The Rome I Regulation, the CISG and the EU-AstraZeneca Dispute

VIEWS AND COMMENTS

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In the legal proceedings that European Union (EU) brought before the Belgian courts against AstraZeneca in April 2021 [https://eapil.org/2021/04/26/update-eu-sues-astrazeneca/] and May 2021 [https://www.reuters.com/world/europe/new-eu-legal-case-against-astrazeneca-over-vaccine-supplies-gets-underway-2021-05-11/] , one of the key questions is the law applicable to the Advance Purchase Agreement ("APA") for the production, purchase and supply of a Covid-19 Vaccine in the European Union [https://ec.europa.eu/commission/presscorner/api/files/attachment/867990/APA%20-%20AstraZeneca.pdf] signed between the European Commission (with a business address in Belgium) and AstraZeneca (incorporated in Sweden with a business address therein) on 27 August 2020.

Since the publication of the APA, which is governed by the laws of Belgium as per its Section 18.4, there have been discussions around whether the United Nations Convention on Contracts for the International Sale of Goods [https://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf] (known as the CISG or the Vienna Sales Convention 1980) applies to this agreement (see eg Global sales law in a global pandemic: The CISG as the applicable

[https://cisg-online.org/Home/International-Sales-Law-News/eu-astrazeneca-contract-applicability-of-the-cisg] written by Till Maier-Lohmann and cited in Dr Köhler's blog).

But the fact that this question relates to the law applicable to the APA, and accordingly the application of the Rome I Regulation [https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32008R0593] on the law applicable to contractual obligations, seems to have been overlooked so far apart from a couple of publications (see eg Sixto A. Sánchez Lorenzo, "El advance purchase agreement (APA) entre AstraZeneca y la comisión europea visto desde el Derecho privado", La Ley: Unión Europea, No 90 March 2021 [https://fernandezrozas.com/2021/03/31/la-ley-union-europea-no-90-marzo-2021/] , for which a useful summary in English was provided in Professor Matthias Lehmann's post in this blog entitled Suing AstraZeneca: Who, Where, and under Which Law? [https://eapil.org/2021/04/22/suing-astrazeneca-who-where-and-under-which-law/]).

Upon the first decision [https://cisgportugal.files.wordpress.com/2021/06/court_decision_18-06-2021.pdf] of the Belgian court on 18 June 2021 which states at paragraph 29 at p.39 that "*Les conventions doivent être interpretées au regard de l'intention commune des parties, conformément à l'article 1156 de l'ancien Code Civil"* ("The agreements must be interpreted with regard to the common intention of the parties, in accordance with Article 1156 of the former Civil Code"), further questions have been raised in relation to the applicable law: "Has the court held that Article 3(1) of Rome I Regulation excludes the application of the CISG?; Did the Court apply its domestic conflict rules?; Does the choice of Belgian law by the parties preclude the application of the CISG?"(see Some questions about the first decision of the Belgian court in the dispute between AstraZeneca and the European Commission – CISG-Portugal.org [https://cisg-portugal.org/2021/06/20/some-questions-about-the-first-decision-of-the-belgian-court-in-the-dispute-between-astrazeneca-and-the-european-commission/] by César Pires).

The relationship between the Rome I Regulation and the CISG is at the heart of this discussion. Which instrument should be the starting point of the applicable law analysis for the EU-AstraZeneca APA and does this matter in practice?

law applicable to contractual obligations. Under Article 2(2), it applies in the EU in situations involving a conflict of laws, to contractual obligations in civil and commercial matters that fall into its scope. Being in the form of a regulation, Rome I has general application, is binding in its entirety and directly applicable in all EU Member States (with the exception of Denmark) pursuant to Article 288 of the Treaty on the Functioning of the EU [https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT] .

On the other hand, the CISG is an international convention which provides primarily uniform substantive law rules relating to international sale of goods contracts that fall into its scope. Under Article 1(1), it applies to contracts between parties whose places of business are in different States if either (a) both of those States are Contracting States or (b) the rules of private international law lead to the law of a Contracting State (unless a state reservation exists regarding the 1(1)(b) situation as per Article 95 or parties have excluded the application of the CISG as per Article 6). The CISG has been adopted [https://uncitral.un.org/en/texts/salegoods/conventions/sale_of_goods/cisg/status] by the majority of EU Member States, including Belgium and Sweden, and is in force as part of their national law.

It has been argued on different grounds that if the forum is located in an EU Member State party to the CISG, the CISG takes precedence over Rome I or is capable of applying directly (or autonomously) without recourse to Rome I. This seems to be the prevailing view, notably in Germany, and has been recently endorsed in the UNCITRAL, HCCH and Unidroit Legal Guide to Uniform Instruments in the Area of International Commercial Contracts, with a Focus on Sales [https://assets.hcch.net/docs/0571d8ca-8b56-41a2-8443-4fe93e306c17.pdf] . However, it is questionable to what extent this approach is consistent with EU law:

1. It has been argued that for courts in the CISG Contracting States, the CISG (as uniform substantive law) eliminates under its Article 1(1)(a) the need to recourse to conflict of laws analysis to determine whether it applies (see eg Peter Winship, 'Private International Law and the U.N. Sales Convention', (1988) 21 *Cornell International Law Journal* 487, p.520). According to this view, courts in the EU Member States which are also the CISG Contracting States do not first have to resort to their private international law because, where the CISG is applicable,

fact that there is uniform substantive law to apply to a case does not mean that there is no situation involving a conflict of laws in the given case. It rather means that the conflict of laws is resolved in the given case partially or fully by the application of that uniform substantive law. The question of 'as part of which law that uniform substantive law applies to the given case' would still first require a conflict of laws process (for a similar alternative interpretation of Article 1(1)(a) of the CISG, see Arthur Taylor von Mehren, Explanatory Report on the Convention on the Law Applicable to Contracts for the International Sale of Goods [https://assets.hcch.net/docs/b9e13840-b2af-4456-bd48-31b3bbd8eecf.pdf] , Proceedings of the Extraordinary Session of October 1985, para. 192). This is to be the approach to follow unless the forum's private international law provides otherwise and gives precedence to uniform substantive law rules over conflict of laws rules (for such a provision, see eg the Turkish Private International Law and International Civil Procedure Act (numbered 5718 and dated 2007) which gives, in its Article 1(2), precedence to the provisions of international agreements to which Turkey is a party over the Act).

2. It has been argued [https://conflictoflaws.net/2021/global-sales-law-in-a-global-pandemic-the-cisg-as-the-applicable-law-to-the-eu-astrazeneca-advance-purchase-agreement/] that the CISG's provisions on its sphere of application take precedence over the conflict of law rules in Rome I according to Article 25(1) regulating the Rome I's relationship with existing international conventions. However, an existing international convention to which one or more EU Member States are parties at the time when Rome I is adopted can only take precedence over the rules of Rome I under Article 25 if the convention in question lays down conflict of law rules relating to contractual obligations. The CISG does not lay down conflict of law rules relating to contractual obligations and accordingly it is not listed as per Article 26 of Rome I among conventions [https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=OJ:C:2010:343:FULL&from=PT] that are referred to under Article 25(1). To assist with comparison, one example of such an international convention in the context of sale of goods which could prevail over the rules of Rome I under Article 25 of Rome I is the 1955 Hague Convention on the Law Applicable to International Sale of Goods [https://www.hcch.net/en/instruments/conventions/full-text/?cid=31] as this convention does lay down conflict of law rules relating to contractual obligations.

specialis derogat legi generali. However, this principle should come into play where there is more than one law/provision dealing with the same matter (eg the CISG and national substantive sales laws in relation to matters of sale of goods contracts). This is not the case regarding the CISG and Rome I as these instruments deal with different matters.

Furthermore, from the perspective of EU law, it is questionable whether the argument that the CISG takes precedence over Rome I is consistent with the supremacy of EU law and the direct effect of EU regulations given that the CISG is not a convention to which the EU is a party and therefore not internalised in the EU system. EU law, in principle, cannot be overridden by an extraneous source unless that extraneous source is internalised.

In terms of the relationship between Rome I and the CISG for EU Member States party to the CISG, an alternative view here to the prevailing view suggests a two-step approach. The first step is that, if the forum is located in an EU Member State, a state law is determined as the applicable law in a given case under the rules of Rome I. The second step is that if that law includes the CISG, then the applicability of the CISG (as part of that law) to the given case is determined under the rules of the CISG. The CISG may become applicable as part of that law through its Article 1(1)(a) if the places of business of both parties are in Contracting States or through its Article 1(1)(b) even if only one or none of these places is in Contracting States (on how the CISG interacts with state law, see also Benjamin Hayward [https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Benjamin%20Hayward%20&eventCode=SE-AU] , Bruno Zeller [https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Bruno%20Zeller%20&eventCode=SE-AU] and Camilla Baasch Andersen [https://www.cambridge.org/core/search?filters%5BauthorTerms%5D=Camilla%20Baasch%20Andersen%20&eventCode=SE-AU] , 'The CISG and the United Kingdom- Exploring Coherency and Private International Law' (2018) 67 *International and Comparative Law Quarterly* 607).

One question that arises in this context is whether it matters in practice if a court starts the analysis with Rome I or the CISG. In cases where the applicable law is to be determined according to objective choice of law rules under Article 4 of Rome I, the outcome might differ depending on the approach that the court takes if the

For example, if the sales contact is between parties with places of business in the CISG Contracting States (eg Belgium and Sweden), and if the court in the EU starts the analysis with the CISG, the court will find that the CISG applies to the contract as per Article 1(1)(a) of the CISG. In the same example, if the court starts the analysis with Rome I and determines that the objectively applicable law is a law of a non-Contracting State, eg law of England and Wales, which would be something rare but possible via the operation of the escape clause in Article 4(3) of Rome I, the court will find that the UK's Sale of Goods Act 1979 will apply to the contract (not the CISG). If the outcome might differ depending on a court's approach, this would potentially also give scope for forum shopping.

The First Step: Application of Rome I to the EU-AstraZeneca APA

In the light of the above analysis, as the first step, the law applicable to the APA is to be determined under the Rome I Regulation.

The APA is not one of the types of contracts for which Rome I provides special choice of law rules between Articles 5 and 8, and therefore the applicable law of the APA will be determined according to the general choice of law rules under Article 3 (on freedom of choice) and Article 4 (on the applicable law in the absence of choice) of Rome I.

Under Article 3 of Rome I, a contract is governed by the law chosen by the parties and this choice can be express or clearly demonstrated by the terms of the contract or the circumstances of the case. The APA includes an express choice of law agreement in Section 18.4 according to which it is governed by the laws of Belgium. Provided that this choice of law agreement is valid in its form and substance under Articles 10 and 11 of Rome I and raises no issues of legal capacity (to which Rome I does not apply as per Article 1(2)(f)), Belgian law is the law applicable to the APA and governs the matters that fall into the scope of the applicable law set out under Article 12. Since *renvoi* is excluded under Article 20 of Rome I, this means that substantive law rules of Belgian law will be applied to the APA.

The Second Step: Applicability of the CISG to the EU-AstraZeneca APA

It follows that the CISG is applicable to the extent that a given dispute, which may arise under or in connection with the APA or the legal relationships established by the APA, falls into the scope of the CISG. In such cases, the CISG itself will not be strictly speaking the applicable (or governing) law of the APA, but it will apply as part of the applicable (or governing) law of the APA which is Belgian law.

The extent of the CISG's applicability in this context would further require a substantive law analysis as to (i) whether the APA is a type of sales contract that falls into the scope of the CISG (see eg Application of the CISG to International Government Procurement of Goods [https://www.justen.com.br/pdfs/IE103/Congresso%20_artigo_Cesar.pdf] by Cesar Pereira), (ii) whether a given dispute will fall into the scope of the CISG (as the CISG does not deal with all types of disputes that a sales contract may give rise to), (iii) whether any relevant state reservations exist, and (iv) whether the APA provides otherwise (which would mean under Article 6 of the CISG that the parties have derogated from or varied the effect of CISG's provisions).

As a concluding remark, it is also worth noting that the CISG in essence is a safety net for sales for which contractual parties have not utilised freedom of contract and party autonomy. For other sales, the CISG's utility and also scope of application is much more limited in practice and, in some cases, even excluded by the parties as allowed under Article 6 of the CISG.

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