Although not necessarily the first thought when drafting an agreement, it is important to give consideration to what may happen in the event of a dispute arising under the contract or difficulty in interpreting it. In such circumstances, and particularly where the parties are based in different countries, it is desirable to know which law shall apply. It is extremely important to stipulate in the contract which forum shall try disputes, in order to avoid the loss of time and unnecessary expense in litigating the question of jurisdiction later on, before the merits of the dispute can even be considered. However, it is equally important to make express provision in the contract for a choice of applicable law. A particular governing law may give one of the parties a defence or a right of action which might not be available under the laws of another system. Businesses may also wish to ensure that a chosen law will apply uniformly to their standard agreements.

A typical law and jurisdiction clause reads:

“This contract shall be governed by and construed in accordance with English law and all disputes arising out of or in connection with this contract shall be referred to the High Courts of Justice in London.”

The English Courts (and those of other signatory states) currently apply the Rome Convention on the Law Applicable to Contractual Obligations (Rome Convention). This 1980 Convention was the product of work of the European Union aimed at establishing uniform rules in this area. The Convention came into force following its seventh ratification by a contracting state and makes provision as to the law applicable to contractual obligations in the case of a choice of laws of different countries. The Rome Convention was enacted into English law by the Contracts (Applicable Law) Act 1990.

However, the Rome Convention is the only Community private international law instrument that remains in international treaty form.

In 2003 the European Commission proposed that the Rome Convention 1980 should be converted into a Community Regulation (Rome 1). Unlike an International convention, which has to be ratified and adopted by States, a Regulation has the force of law throughout the EU. Save where an opt out is permitted, and requires no measures for transposition into the domestic law of Member States. Whilst not setting out to establish a new set of legal rules, the review process envisaged that certain provisions of the Rome Convention would be amended and updated. That work is now complete and the Rome 1 Regulation entered into force in July 2008. It will apply to contracts concluded after 17 December 2009 (see Articles 28 and 29) and will have direct effect in all EU Member States save for Denmark. The UK had opted out of the initial proposals in 2005 but is now seeking the consent of the European Commission to participate in the regulation.

To a large extent the new Regulation has replicated the provisions of the existing Rome Convention. Most importantly, the new Regulation preserves freedom of contract. Article 3 provides that contracts shall be governed by the law chosen by the parties. It is only where no choice of law is made, that the default provisions in the other Articles of the Regulation will apply. Article 4 (applicable law in the absence of choice) includes express provisions for certain types of contract. Thus a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence; and a contract for the provision of services shall be governed by the law of a country where the service provider has his habitual residence. The habitual residence of companies and other bodies corporative or unincorporated is defined as the place of central administration, determined at the time of the conclusion of the contract (Article 19).

In other cases, Article 4 provides that the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence. This requirement may be displaced where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with the law of another country, in which case the law of that other country shall apply. Finally, where the applicable law cannot be determined pursuant to these principles, the contract shall be governed by the law of the country with which it is most closely connected.

These provisions are similar to those which appeared in the Rome Convention. In addition, special provisions apply to contracts of carriage (Article 5), consumer contracts (Article 6), insurance contracts (Article 7) and individual employment contracts (Article 8).

So far as concerns contracts for the carriage of goods, Article 5 provides that to the extent that the applicable law has not been chosen by the parties, the law applicable shall be that of the country of the habitual residence of the carrier, provided that the place of receipt or the place of delivery or the habitual residence of the consignor is also situated in that country. If those requirements are not met, the law of the country where the place of delivery as agreed by the parties is situated shall apply.

To the extent that the law applicable to a contract for the carriage of passengers has not been chosen by the parties, the law applicable shall be that of the country where the passenger has his habitual residence, provided that either the place of departure or the place of destination is situated in that country. If these requirements are not met, the law of the country where the carrier has his habitual residence shall apply. In the absence of a clear choice of law in the contract of carriage, these provisions might mean, for example, that a cruise operator could find that differing systems of law could apply to standard passage contracts, dependent on the country of domicile of the passengers embarked.

Unlike the Rome Convention, the new Regulation includes provisions regarding insurance contracts. The current law relating to insurance contracts is complex. For contracts of direct insurance relating to risks situated within the European Union, the provisions of the EU law and non life insurance directives apply. For contracts of direct insurance relating to risks not situated in the Member States of the European Union, and all reinsurance contracts (wherever the risk be situated) the provisions of the Rome Convention apply.

In its preparatory work for the new Regulation, the European Commission decided that it should provide a comprehensive treatment to replace the choice of law rules both in the Rome Convention and the two European Directives. The new Regulation maintains the distinction in the European non life directives between insurance contracts covering “large risks” and those which do not. “Large risks,” as defined, include all liabilities arising out of the operation of ships, including carrier’s liability.

The Regulation applies to insurance contracts covering a “large risk” whether or not the risk covered is situated in a Member State, and to all other insurance contracts covering risks situated inside Member States (see Article 7). Article 7 does not apply to reinsurance contracts, but these would appear to be covered by the general provisions of the Regulation since they are not excluded in Article 1.

The final text is broadly a consolidation of the current rules as contained in the existing EU directives, and therefore a choice of law in insurance...
contracts is maintained where such a choice already exists under the current directives. Accordingly, an insurance contract covering “large risks,” which include all liabilities arising out of the operation of ships, will continue to be governed by the law chosen by the parties. In the absence of choice, then default provisions specified in Article 7 will apply.

Club members should therefore ensure that they provide in their contracts for an express choice of applicable law, and in the EU, where the Rome Regulation will apply, this will have the additional benefit of avoiding any unwelcome impact of the default provisions in the Regulation.

The full text of the Regulation can be downloaded below.