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Party Autonomy in Contractual and Non-Contractual Obligations

A European and Anglo-Common Law perspective on the freedom of choice of law in the Rome I Regulation on the law applicable to contractual obligations and the Rome II Regulation on the law applicable to non-contractual obligations

PL ACADEMIC RESEARCH

Introduction

The principle of *party autonomy*, in the sense of freedom of choice, or the self-arrangement of legal relations by individuals according to their respective will, broadly encompasses the idea that parties should be free to choose the law to govern their relations and the forum to adjudicate any disputes that might arise between them. It is one of the leading principles of contemporary conflicts theory and forms the cornerstone of the intersection between international commerce and private international law. In cross-border litigation, one of the key questions a court will be required to solve is how to determine the applicable law. This study focuses on the extent and scope of the parties' freedom to choose the substantive law to govern their cross-border contractual dispute and in particular, the significant developments extending this right into the area of non-contractual disputes, an area previously thought to be unable to provide for party autonomy.

In contrast to rules, which generally seek to connect the contract or tort to the law having a connection or most substantial relationship, the principle of party autonomy puts the will of the parties at the centre of the search for the applicable law. It is not longer the belief that a territorial connection should be the determining factor or that the objectively ascertained choice of law identified through objective connecting factors should be at the forefront, but rather that the will of those involved should be determinative of the applicable law. Parties are given the freedom to displace and by agreement rise above the otherwise applicable law. This freedom of choice is generally regarded to be the conflict of laws aspect of freedom of contract or market autonomy. It is common in international litigation and commercial arbitration and recent significant developments at a European level strongly underscore the trend in favour of party autonomy. Both the Rome I Regulation on the law applicable to contractual obligations[1] and the Rome II Regulation on the law applicable to non-contractual obligations[2] have elevated party autonomy to be the central choice of law rule within European private international law. Indeed,

1 Regulation (EC) No 593/2008 on the law applicable to contractual obligations (OJ L 177, 6 [4.7.2008]) (reproduced in Appendix 1).

2 Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 40 [31.7.2007]) (Reproduced in Appendix 2).

the parties' right to choose the applicable law not only forms an integral part of European choice of law rules but also in many other common law countries including the USA, Canada, Australia, New Zealand and Singapore. Has party autonomy become the most important universal principle in the conflict of laws?

i. Research aims and methodology

Party autonomy encompasses the parties' right to choose the *forum* to adjudicate any disputes that arise between them and the *law* to govern their relations. However, only the power of parties to determine the substantive law by which they will be bound is the subject of this study. The aim is to examine the freedom of choice of law provided for in both the Rome I Regulation on the law applicable to contractual obligations and the Rome II Regulation on the law applicable to non-contractual obligations. The examination follows an integrated comparative method, whereby the principle of party autonomy as provided for in the Regulations is compared with the pre-regulation position in Germany and England. In particular, the innovative inclusion of party autonomy in the Rome II Regulation and the rationales underpinning the principle within non-contractual obligations is explored. The examination of European developments provides the basis for the subsequent critical reflection on the position of party autonomy in contract and tort in the Anglo-common law jurisdictions of Australia, New Zealand, Canada and Singapore. An assessment of the scope for party autonomy within the tort and contract choice of law rules of these common law systems will be made. Since all of these common law jurisdictions are based on English law, it is particularly pertinent to analyse and compare the European developments to those systems still clinging to the pre-legislative and pre-regulation reform position in England. Moreover, can these European developments make a contribution to the call for reform of the common law position concerning party autonomy in contractual, and perhaps more radically in non-contractual obligations?

This study is set out into the following five parts: *Part I* considers the place of party autonomy within the Rome I Regulation on the law applicable to contractual obligations. It provides a brief summary of the history of the Convention on the law applicable to contractual obligations and an outline of the background developments leading to the enactment of the subsequent Rome I Regulation. It focuses on the central position given to party autonomy in Article 3 of the Regulation. In addition, the inclusion of limitations on the parties' freedom to choose the governing law is also examined.

Part II similarly presents an exposition of party autonomy within the Rome II Regulation on the law applicable to non-contractual obligations. A brief summary of the history of the Rome II Regulation and an outline of the background developments

leading to its enactment are presented. But given that choice of law in non-contractual obligations has largely been considered unworkable, it is thought important to consider the possible justifications for granting a freedom of choice in this area of law. Accordingly, the rationales that underpin the general rise in the status of party autonomy, and more specifically, the acceptance of the principle within the field of non-contractual obligations are set out. Following this, the primary choice of law rule established in Article 14 of the Rome II Regulation dealing with the principle of freedom of choice of law is examined. The requirements for a valid choice of law as well as the inclusion of limitations on the parties' freedom to choose the governing law are presented and dealt with separately.

Part III considers the procedural treatment and application of the parties' chosen foreign law according to Rome I and Rome II. Section A examines the introduction of the chosen law in national courts and the relationship between the law of the forum and the chosen foreign law. Section B focuses more specifically on the national procedural approaches taken to the introduction and ascertainment of foreign law in both German and English courts.

Part IV provides a critical reflection on the English common law origins and development of the principle of party autonomy in light of European developments. More specifically, a cross-national examination of party autonomy in the common law jurisdictions of Australia, New Zealand, Canada and Singapore is given. The conflict choice of law rules for contractual and non-contractual obligations in each legal system are dealt with in turn. For contract, the reception and application of the English doctrine of the proper law in each common law jurisdiction is set out. For non-contractual obligations the general English rule of double-actionability and its exception, followed by its reception and application in each common law jurisdiction is presented. Subsequently, the narrow scope for party autonomy within the common law approaches is summarised, followed by the suggestion of four general approaches that may accommodate party autonomy.

Part V summarises the conclusions drawn in the foregoing analyses and reflects upon these. From this three main themes emerge. The first is that both the Rome I and Rome II Regulations have clearly elevated the principle of party autonomy to the central choice of law rule within European private international law. More specifically, the Rome II Regulation has clearly confirmed the applicability of the principle in non-contractual obligations, including *ex ante* agreements. The second is, after an analysis of the procedural treatment and application of a choice of foreign law it is evident that there remains room for divergent approaches taken by national courts to this issue. It follows that there is a need for uniform procedural rules to supplement the uniform choice of law rules contained in the Rome I and

Rome II Regulations. Thirdly, both Regulations provide a great platform upon which to reconsider the common law approach to party autonomy within contract and non-contractual obligations. In particular in the area of non-contractual obligations it is suggested that the approach taken in the Rome II Regulation, permitting the freedom of choice and the benefits that derive from recognition of party autonomy within a structured choice of law regime, offers a great opportunity to rethink the traditional common law tort choice of law approaches.

By way of preceding information it is believed that the importance of the Rome I and Rome II Regulations should be understood within the context of the communitarisation or unification of private international law. The following point briefly sets out the impetus behind the unification of private international law, precipitating the significant rise in the status of party autonomy within European choice of law rules.

ii. The unification of private international law within Europe

The international harmonisation and unification of commercial law is a well-known phenomenon, facilitated by various methods such as through the adoption of Conventions,[3] Regulations,[4] Principles,[5] general rules in the form of European Directives,[6] or model contracts[7]. The impetus behind these developments stems from the difficulties encountered in international commercial transactions. A single transaction may involve multiple legal relationships, which may be subject to several different laws. Those who engage in cross-border transactions

3 E.g. CISG – United Nations Convention on Contracts for the International Sale of Goods, Vienna, 11 April 1980, S.Treaty Document Number 98–9 (1984), UN Document Number A/CONF 97/19, 1489 UNTS 3. See further, *Matthias Lehmann*, The State of Development of Uniform Law in the Fields of European and International Civil and Commercial Law (7/2008 EuL Forum) 266–270.

4 E.g. Regulation (EC) No 593/2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 6 [4.7.2008]); Regulation (EC) No 864/2007 on the law applicable to non-contractual obligations (Rome II) (OJ L 199, 40 [31.7.2007]).

5 E.g. UPICC – UNIDROIT Principles of International Commercial Contracts 2010; PECL – Principles of European Contract Law, prepared by the European Commission on Contract Law (Lando-Commission) 1999.

6 See e.g. directives at http://ec.europa.eu/legislation/index_en.htm.

7 See e.g. ICC (International Chamber of Commerce) model contracts listed at http://www.iccwbo.org/policy/law/id272/index.html.

will be required to have adequate knowledge of the legal conditions governing the interpretation and performance of the general obligations. In the case of litigation, courts or arbitral tribunals will be required to determine the law applicable to the contract and possibly to the different aspects of the transaction. For both the parties involved and the courts, ascertaining the applicable law will clearly prove more difficult where the transaction is subject to divergent national laws. It may be a relatively uncomplicated task where the parties have clearly specified the law applicable to the parts of the transaction. However, where the parties have not included a choice of law clause or have failed to clearly express the law intended to govern the transaction, the various rules of private international law of the forum will govern. The uncertainty surrounding the ascertainment of the governing legal system may prove costly and time consuming and the application of different national laws may result in divergent solutions to the same problem. It is thought that the harmonisation or unification of private international law rules will promote legal certainty, economic efficiency and prevent divergent results.

Although the concepts of unification and harmonisation are often referred to as analogous activities, they are distinct in their objectives and results.[8] Harmonisation refers to the approximation of the laws of different jurisdictions. It does not lead to a uniform set of agreed rules, but rather it directs a change of rules, standards or processes in order to bring about equivalence.[9] Unification means the adoption of agreed set of rules, standards or guidelines for application to cross-border transactions without any room for different implementation.[10] Within the European context, this is predominantly achieved through Conventions or Regulations. The unification of choice of law rules for contract was initially achieved by the Rome Convention of 1980.[11] Although it unified the law applicable to contractual obligations, the creation of real

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8 *Katharina Boele-Woelki*, Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws, Collected Courses of the Hague Academy of International Law 340 (2010) 299. On terminology see also *Luke Nottage*, Convergence, divergence and the middle way in unifying or harmonizing private law (2004) 1 Annual German and European Law 166–245; *Christian Twigg-Flessner*, The Europeanisation of Contract Law (2008) 9–19.

9 Note however, that the term harmonisation is commonly used to denote all efforts to achieve an approximation of the laws of states.

10 See further, *Camilla Baasch-Andersen*, Defining uniformity in Law (2007) 12 Uniform Law Review, 5–56.

11 The Convention on the Law Applicable to Contractual Obligations, 1980 (OJ L 266, 1 [9.10.1980]). The consolidated text of the Convention is published in OJ C 27, [26.01.1998] 0034 – 0046 (English text).

unified or uniform law still required the ratification of the Convention by the individual states. It was not until the Treaty of Amsterdam[12] expressly granted the European Community the competence to deal with matters of private international law that it was possible to codify choice of law rules for both contractual and non-contractual obligations in the form of Regulations. This means that in accordance with the Treaty on the Functioning of the European Union (TFEU)[13], a Regulation shall be binding in its entirety and directly applicable in all Member States[14] on the date of its entry into force[15] and no measures to incorporate it into national law are required.

For the purposes of this study, the unification of private international law is relevant. Compared with the unification of substantive law, the unification of the rules of private international law is more practicable, since the rules apply solely to legal relations involving an international element.[16] In Europe, the unification of choice of law rules, also referred to as the europeanisation of the rules of private international law, was achieved by the Rome Convention of 1980 and more recently by the Rome I Regulation for contractual obligations and the Rome II Regulation for non-contractual obligations.[17] According to Article 81 TFEU,[18] measures in the field of judicial cooperation having cross-border implications, and insofar as necessary for the proper functioning of the internal market, include among others those aimed at ensuring the compatibility of the conflict-of-law rules.[19] Accordingly, Recitals of both the Rome I and Rome II Regulations affirm that the proper functioning of the internal market creates a need to establish uniform conflict-of-law rules irrespective of the nature of the court or tribunal seized.[20] The justification for the unification of the choice of law rules is based on the argument that the differences between the legal systems

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12 Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts of 10 November 1997, OJ C 340/01.

13 Treaty on the Functioning of the European Union (TFEU), consolidated text of the Treaty is published in OJ C 115/47, [9.5.2008].

14 See Art. 288 TFEU.

15 I.e. 20 days after their publication in the Official Journal.

16 *Mario Giuliano & Paul Lagarde*, Report on the Convention on the Law Applicable to Contractual Obligations, OJ C 282 [1.10.1980] (hereafter: *Giuliano & Lagarde* Report) 1.

17 For a useful overview of the methodological background in Europe, and, in particular on the objectives of the Rome II Regulation see, *Th. de Boer*, The purpose of uniform choice of law rules: The Rome II Regulation (2009) NILR 295–332.

18 Formerly Article 65 Treaty on European Union (consolidated version) OJ C 321E [29.12.2006], 203–224 (EC Treaty).

19 Article 81(c) TFEU (*ex* Article 65(b) EC Treaty).

20 See Recitals (6) Rome I; Recital (6), (8) Rome II.

hinder commercial cross-border transactions, bring about unequal conditions of competition, and that the uncertainty surrounding the ascertainment of the governing legal system may prove costly and time consuming.[21] The advantage of a unified European system of conflict-of-law rules is that it will increase the level of legal certainty, promote confidence in the stability of legal relationships, and augment the protection of rights over the entire field of private law.[22] The consolidation or strengthening of legal certainty implies substantial predictability of "the outcome of litigation",[23] and as a result will promote settlements. It also implies decisional certainty whereby different courts in different countries will decide disputes according to the same law and consequently recourse to 'forum shopping' is prevented.

Nevertheless, a unification of choice of law rules will not guarantee absolute decisional harmony. Inherent in the creation of a unified system of conflict-of-law rules is the persistent struggle to find a balance between certainty and predictability on the one hand and flexibility on the other. Inevitably, such a system will need to include specific rules coupled with rules of displacement and rules that provide for recognition of national interests and policies. Choice of law criteria must be based on the premise that forum law and foreign law are equally suited for application and that any choice between them should be made on a neutral basis.[24] Thus, because the European choice of law rules contained in the Rome Regulations must be autonomously applied and interpreted, there should be no room for any divergent

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21 *Helmut Koziol*, Comparative Law – A Must in the European Union: Demonstrated by Tort Law as an Example (2007) Journal of Tort Law Vol. 1 Issue 3 Article 5 1–18, 2. Further on the importance of harmonisation and unification in Europe see, *Stefan Leible*, Wege zu einem Europäischen Privatrecht – Anwendungsprobleme und Entwicklungsperspektiven des Gemeinschaftsprivatrecht (2005); *Thomas Kadner Graziano*, Die Zukunft der Zivilrechtskodifikation in Europa – Harmonisierung der alten Gesetzbücher oder Schaffung eines neuen? 2005 Zeitschrift für Europäisches Privatrecht 523; *Elsabe Schoeman*, Third (Anglo-Common Law) Countries and Rome II: Dilemma or Deliverance? 2011 Journal PIL Vol. 7 No. 2 361–392. See also the *Giuliano & Lagarde* Report at 2: "The number of cases in which the question of applicable law must be resolved increases with the growth of private law relationships across frontiers."

22 See also *Erik Jayme/Christian Kohler*, Europäisches Kollisionsrecht 2007: Windstille im Erntefeld der Integration (2007) IPRax 493–499, 495 with further references.

23 Recital (6) Rome I and Recital (6) Rome II.

24 See *Th. de Boer*, The purpose of uniform choice of law rules: The Rome II Regulation (2009) NILR 295, 297; *idem*, Forum Preferences in Contemporary European Conflicts Law: The Myth of a Neutral Choice, FS Jayme Vol. I (2004) 39–55 who posits that the possibility for forum bias remains.

application of the *lex causae*. However, both Rome Regulations include mandatory rules designed to protect the weaker party[25] and special rules as a means to further commonly accepted social policies.[26] The inclusion of these rules recognises that substantive values, interests and policies of the forum should be permitted to influence the outcome of the choice of law process, but at the same time may cause a degree of legal uncertainty. In this respect, the role of the European Court of Justice (ECJ), as having substantive control over the choice of law rules contained in the Regulations, provides the potential to remove discrepancy in the application of the choice of law rules by national courts and further the absolute unification of European private international law.[27] Moreover, both Rome Regulations expressly exclude issues of procedure. This means that the general principles of procedural conflict-of-law rules may be applied in different ways by national courts, leaving open the further potential for discrepancies amongst fora and possibly the ability to 'forum-shop' for procedural advantages. Leaving this issue unresolved on the European level will continue to represent an obstacle to the underlying aims of both Rome Regulations, namely to achieve uniformity, certainty and predictability of results within European private international law. It is suggested in Part 3 below that in order to reach these objectives, the Rome Regulations need to be supplemented by uniform procedural rules governing the introduction and ascertainment of foreign law in court.[28]

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25 See for example Arts 6(1) and 8(2) Rome I Regulation.

26 *Th. de Boer*, The purpose of uniform choice of law rules: The Rome II Regulation (2009) NILR, 297–298; on this also *Felix Maultzsch*, Rechtswahl und ius cogens im Internationalen Schuldvertragsrecht, RabelsZ Vol. 75 (2011) 60–101.

27 National court decisions are subject to review by the ECJ. In particular, the ECJ has full jurisdiction to control the application of the notion of public policy in any particular case where it was invoked: Case C-7/98 *Krombach v Bamberski* [2001] QB 709 at [22] (recourse to the public policy exception could be envisaged only if recognition or enforcement constitutes a manifest breach of a rule of law regarded as essential or as a fundamental right in the legal forum; Case C-38/98 *Régie Nationale des Usines Renault SA v Maxicar SpA* [2000] ECR I-2973 at [27] (equality of national and Community law).

28 Note Article 30(1)(i) Rome II: "Not later than 20 August 2011, the Commission shall submit to the European Parliament, the Council and the European Economic and Social Committee a report on the application of this Regulation. If necessary, the report shall be accompanied by proposals to adapt this Regulation. The report shall include: (i) a study on the effects of the way in which foreign law is treated in the different jurisdictions and on the extent to which courts in the Member States apply foreign law in practice pursuant to this Regulation." On this see project JLS/CJ/2007-I/03,