article 4(3)
[55] Apple Computer Corps v Apple Computer Inc [2004] EWHC 748 (Ch), available at https://uk.practicallaw.thomsonreuters.com/7-106-7840?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1

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For a better visualization of which law applies to the case, a flow chart is presented.[56] The rules concerning the scope of the Regulation are presented in green boxes and those aimed at protecting vulnerable litigants, such as consumers are presented in yellow ones. Blue boxes contain agreements on governing law and in the bottom of the page orange boxes contain rules where there is no agreement between parties, so default rules apply.

There are also strict provisions in the Regulation for certain categories, according to Article 4(1) (first orange box).[57] This chart is helpful for understanding the priorities among the articles, as well as is the visual algorithm of the applicable law determining in certain cases.

[56] Hogan Lovells, "Jurisdiction and Governing Law Rules in the European Union", available at https://www.hoganlovells.com/~/media/hogan-lovells/pdf/2017-general-pdfs/jurisdiction-and-governing-law-rules-in-the-european-union-2016.pdf

[57] REGULATION (EC) No 593/2008 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 17 June 2008 on the law applicable to contractual obligations (Rome I)

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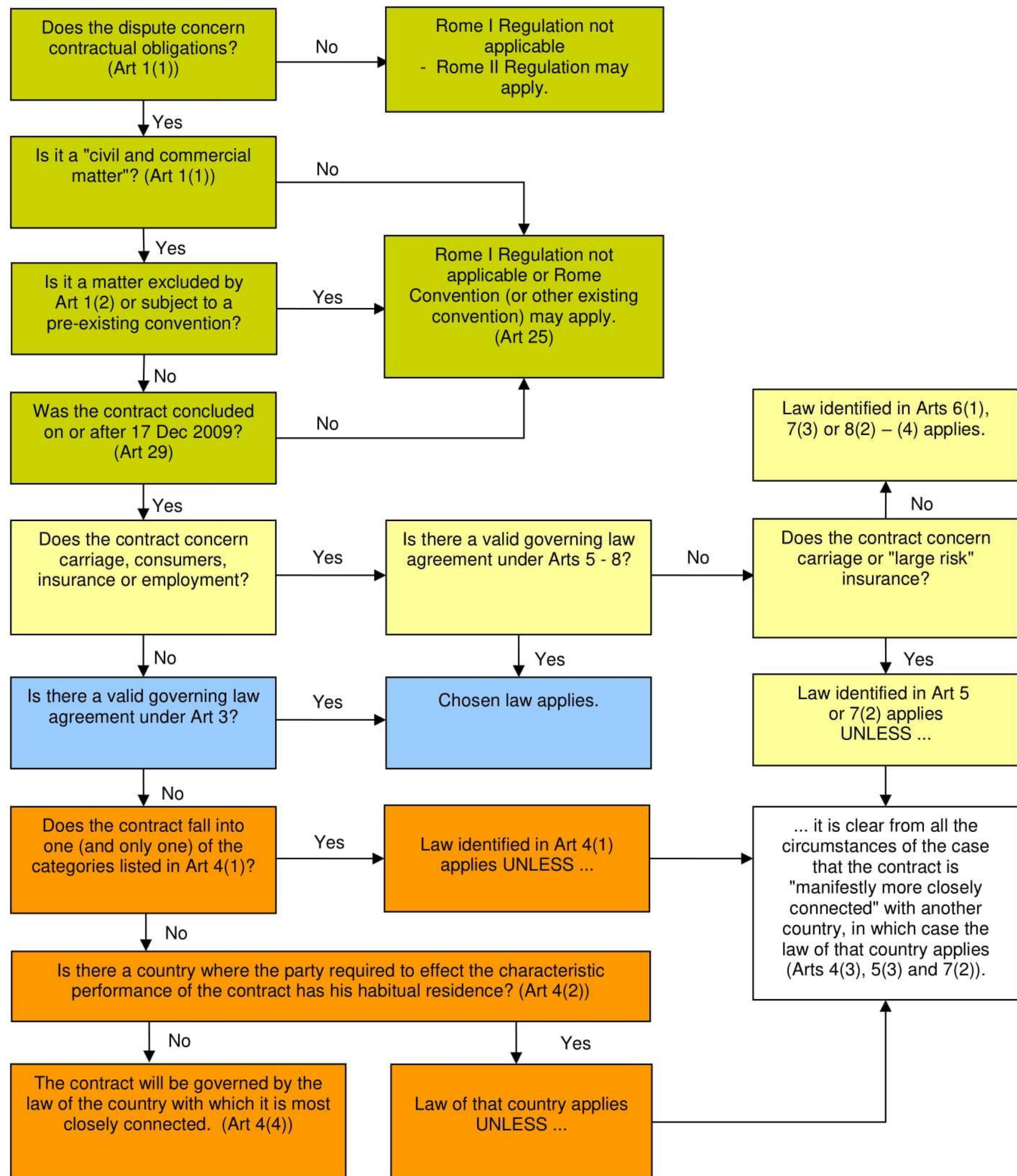
Rome I (EC 593/2008) - Which law applies to contractual obligations?



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CONCLUSION

The actuality of electronic communication nowadays has already led to electronic contract concluding, which consists of many complicated processes. There are two phases of concluding the contract, making an offer and accepting it. Each of these processes has such requirements for the contract not to be void, as mentioning terms and conditions, quantity and price of the items, etc. Among the different clauses included in the contract there may be a clause where parties choose the applicable law to the contract and jurisdiction, which is called party autonomy. Whenever no such clause is mentioned in the contract, then for dispute resolution cases some international regulations apply for solving the issues.

Particularly:

1) For identifying the courts authorized to hear the case the Civil Procedure Code of RA and Brussels Regulation apply.
2) For defining the law applicable to the contract the Civil Code of RA and Rome 1 Regulation apply.

The abovementioned regulations are significant when concluding contracts with international elements, as they provide the parties with all the possible outcomes in case of a dispute.

As it was mentioned in the beginning of the Paper, it is aimed to provide solutions for dispute resolution cases, starting from the point of concluding the contract. In the first chapter of the Paper the process of concluding a contract was described, including the elements of a contract necessary for it to be concluded, as well aa all the possible ways of concluding it. Further, the errors connected with e-contracts were discussed by differentiating which errors can make a contract null, and which errors are not considered to be 'fundamental'.

On the other hand, the consequences of the contract disputes were discussed in the Paper, i.e. how the disputes arising out of the contract are going to be resoluted. For answering this question firstly, the jurisdiction issues were spoken about, including general jurisdiction, special jurisdiction and exclusive jurisdiction cases. Given that more than one court may be authorized to try the case, we came to the point of parallel litigation and using the adbantages of the possibility to try the same case in different jusrisdiction by one of the parties, that is tactical litigation. However, as the foreign countries may be authorized to heat the case and render a judgment, but the final place of enforcement is another country, the isse

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of unenforceability arises. The solution for the latter are the treaties concluded between different countries, that give certain provisions for specific cases.

Secondly, the applicable law issue was discussed. As in the case of jurisdiction, in this case also parties have freedom to employ a clause in the contract, specifying which law shall govern the contract. However, in cases when no law is mentioned both the Armenian legislation and the Rome 1 Regulation provide that in case of sale of goods the law of the country where the seller has habitual residence applies.

To sum up, the sphere of electronic contracts is new enough to have all the regulations that would prevent from all the possible risks, however, for this moment and level of development of this field the law provides not only with the provisions that protect the seller's and the buyer's obligations, but also gives a space to manipulate for some advantages and provides with immunity in certain cases.

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