

AN ITALIAN COURT DECISION MAKES THE FIRST REFERENCE TO ROME I REGULATION

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1 INTRODUCTION

The *Finverto v Glassmoble*¹ case, which was adjudicated by the Court of Padua (Section of Este) on 22 April 2009, concerns a 'brand licensing and manufacturing agreement' for special windowpanes. An Italian licensor and a Spanish licensee entered into said agreement in June 1999. Under this agreement, the Italian company should provide equipment and components for the manufacturing of windowpanes by the Spanish company, who would assemble and resell them into the Spanish territory with exclusiveness.

The agreement provided for the payment of royalties at the amount of EUR 51,645.69 per year. However, in 2004 the licensee ceased to pay the annual royalties as well as to take over the goods. As a result, the licensor avoided the agreement.

As a result of the parties' choice, the Court applied Italian law to the substantive part of the dispute. Prior to deciding in favor of the application of Italian law, the Court ruled on its jurisdiction under the Brussels Regime.

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¹ See Tripodi Leandro, "Case Translation of Finvetro S.R.L. v Glassmoble S. A", (2010) 14 *Vindobona Journal* 117.

As a consequence of the application of Italian law, the Court found that the Spanish licensee was in breach of its obligations and that the Italian licensor was justified in avoiding the agreement. The licensee was ordered to pay the Italian licensor all the sums in arrears as well as a penalty based on the value of the annual royalties. Reimbursement of litigation expenses was also contemplated.

2 COURT'S FINDINGS ON JURISDICTION

The Defendant (i.e., the Spanish licensee) appeared before the Court not raising any objection to its jurisdiction. Considering the principle of party autonomy in contractual matters, this can be regarded as amounting to a waiver of forum. The Court accordingly decided that it was competent to hear the case under the applicable international provisions.

The basic rule set out both in the Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 1968 ('Brussels Convention') and in the Council Regulation (EC) No. 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters ('Brussels I Regulation')² is that a person should be sued before the courts of its own domicile.

According to Recital 11 of the Brussels I Regulation:

[t]he rules of jurisdiction must be highly predictable and founded on the principle that jurisdiction is generally based on the defendant's domicile and jurisdiction must always be available on this ground save in a few well-defined situations in which the subject-matter of the litigation or the autonomy of the parties warrants a different linking factor.

On this basis, a number of exceptions to that rule are set forth in Sections 2 to 7 of Chapter II of the Brussels I Regulation. Most of those exceptions relate to specific kinds of obligations such as: insurance, consumer contracts or immovable property or to an agreement by the parties. However, one exception directly applies in matters relating to a contract, specifically, that the courts of the place of performance of the obligation shall be deemed competent.³

² For Member States of the European Union, the *Brussels I Regulation* has replaced the Brussels Convention as of 1 March 2002.

³ See Article 5 (1) (a) to (c) of the *Brussels I Regulation*.

Article 5 (1) (b) of the Brussels I Regulation provides for two criteria in support of the determination of the place of performance of the obligation, namely:

- In the case of the sale of goods, the place where, under the contract, the goods were delivered or should have been delivered;
- In the case of the provision of services, the place where, under the contract, the services were provided or should have been provided.

The agreement at stake involved a combination of sale of goods and provision of services. As to the sale of goods, it is unclear where the delivery should have been made. The Court concluded, however, that the Plaintiff (i.e., the Italian licensor) was responsible for delivery, which indicates that delivery had to be made at the place of business of the licensee. Additionally, the services (licensing of a brand) were to be provided in the Spanish territory. Hence, under either of the two criteria of Article 5 (1) (b) of the Brussels I Regulation, it does not appear that an Italian court was competent to entertain the case.

Notwithstanding that, the Court avoided such a line of reasoning. Instead, it assessed its jurisdiction as follows:

In regard to:	The Court found that:
The territorial aspect	The application of the Brussels I Regulation is direct and binding over both Spain and Italy.
The subject-matters involved	<ul style="list-style-type: none"> • The case deals with “civil and commercial” matters; • No exclusion under Article 1 (2) of the Brussels I Regulation applies.
Tacit acceptance of jurisdiction	<ul style="list-style-type: none"> • “[The Defendant] has appeared before the first instance judge and did not in any way contest his jurisdiction or competence”; • “[Such] conduct must be evaluated as a tacit acceptance of the jurisdictional competence of the Court of Padua”; • No rule on exclusive jurisdiction as provided for in Article 22 of the Brussels I Regulation applies.

Therefore, the Court's findings are in line with Article 24 of the Brussels I Regulation, which states that:

[a]part 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.

This is also in line with the principle of party autonomy.⁴ However, no express mention to Article 24 of the Brussels I Regulation or to the autonomy of the parties as regards a choice of forum was made throughout the decision.

3 COURT'S FINDINGS REGARDING APPLICABLE LAW

As held by the Court, the agreement contained a choice of law clause, providing for application of Italian law. The Court referred to the parties' choice on the basis of the 1980 ECC Convention of Rome on the Law Applicable to Contractual Obligations ('Rome Convention')⁵.

The 'golden rule' of the Rome Convention is that of freedom law choice. This rule is set out in Article 3 (1) of the Rome Convention:

[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 to the whole or a part only of the contract.

The regime of the Rome Convention is a liberal one, allowing the parties to change the law applicable to the contract at a subsequent time⁶ provided that neither the validity of the contract nor the rights of third parties are affected. However, parties are prevented from frustrating the application of mandatory rules of a Member State where all the elements of a contract (except for the choice of law and, if it happens to exist, of forum) are connected with that Member State alone.⁷

⁴ See also Recital 14 of the *Brussels I Regulation*:

“[t]he autonomy of the parties to a contract, other than an insurance, consumer or employment contract, where only limited autonomy to determine the courts having jurisdiction is allowed, must be respected subject to the exclusive grounds of jurisdiction laid down in this Regulation”.

⁵ It deserves note that the Court pointed out that no uniform legal text exists on the subject of brand licensing and manufacturing agreements that could be applied to the case.

⁶ See Art. 3 (2) of the Rome Convention.

⁷ See Art. 3 (3) of the Rome Convention.

In light of that, the Court concluded that the parties' choice in favor of the application of Italian law was a valid one under the applicable rules. At this point, the Court made reference to a very interesting issue. The Rome Convention has been recently replaced for Member States of the European Union by the Rome I Regulation⁸, which was not thought to be effective at the time when the decision was laid down. In fact, the Rome I Regulation (Article 29, second part) applies for contracts concluded as of 17 December 2009.

The decision on this issue is the first reported judicial decision to discuss the Rome I Regulation. The Court's comments on the subject are as follows:

[i]t can be noticed that one would reach the same conclusion by application of the new EC 593/2008 Regulation (Rome I Regulation) on the Law Applicable to Contractual Obligations, since this act also adopts party autonomy as a (key) connection criterion.

As a matter of fact, the only difference between Article 3 (1) of the Rome Convention and Article 3 (1) of the Rome I Regulation is the exchange of the words 'reasonable certainty' for the phrase 'clear demonstration' when it comes to an implicit selection of applicable law. In the case at hand, this particular difference did not arise since the parties' choice was expressly made.

As a result, the Court confirms that party autonomy remains the cornerstone of the conflict-of-law system adopted by the European Union in commercial contractual matters.⁹

4 COURT'S FINDING ON MERITS OF THE DISPUTE

Broadly speaking, the subject matter of the dispute was a breach of the brand licensing and manufacturing agreement. The agreement stipulated a penalty for breach and also provided a resolutive clause.

The Court applied Article 1456 of the Italian Civil Code, which provides for the avoidance¹⁰ of the contract by the aggrieved party. The avoidance is effective as of the moment when the aggrieved party notifies the other party of its intention to avoid the contract.

⁸ See Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008.

⁹ In the wording of Recital 11 of the Rome I Regulation:

"The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations".

¹⁰ 'Resolution', in this case meaning that a party deems that the co-contracting party is in breach and then unilaterally terminates the agreement.

The Court held that the avoidance by the Italian licensor was justified and that the penalty for breach of contract should be ordered.

5 CONCLUSION

The Court's findings on its jurisdiction and on the applicable law were made under the Brussels Regime (precisely, under the Brussels I Regulation) and under the Rome Convention.

The Court stated that the same result as to the applicable law would be achieved under the newly adopted Rome I Regulation on the Law Applicable to Contractual Obligations. For the Member States of the European Union, the Rome I Regulation replaces the Rome Convention with respect to contracts entered into as of 17 December 2009 by parties of the Member States.

The replacement of international conventions for community regulations is part of the development of the European legally binding basis. Matters covered by old treaties such as the Rome Convention and the Hague Convention of 2 October 1973 on the Law Applicable to Products Liability, are now governed by the novel Regulations of Rome. This is an evolution of the process of adoption of uniform private international law and international civil procedure rules within the 'European space of justice'. The result of that process is denationalisation of private international law and the genesis of communitarian rules in the replacement of domestic ones.¹¹

With respect to the law applicable to a commercial contract by virtue of a choice of law by the parties, no relevant modification exists between the Rome Convention and the Rome I Regulation. In the case of an absence of such choice, the Rome I Regulation is much clearer than the Rome Convention. It keeps the main standard of the Rome Convention¹² only as an ancillary criterion¹³ and sets out precise connection criteria for the following types of obligations: (a) sale of goods; (b) provision of services; (c) and (d) immovable property and tenancy; (e) franchise contracts; (f) distribution contracts; (g) sale of goods by auction and (h) financial instruments.¹⁴

¹¹ BASSO, Maristela. *Curso de Direito Internacional Privado*. São Paulo, Atlas, 2009, pp. 63-66.

¹² According to Article 4 (2) of the Rome Convention:

"[I]t 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".

¹³ See Art. 4 (2) of the Rome I Regulation.

¹⁴ The letters (a) to (h) refer to the same letters in Art. 4 (1) of the Rome I Regulation.