

Choice-of-law Rules for International Cooperative Agreements

Rolf Dotevall

General

It is common practice in many fields to enter into cooperative agreements in order to undertake major projects. The forms taken by such cooperative arrangements are generally developed against a background of considerations relating to competition law. A determination must be made as to which jurisdiction is to apply if the cooperation has connections to more than one country. The purpose of this paper is to elucidate the choice-of-law issues which can arise in such cases.

In a cooperative arrangement, the parties are at liberty to use the forms of association at hand. In a Swedish context, a non-registered partnership¹ is generally formed when a cooperative agreement is entered into. Such a partnership arises when two or more persons enter into an agreement to engage in an enterprise with a common purpose. Of course the cooperation can also be conducted in a joint-stock company formed especially for the purpose. In such cases, the primary orientation of the enterprise is usually regulated in a shareholders' agreement, which is also generally a non-registered partnership. The company can then be subject to a different jurisdiction than the cooperative agreement. The content of the cooperative agreement may then conflict with compulsory provisions of company law.

Many countries have no equivalent to the non-registered partnership. This is true, for example, in American, English and Danish law. The laws of these countries use the term *joint venture* in connection with cooperative agreements, particularly those which have an international aspect.

The term joint venture is derived from Scottish law, where it was used to designate joint projects for enterprises which were formed *ad hoc*, as opposed to

¹ "Enkla bolag" can be translated as simple partnership. But the official Swedish government translation, i.e. "lag om handelsbolag och enkla bolag" is non-registered partnership.

partnership. A partnership normally comprised an enterprise which was more strongly established.² The term joint venture also appeared early on in American law as a designation for agreements entered into during the 1800s to build railroads.³ The joint venture designation is currently applied in American law to associations which are reminiscent of partnerships but do not meet all the requirements for the establishment of a partnership. This can be explained in that legal persons could not, and in some states, still cannot, be partners in a partnership. For this reason, joint venture was used to refer to the legal institution which enterprises could employ for their cooperative arrangements.

Changing views on how a cooperative agreement is to be considered under different jurisdictions can lead to complications in choice-of-law issues associated with cooperative arrangements involving international pools.

What Choice-of-law Rules Apply to Cooperative Agreements?

General

The domicile principle applies in French and German law, for example, in cases where the cooperation is undertaken in the form of a joint-stock company or a partnership. This means that a company which conducts its primary business activities and thus has its headquarters in Germany or France must comply with the rules in effect there in order to be accepted as a legal person.

Conversely, the principle of incorporation applies in Sweden, as it does in England and the USA.⁴ This means that if a joint-stock company or partnership is active in Sweden but registered in some other country, it is perceived as a legal person under Swedish law and enjoys certain privileges, such as legal capacity in court. The domicile principle applies in the case of legal persons who do not need to be registered, as is the case, for example, with the equivalents of our partnership in Denmark and Norway, as well as under Swedish international private law.⁵ However, the situation is more complicated for non-registered partnerships and comparable partnership forms in other countries.

The question is: what choice-of-law rules are to be applied to cooperative arrangements which are not conducted in the form of a joint-stock company or partnership? The Rome Convention⁶ regulates which country's laws will apply to contracts and unilateral obligations. The convention has an extensive area of application, and encompasses all contracts relating to property law in all cases where a choice must be made between the laws of different countries. With

² See Baptista, Lutz O. och Durand-Barthez, Pascal, *Les associations d'entreprises (Joint Ventures) dans le commerce international*, Paris 1986, at 51.

³ See Martinek, Michael, *Moderne Vertragstypen III*, München 1992, at 211.

⁴ See Bogdan, Michael, *Svensk internationell privat- och processrätt*, 5 uppl., Lund 1999, at 150.

⁵ See Bogdan, at 150.

⁶ *The Rome Convention on the Law Applicable to Contractual Obligations*, concluded on June 19 1980 [1980] O.J. L266/1.

respect to the convention's area of application, Article 1 (1) establishes that the convention covers contractual obligations. In Art. 2, 3 (2), the Rome Convention excludes a number of types of contracts from its area of application, such as issues pertaining to the status and legal capacity of physical persons, contracts relating to family law or laws of succession, and agreements regarding case reference and arbitration. Article 1 (a)(e) further provides that "questions governed by the law of companies and other bodies corporate or unincorporate such as the creation, by registration or otherwise, legal capacity, internal organization or winding up of companies and other bodies corporate or unincorporate and the personal liability of officers and members as such for the obligations of the company or body" also fall outside of the convention's area of application.

Regarding the Interpretation of the Rome Convention

The following may be noted with regard to the interpretation of the scope of the aforementioned exceptions cited in Article 1 (a)(e). The Rome Convention is characterised in that it was formulated within the EU but does not constitute EC law in the strict sense of the term, even though all the member states do apply the convention. However, questions of interpretation which bear upon the convention can be brought before the EC Court under two supplemental protocols. The convention thus has close ties to EC law. The EC's institutions and, in particular, its commission, have also played an active role in its establishment. The parties are EU member states, and have entered the treaty in that capacity. The preamble to the convention further states that the convention is intended to serve as a part of the harmonisation effort, and thus of efforts to achieve integration within the union.⁷

The Brussels Convention is based directly on EC law.⁸ The Brussels Convention affects the interpretation of the Rome Convention due to the strong association between the two conventions set forth in the preamble to the Rome Convention. The EC Court has consequently permitted the Brussels Convention to serve as a guide in interpreting the Rome Convention.⁹ However, it should be noted that the Brussels Convention concerns jurisdiction, while the Rome Convention concerns choice of law.

General rules for the interpretation of treaties are found in the Vienna Convention on the Law of Treaties of 1969. According to Art. 31 of this convention, the provisions of a treaty are to be interpreted in view of its context, and against the background of its objectives and purpose. Art. 31 (2)(a) further provides that any preamble or other document established in conjunction with a treaty can be used in its interpretation. This means that a teleological

⁷ See Pålsson, Lennart, *Romkonventionen*. Stockholm 1998, at 26.

⁸ See *Council Regulation (EC) No 44/2001 of December 2000 on jurisdiction and the recognition and enforcements in civil and commercial matters*.

⁹ See i.e 133/81 *Ivenel v. Schwab* [1982] E.C.R. 1891, 1900 och 440/97 *GIE Groupe Concorde* [1999] E.C.R. I-6307.

interpretation is to be applied. The aim of the Rome Convention is to enhance the rule of law within the union through consistent regulation, and to eliminate the negative effects entailed by different rules regarding choice of law.¹⁰

According to Art. 18 of the Rome Convention, consideration must be given, in applying the convention, to its international character and to the desire to achieve consistency in its application. This article is tantamount to an expression of a general legal principle in this context, namely that international conventions are to be interpreted autonomously, without connections to any specific legal system. It is important to preserve the unity of law which the convention embodies and to work to ensure that it does not dissolve into national particularities over time.

The Rome Convention's *travaux préparatoires* may be used in its interpretation, as they are fairly exhaustive and have been approved by the convention states.¹¹

The Rome Convention has been implemented in the respective legal systems of the signatory states. It is an important principle that a convention such as this one must be interpreted autonomously, and not in relation to any individual legal system. This principle is set forth in Art. 18. It entails among other things that, when interpreting the convention, the courts in the respective countries must take into account the application of the law in other countries which have adopted the convention.¹²

Are Non-registered Partnerships Covered by the Rome Convention?

The EC Court explained in *Daily Mail*¹³ that the rules which bear upon the actual existence and creation of a company are not harmonised within the EU. In the case in question, the EU Court added that, “unlike natural persons, companies are creatures of the law and, in the present state of community law, creatures of national law.” A uniform definition of the term “partnership” thus does not exist within the EU.

As I touched upon earlier, the Rome Convention does not extend to agreements whose purpose is to create a partnership, regulate its internal affairs or determine how it is to be dissolved. The system concept in the national legal system should serve as the point of departure for determining whether the Rome Convention is applicable.¹⁴ Article (2)(e) of the Rome Convention has deliberately been made flexible so that it will be possible to take into account the

¹⁰ See Plender, Richard & Wilderpin, Michael, *The European Contracts Convention*, 2 ed., London 2001, at 47.

¹¹ See Giuliano, Mario & Lagarde, Paul, *Report on the Convention on the law applicable to contractual obligations*, by, OJ 1980 C 282/1. See also Pålsson, *Romkonventionen*, at 24.

¹² See Plender & Wilderpin, at 344.

¹³ 81/87 R v HM Treasury and Commissioners of Inland Revenue ex p Daily Mail and General Trust plc [1988] ECR 5483.

¹⁴ See Ebenroth, Carsten Thomas, *Das Verhältnis von joint-venture-Vertrag, Gesellschafts-satzung und Investitionsvertrag*, JZ 1987, at 265, 267 och Plender & Wilderspin, at 74-75.

evolution of company law in the respective member countries.¹⁵ A commentary on the convention runs as follows:¹⁶

Having regard to the differences which exist, it may be that certain relationships will be regarded as within the scope of company law or might be treated as being governed by that law (for example, *société de droit civil*, *nicht-rechtsfähiger Verein*, partnership, *Vennotschap onder firma*, etc.) in some countries but not in others. The rule has been made flexible in order to take account of the diversity of national laws.

The Rome Convention may still be applicable even when a cooperative form is classed as a company in a given country. Art. 1 (2)(e) of the Rome Convention provides that agreements which contain rules concerning companies and “internal organization” fall outside of the convention’s area of application.

The key issue in terms of the application of the convention to cooperative agreements has to do with what is meant by the expression “internal organization” in Art. 1(2)(e). The expression means “the calling of meetings, the right to vote, the necessary quorum, the appointment of officers of the company or firm”.¹⁷ This presumes that the company is a legal person and appears as a single entity vis-à-vis third parties. Chapter 4, sec. 3 and 5 of the Swedish Partnership and Non-Registered Partnership Act provide that issues which bear upon the administration of the activities in a non-registered partnership are to be resolved by all the partners unless otherwise agreed, and that, absent power of attorney, no partner may bind the others vis-à-vis a third party. For the convention to be applicable, it is necessary that the association be discernible to third parties, which is thus not the case with respect to non-registered partnerships.¹⁸ Non-registered partnerships and their equivalents under, for example, French and German law thus can hardly be viewed as partnerships under the Rome Convention. It is also clear that such cooperative agreements as are termed joint ventures under American and English law are covered by the convention. From a Swedish perspective, this means that non-registered partnerships are covered by the Rome Convention, while partnerships and joint-stock companies are not.

The Extent of Party Autonomy Under the Rome Convention

Cooperative agreements often contain a choice-of-law clause. According to Article 3, the point of departure is that the law chosen by the parties must be applied. Such choices of law are valid, with some exceptions.

¹⁵ See Plender & Wilderspin, at 312-313.

¹⁶ See Plender & Wilderspin, at 312-313.

¹⁷ See the Guliano/Lagarde Report in Plender & Wilderspin, at 312.

¹⁸ See Schnyder, Anton, *Internationale Joint Ventures – verfahrens-, anwendungs- und schiedsrechtliche Fragen, Kooperations- und Joint-Venture-Verträge*, ed. Meier-Schatz, Christian J., Bern 1994, at 81, 86.

The parties' choice of law is subject to certain limitations, as set forth in Art. 3 (3). If the parties have chosen that the law of a specific country is to be applied, but the agreement is tied to a single country, the choice of law cannot prevent the application of compulsory provisions of the laws of that country. This can be relevant in connection with, for example, shareholders' agreements in issues involving compulsory provisions of the company law of the country where the business is being operated. In this case it should be noted that EC law also contains compulsory provisions.

In those cases where the cooperative agreement has ties to a legal system other than that which applies to the company, the parties cannot escape any compelling provision of national company law through an agreement provision which refers to the rules of law of another country. It is thus the legal system which regulates the company's circumstances which determines whether the agreement is valid in this regard.¹⁹ If the shareholders' agreement is in conflict with the articles of association, the articles will generally take precedence.²⁰ The shareholders' agreement will take precedence over the articles insofar as it includes a number of shareholders sufficient to enable them, under company law, to amend the articles of association.²¹

Under Swedish law, the parties are at liberty to choose which country's laws are thought to be applicable to the agreement in question.²² The rules of law in the relevant field may, for instance, be particularly advanced in a given country. Another motivation could be the parties' desire to choose the laws of the market which is largest with respect to the product or service in question. Such situations occur with some frequency, for example, in the context of maritime law, where the parties choose English law even though they have no direct ties to England. The choice of law is often connected with a desire to refer court cases to the courts of the chosen country, or with a desire for any future arbitration proceedings to be held in that country.

Which Legal System is Applicable if the Agreement Makes no such Provision?

Under the Rome Convention, the agreement must be regulated by the laws of the country to which it has the strongest ties. This is determined by the overall assessment of the court.²³

Article 4 (2) sets forth a presumption which entails that the agreement has the closest ties to that country in which the party carrying out the performance which typifies the agreement has its domicile. Article 4 (5) provides that this

¹⁹ See Engsig Sørensen, Carsten, *Internationale joint ventures – udvalgte selskabsretlige problemstillinger*, TfR 2001 at 406, 424.

²⁰ See Engsig Sørensen, TfR 2001, at 406, 420-421.

²¹ See Werlauff, Erik & Nørgaard, Nørgaard, *Vedtægter & aktienæverenskomster*, København 1995, at 89.

²² See Bogdan, at 234.

²³ See Pålsson, at 53.

presumption may not be applied if it is not possible to determine what the characteristic performance is. This is typically the case in connection with a cooperative agreement.²⁴

When no presumption can be made, one may fall back on the general rule set forth in Article 4 (1). This issue has not yet been unequivocally resolved in Swedish law with respect to cooperative agreements. If a joint-stock company has been formed for the cooperation, then the shareholders' agreement is tied so closely to the company that it should be subject to the same legal system.²⁵ If the choice of law is to be made in accordance with the convention, then the laws of the country to which the agreement has the closest ties will apply. According to Swedish law regarding non-registered partnerships, this should be the country which is the primary focus of the company's activities.²⁶ We are thus concerned with the legal system of the country where, according to the partnership agreement, the activities of the cooperation are to be centred.

Concluding Observations

In conclusion, it is clear that international cooperative projects can be undertaken in a variety of forms of association. Cooperative agreements are viewed under Swedish law as non-registered partnerships. The non-registered partnership has no equivalent counterparts in countries such as Denmark, England and the USA. In these countries, a cooperative agreement or joint venture is viewed quite simply as a long-term agreement.

In cases where the parties opt to undertake their cooperation in the form of a joint-stock company, a shareholders' agreement is often established to regulate the activities of the company. Such agreements are generally viewed as non-registered partnerships under Swedish law.

The so-called "incorporation principle" is applicable under Swedish, Norwegian and Danish international private law to issues concerning choice of law in joint-stock companies. This applies to all legal persons who must be registered in order to become legal persons. The incorporation principle entails that the legal person must be seen as a legal subject of the country of registration. Other countries, such as Germany and France, apply the domicile principle, which means that the domicile of the board of directors will determine which country's laws are to be chosen.

The Rome Convention is applicable with respect to the choice of law for non-registered partnerships. The exceptions pursuant to Art. 1 (2)(e) of the convention do not include non-registered partnerships. The basis for the application of the convention is that the parties' agreement regarding choice of

²⁴ See Pålsson, *Romkonventionen*, at 66.

²⁵ See Engsig Sørensen, Carsten, *International joint ventures, The internationalisation of companies and company law*, Köpenhamn 2001, at 172, Göthel, Stephan, *Joint ventures im internationalen Privatrecht*, Heidelberg 1999, at 94-99 and Braun, Heiner, *Joint ventures im amerikanischen und deutschen Internationalen Privatrecht*, Frankfurt a. M., 2000, at 43-54.

²⁶ Cf. Göthel, at 94.

law must be valid. If no such agreement has been made, or if it is invalid, the laws of the country to which the agreement has the strongest ties shall apply under the convention. Under Swedish law, this is defined as the location of the main focus of the business activities.