



International Distribution Institute

# **Corman-Collins effects on applicable law:** *has the Pandora Box been opened?*

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# Brussels I - Regulation 44/2001, Art. 5 (soon Brussels I *bis* Regulation 1215/2012, Art. 7)

on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters

- A person domiciled in a Member State may, in another Member State, be sued:
  - (a) in matters relating to a contract, in the courts for the place of performance of the obligation in question;
  - (b) for the purpose of this provision and unless otherwise agreed, the place of performance of the obligation in question shall be:
    - 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
    - in the case of the provision of services, the place in a Member State where, under the contract, the services were provided or should have been provided;

## Rome I - Regulation 593/2008 - Article 4(1) on the law applicable to contractual obligations

If the law applicable to the contract has not been chosen :

- a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
- b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
- (...)
- f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;

# Rome I - Regulation 593/2008

## on the law applicable to contractual obligations

### Article 19

- 1) For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration.



Both the AG JÄÄSKINEN and the ECJ Judges in Corman-Collins point out:

- the concept of ‘distribution agreement’ is not defined in European Union law and
- is likely to refer to different situations in the laws of the Member States

*[SIDE NOTE: Portuguese SCJ ( ac. STJ 12-10-2006, 09-10-2008, 29-04-2010) ruled that “As the commercial concession agreement, in view of its structure, cannot be assimilated, for the effects in question, to a sale of goods or to a provision of services, art 5 (1) b) of the Regulation [Brussels I] should not be applied.”]*

# Rome I - Regulation 593/2008

## on the law applicable to contractual obligations

- **Recital 7** provides that *“the substantive scope and the provisions of this Regulation should be consistent with those of Regulation [No 44/2001] [Brussels I]”*
- **Recital 17** provides that *“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 [Brussels I] in so far as sale of goods and provision of services are covered by that Regulation. Although franchise and distribution contracts are contracts for services, they are the subject of specific rules.”*
- **Recital 19** provides that *“Where there has been no choice of law, the applicable law should be determined in accordance with the rule specified for the particular type of contract. Where the contract cannot be categorised as being one of the specified types or where its elements fall within more than one of the specified types, it should be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence.”*

## The problem

- We have seen that the ECJ has (timidly) put forward criteria for a definition of ‘distribution agreement’ (the particulars of which I will not go into in this presentation since they were object of the previous ones)
- As a result, it is expected, then, that that criteria may also be used for determining if and when there is a distribution agreement under Rome I



## The problem

### Under Brussels I

- If a mere purchase and sale of goods - the competent court would be the one where the goods were delivered (Art 5(1)(b) 1<sup>st</sup>§).
- If the contractual relationship is seen as a *framework agreement* where the “distributor” undertakes a certain range of obligations regarding the distribution of goods sold by the grantor, providing therefore a service - the competent court would be the court of the place in which the service is provided (Art 5(1)(b) 2<sup>nd</sup>§).



## The problem

### Under Rome I

- if a mere purchase and sale of goods - the applicable law would be that of the country where the seller has his habitual residence (Art 4 (1) a)).
- If a distribution agreement - the applicable law would be that of the country where the distributor has his habitual residence (Art 4 (1) f)).

## The problem

If a distributor was acting in a Member State different from the one where it has its habitual residence, then it may happen that the distributor may sue the grantor (or be sued) in that other country where the service is being provided but apply the law of the country of its habitual residence (in the absence of a permanent establishment in that other country).

Questions will arise if there is doubt about the qualification of the contractual relationship as a true distribution agreement.

In addition ...

# The problem

## Rome I - Regulation 593/2008

### on the law applicable to contractual obligations

#### Article 9

- 1) Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under the Regulation.
- 2) Nothing in the Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.

## The problem

In countries where there is analogy with agency law, issues may arise when applying a foreign law

- In the event that analogy with Agency Law is applicable, for e.g. Portuguese Agency Law has a particularity once it establishes a “*loi de police*” (Overriding mandatory provision) in what concerns the applicable law to the termination of contract rules.
- Portuguese Agency Law states that in what concerns agency (analogously, distribution) contracts that are executed exclusively or preponderantly in national territory, the Portuguese law shall always be the applicable law to termination of contract matters unless it is demonstrated that a foreign law is more advantageous to the Distributor.



## The problem

However, a very recent award by the Lisbon Court of Appeals (*Tribunal da Relação*) (ac. TRL 16-01-2014) states that:

- *“the provisions of art 33<sup>o</sup> [clientele indemnity] and art 38<sup>o</sup> of Agency Law are indeed part of the [Portuguese] material law public order, but are not part of the international public order of Portugal, the latter of a more stricter nature.”* [There is no result] *“which is incompatible with the rules and fundamental principles of the [Portuguese] legal order.”*

*[Redress to the SCJ is expected]*

## The consequences

If Distributors are able to qualify a commercial relationship as a “distribution contract” as per Corman-Collins, Grantors will largely risk:

- 1) to be sued by distributors before the courts of the distributors and
- 2) to have distributors benefiting from any protection eventually provided by the law/case-law of their countries

Henceforth, the absence of written contract and of choice of competent court/applicable law, might well mean 1) courts of the distributor and 2) law of the distributor (most of the times).

## The consequences

Difficulties will continue (as will national disparities) as to ascertain if and to which extent are we before a true distribution agreement, once the ECJ naturally leaves up to national courts the task of sorting that out.

Corman-Collins was a small step towards uniformity but not a definite solution.

In that sense, no Pandora Box has been opened. At least, not yet.



In any case, further analysis of Corman-Collins effects  
may wait for next Monday's World Cup clash  
between Portugal and Germany



*Murphy's  
Law  
is not  
applicable!*





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