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What "law" to choose for international contracts?

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In addition, the notion of territory and “place” are disintegrating as beacons of light to determine jurisdiction in terms of modern commercial activity. Global commerce and, particularly cross-border financial services, transcend these 19th century notions upon which the rules of conflicts of law were erected. In an earlier article, my colleague and I have proved the inability of the Brussels I Regulation to resolve a jurisdictional problem arising from failed transactions in the indirect holding system of securities. Further, Article 5 that provides new jurisdictional rules for provision of services and delivery of goods poses thorny interpretative questions. The ECJ is disingenous when it insinuates that the Brussels I Regulation provides a paradigm of jurisdictional certainty, contrary to alternative legal orders such as the jurisdictional laws of the United States. When the surface of Brussels I is penetrated and its rules subject to scrutiny, recognition of the doctrine of “forum non conveniens” would not turn Brussels I on its head. The rule is a rarely invoked exception to general rules of jurisdiction in the European Union. In American Dredging Co. v. Miller, Justice Scalia aptly described the doctrine as “nothing more or less than a supervening venue provision, permitting displacement of ordinary rules of venue when, in light of certain conditions, the trial court thinks that jurisdiction ought to be declined”. The doctrine serves the salutary purpose of preventing the plaintiff from forum shopping. The Brussels' system of creating “a strict race to the courthouse” does not induce integrity or advance justice.

**Conclusion**

The doctrine of “forum non conveniens” does not have a role in the Brussels I jurisdictional system. The advantage is clarity and predictability of legal rules. The disadvantage is lack of flexibility for courts faced with unanticipated legal questions. Owusu has built a fortress around Europe erected on dubious assumptions and inadequate forethought. The judgment in Owusu is misguided because the doctrine of “forum non conveniens” lacks the power to destabilise the rules of the Brussels I Regulation, and the latter, despite statements to the contrary, is riddled with perplexing questions of which court has appropriate jurisdiction. Rejecting a doctrine designed to identify the court best suited to decide a dispute is a puzzling judgment.

**What “law” to choose for international contracts?**

*Giulia Sambugaro*

1. **Introduction**

25 years after the publication of the 1980 Rome Convention on the law applicable to contractual obligations, there appears to be a renewed interest in its provisions on party autonomy in general and the law that the parties are allowed to choose as the law applicable in particular.

The renewed interest in party autonomy is due to the partially different characteristics attributed to it by the various drafts of the recently adopted Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which will take the place of the aforementioned Rome Convention. In effect, one of the issues focused on by the drafters of the new Regulation was that of the extent to which the parties to an international contract are free to choose the law applicable. When looking at the forty-six recitals of the Rome I Regulation, one is struck by the incessant reference to party autonomy: above all, the eleventh recital expressly states that party autonomy in the sense of the “parties’ freedom to choose the applicable law”, is “one of the cornerstones of the system of conflict-of-law rules in matter of contractual obligations”.

The point is of a certain interest since, as regards the issue at hand, the 2005 Draft Regulation differed from the text eventually adopted in June, and since the differences relate to the problem of whether the parties are free to choose non-State law as the law governing their contract. In effect, while the 2005 Draft Regulation expressly stated in Article 3(2), that

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1 European Community Convention on the law applicable to contractual obligations.


3 Hereinafter referred to as Rome I Regulation.

Pursuant to its Articles 28 and 29, the regulation will apply from 17 December 2009, to contracts concluded after the same date.

parties could choose "principles and rules of the substantive law of contract recognized internationally or in the Community", thus acknowledging the possibility to choose non-State law as the "law" applicable, in the text eventually approved that sentence was deleted, thus bringing that provision of the new Regulation much more in line with its predecessor, i.e., Article 3 of the Rome Convention.

Thus, if one compares the Rome Convention with its successor, the Rome I Regulation, it appears that there are no substantial changes, at least as far as party autonomy is concerned. In light of the coming into force of the Rome I Regulation, it seems useful, therefore, to recall some of the main characteristics of party autonomy under the Rome Convention. Reference to the Rome Convention is justified for another reason, which is more closely related to the topic of this case note, i.e., a recent decision rendered by the England and Wales Court of Appeal, which applied the Rome Convention.

2. Party autonomy and the Rome Convention

The provision relevant under the Rome Convention for the purpose of this case note is Article 3(1), which, by stating that "[a] contract shall be governed by the law chosen by the parties", sets forth the principle of party autonomy. What characterizes the principle of party autonomy under the Rome Convention is its breadth, evidenced among others by the fact that, as can be gathered from Article 2 of the Convention, the parties can also choose the law of a non-contracting State.

However, as has been pointed out in legal writing, the supremacy of the lex voluntatis is not an "absolutely unrestricted freedom to choose the applicable law". In effect, the Rome Convention imposes on parties three types of restrictions: one relating to the scope of the Convention itself, one based on the formal and material validity of the choice of law and one regarding the mandatory rules of the forum State.

Looking into the source of party autonomy is paramount to better understand the limits this principle is subject to. In this scenario, two are the possibilities: either the freedom of choice granted to the parties is self-sufficient insofar as its validity does not depend on any particular system of law, or the freedom of choice finds its source in the conflict of law rules of a particular system of law.

In this paper, party autonomy in the sense of the freedom of parties to agree on the law governing their contract falls within the second possibility referred to, which means that its source as well as its limits can be traced back to the conflict of laws rules of the forum, which is why it is considered a "choix de droit international privé". In other words, party autonomy is neither unlimited nor does it exist in a vacuum, but rather depends on the conflict of law rules of a given State, i.e., those of the forum. In effect, it is the forum State that controls the choice of law and thus has an impact on party autonomy in international contracts.

Author lists briefly the influences of the lex fori on party autonomy, underlining that the law of the judicial forum determines the conditions under which the parties are permitted to choose a law, identifies those requirements for the formal validity of such choice and determines the application of and effect on mandatory rules, both in a national prospective and in an international one.


The differences between these two approaches are, however, very narrow.

Nygh, supra note 13, at 31-35.

It was rightly affirmed that party autonomy may manifest itself as both choice of law and choice of forum (Nygh, supra note 13, at 33-34).

See, for such a definition, Mo Zhang, Contractual Choice of Law of Adhesion and Party Autonomy, Akron Law Review 1, 6 (2007).


On the contrary, party autonomy intended as the freedom of the parties to legislate single aspects of their contract is to be considered as a principle of substantive law.

Some authors believe that party autonomy thought as a tool of private international law is approaching little by little to the substantial party autonomy, since the freedom of parties is so broad to allow them not only to choose the law applicable to the contract as a whole, but also to regulate every single part of the contract (see, Vinc, supra note 2, at 1234 recalling Sergio M. Carbone and Riccardo Lazzato, Il contratto internazionale 22 (1994), and Nerina Bouscher Verso il rinnovamento e la trasformazione della Convenzione di Roma: problemi generali, Diritto internazionale privato e diritto comunitario 346 (Picone ed., 2004)).

E.g. the conflict laws of Brazil, Iraq, Iran and United Emirates do not allow parties to choose the law regulating their contract.

Thus, even in relation to this issue, one can speak of forum shopping, i.e., a litigant’s attempt “to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict” (see, for this definition, Black’s Law Dictionary, 655 (6th ed. 1990)), since the plaintiff, in order to neutralize the choice of law, can suit the defendant in front of one of the just mentioned fora.

Fabrizio Marella, Autonomia privata e contratti internazionali, Contratto e Impresa Europa 823, 830-831 (2003); Nygh, supra note 13, at 32-33; Frank Vischer, General Course on Private International Law, in Rec. des cours, 125, 139 (1992).

See, also, Alberti A. Ehrenzweig affirming that "[p]arty autonomy is, of course, not an independent source of conflicts rules, but is effective only in so far as it is recognized by such a rule" (Private International Law 44 (1972)).

Thus, the issue of whether the parties are allowed to choose non-State law as the law applicable to their contract has to be solved by looking at the very limits imposed by the conflict of laws rules of the forum; in other words, permitting the parties to “legislate themselves outside the reach of a municipal system of law” and to choose the applicable law originates from the law of the forum.

The aforementioned issue is closely linked to the interpretation of the expression of choice of “law”, as referred to in Article 3 of the Rome Convention, an issue which both courts and commentators have been faced with. As of today, there seems to be no agreement as to how to solve the issue.

The England and Wales Court of Appeal, in the aforementioned decision touched upon that very issue, i.e., that of how to interpret the expression “law” to be found in Article 3 of the Rome Convention. The England and Wales Court of Appeal adopted the view already taken in 2004, and it stated that the choice of non-State law cannot be considered a valid choice of law under the Rome Convention, since the expression “laws” meant laws enforceable in the courts of countries whether parties to the Convention or other states.

The controversy the England and Wales Court of Appeal had to deal with concerned the enforcement of a compromise allegedly reached between the sons of a deceased couple as regards the perception of the due inheritance. For the purpose of this case comment, what is noteworthy is the reference to the law applicable to the compromise: the parties agreed on the “application of Jewish law…” (Halabka). Therefore, the England and Wales Court of Appeal had to tackle the issue of whether Jewish law, i.e., a non-State law, could constitute, on the grounds of an agreement of the parties, the law applicable to a compromise under the applicable English conflict of laws rules, i.e., the rules of the Rome Convention.

The England and Wales Court of Appeal correctly stated that such a choice is not a valid one, because, pursuant to the Rome Convention, which was applicable to determine the law governing the contract, Jewish law cannot be considered a “law” in the sense of Article 3 of the Rome Convention.

As already mentioned above, the question of whether non-State rules can govern a contract, i.e., whether parties can “de-nationalise” their contract, has not yet received a consistent answer. The solution to the issue at hand is of significant interest considering that in transnational relationships it is of fundamental importance to make the right choice of law, more so, since each party attempts to opt, generally, for its own domestic law.

The choice, by the parties, of non-State law is becoming a common practice at international level, especially since the globalization and the growing expansion of international trade and commerce induced academics to draw up a-national sets of rules, thought to suit better not only such expansion but also the variety of contracts that come out of it. This situation leads the parties to choose those sets of rules, generally included in the realm of the lex mercatoria, because parties are persuaded by the character of neutrality that the drafters of those rules assigned them. However, most commenta—

31 Nygh, supra note 13, at 33.
34 Nygh, supra note 13, 33.
36 Another consequence of the expansion of commerce at an international level is the elaboration of international conventions of substantive uniform law, such as the 1980 United Nations Convention on Contracts for the International Sale of Goods (well known as CISG). For the purpose of the present case note I will not focus on the relationship between party autonomy and the choice of such set of rules. For a detailed analysis of this relationship, see Fontoulakis, supra note 33, at 313 et seq.
37 For introductory remarks on this contrasting opinions see, Fabio Bartoletto, La “nuova” lex mercatoria. Costruzione dottrinaria o strumento operativo?, Contratto e Impresa Europa 733, 744 (1996). This author recalls the exhaustive sentence of an English academic writer, according to whom “[t]he subject of the lex mercatoria provokes strong feelings. Some argue that it is the panacea of the problems posed by transnational commercial transactions; others, for whom the lex mercatoria is like the Emperor’s new clothes, regard the whole notion with a high degree of scepticism” (see, Jonathan Hill, The Law relating to International Commercial Disputes 498 (1994)).
tors and courts do not acknowledge the possibility of such choice.

3. What are non-State rules?

Before going into why non-State rules cannot be chosen by the parties as a set of rules governing their contract, it is useful to specify the meaning of the so-called lex mercatoria.

Lex mercatoria is a Latin expression used to identify a “dynamic group of rules established by merchants for regulating international trade”, i.e., “the body of customs and rules of international commerce directly created and followed by businessman and which usually find their best guarantee in application by international arbitrators and in effective sanctions of professional nature”. 41

Besides the lex mercatoria and “trade usage of international commerce” and “general common principles”, there are other sets of rules existing on a supranational level often chosen by the parties in their business transactions:42 these rules have been codified by international bodies, such as the UNIDROIT Principles of International Commercial Contracts (here in after referred to as “Unidroit Principles”)43 and the Principles of European Contract Law Parts I, II44 and III45 (hereinafter referred to as PECL).

The Unidroit Principles,46 created by the International Institute for the Unification of Private Law (Unidroit), establish “general principles for international commercial contracts”,47 and they are not binding law as also stated in case law.48

The goal of the drafters of the Unidroit Principles was “to restate” existing international contract law49 by choosing “which [conflict] rules […] had the most persuasive value and/or appeared to be particularly well-suited for cross-border transactions”.50

This set of rules finds its origin in the need to “prepare[e] uniform rules on international commercial contracts in general”,51 and it is considered to be “speciall[y] tailored to the needs of international commercial transactions”.52

The PECl,53 defined as the counterpart of the Unidroit Principles,54 were intended to be general rules of contract law within the European Community and to be used as a base for the drafting of a European Civil Code. However, the plan for a uniform contract law at European level seems unattainable; thus, nowadays, the PECL are still considered, as the Unidroit Principles, part of the lex mercatoria, and, not unlike the Unidroit Principles, they are not binding.55

The common feature of those sets of rules is that they are transnational provisions, which are not linked to any national law and, as a matter of fact, are not binding. Since they cannot be nationalized, they can be considered only as establishing general principles. Thereby, they do not fall within the term “law”, pursuant to the Rome Convention, and, as we will see in the next paragraph, they cannot be chosen by parties as the law applicable to the contract.

4. Parties cannot choose non-State rules as the law regulating the contract

When faced with a dispute relating to a contract where the

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44 Alberto Luiz Zappi, The Parol Evidence Rule: A Comparative Study of the Common Law, the Civil Law Tradition, and Lex Mercatoria, Georgia Journal of Int'l & Comp. L. 235, 263 (2007). The author underlines that this concept was, at the beginning, vague as a “ghost ship [sailing] trough the discussion of international trade”.

45 Chiosmenti, supra note 25, at 145, citing Villani, supra note 25, at 80.


47 See for a detailed analysis of those kinds of rules, Boele-Woelki, supra note 25, at 652 et seq.


49 Parts I and II of the PECL were published in 1999 and they cover the core rules of contract, formation, authority of agents, validity, interpretation, contents, performance, non-performance, breach and remedies.

50 Part III of the PECL was published in 2003. This part covers plurality of parties, assignment of claims, substitution of new debt, transfer of contract, set-off, prescription, illegality, conditions and capitalisation of interest.

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47 See for the history of this set of rules Adolfo Di Mauro, I principi dei contratti commerciali internazionali dell'UNIDROIT, Contratto e Impresa Europa 287 (1996).

48 Preamble, first line.


53 Bonell, Do We Need a Global Commercial Code?, supra note 49, at 97.

54 One commentator referred to them as the “parte essenziale comune del diritto europeo dei contratti” (Carlo Castronovo, Il contratto e l’idea di codificazione nei Principi di diritto europeo dei contratti, Materiali e commenti sul nuovo diritto dei contratti 854 (Vettori ed., 1999)).


56 Fountoulakis, supra note 33, at 323.
law applicable to the contract has been chosen by the parties, the courts have to focus on the two questions: is that choice a valid choice of "law"? If not, what is the value of such a choice.  

When parties have chosen the law of a State (either a Contracting State or a non-contracting State of the Rome Convention), there are no particular problems, insofar as the court will apply the law chosen by the parties, unless the formal requirements provided by the conflict of law rules are met.

More problems arise when the "law" chosen by the parties is a non-State law, such as lex mercatoria or, as it was in the cases faced by the English courts, the Jewish law or the Sharia.

The first step is to look at the conflict of laws rules of the forum State which, for the purpose of this paper, are those laid down by the Rome Convention. The majority opinion rejects the idea that non-State rules chosen by the parties can govern the contract. The common justification for this rejection is based on a literal argument, in the sense that some scholars look at the words of the Rome Convention in order to justify their opinion.

This argument originates from the need to oppose the view according to which the words of the Rome Convention allow parties to choose a non-State law: according to this latter opinion, parties can, validly, decide that their contract will be governed by non-State law because Article 3(1), unlike Article 4, which refers expressly to "the law of a country", merely refers to the "law" chosen by the parties. Thus, if the drafters of the Rome Convention wanted to allow parties to choose solely the law of a given country, they would have specified it, as they did in Article 4.

However, according to the supporters of the literal interpretation, the solution just mentioned cannot be followed, since the majority of the provisions of the Rome Convention explicitly exclude the possibility to choose non-State law. In effect, Article 1(1) states that the Convention governs the "choice between the laws of different countries"; also Articles 2, 3, 4(1), 5(2), 6(2) and 7(1) designate the law to which reference is made as the national law of a country. In this context, it seems apparent to these commentators that the Rome Convention does not allow parties to choose a non-State law as the law applicable to their contract, since the Convention generally refers to the law of a given country.

However, both interpretations have to be dismissed or, at least, revisited: the one supporting the possibility of choosing non-State law because it is inconsistent with the nature of party autonomy, like any interpretation that allows the choice of non-State rules, and the other one because it is insufficient to explain why the choice of a-national rules is to be rejected.

As mentioned in the first part of this note, the principal reason for rejecting the choice of non-State rules as the law applicable to an international contract is based on the nature of the parties' freedom to choose how to have their relations governed, i.e., a freedom linked to a specific system of law. Thus, the starting point is always the consideration that "States are the only subjects entitled to establish and give effect to situations having legal relevance". This means, as rightly stated by the England and Wales Court of Appeal, that "laws could not exist in a vacuum"; thus the choice of the law applicable to the contract can only be between the laws of different countries.

A court, after having ascertained that only a choice in favor of State laws is admissible, has to answer the question of whether the choice of non-State rules has any residual value or not. Most commentators agree that the question has to be answered affirmatively in order not to devoid the will of the parties of all meaning: the possible solution to "save" the intent of parties is incorporating the reference to non-State law in the contract as contractual terms. This, however, means that those rules will not prevail over the mandatory rules of the lex contractus and they will bind
parties and judges only to the extent in which they do not conflict with such mandatory rules. This result stems from the very nature of party autonomy: the choice of non-State rules as an agreement to incorporate them into the contract as contractual terms falls within the sphere of substantial party autonomy, a kind of party autonomy that cannot lead to the chosen rules prevailing over the party autonomy of private international law.

Once established that the only possible (and valid) choice of law is the choice of a State law, the interpreter has to consider the consequences: could parties, by virtue of their freedom to legislate their contract, opt out from any State law?

An Italian court, in a decision that can be considered a leading case on the matter, and in which it had to deal with the choice in favor of “the laws and regulations of the International Chamber Commerce of Paris”, took the opportunity to solve the issue of the negative choice of law. On that occasion, the Italian court held that, even though the parties may exclude the application of one or more State laws, they are not allowed to exclude all state laws.

5. Choice of non-State law in arbitration

The issue of whether the parties are allowed to choose non-State law as the applicable law is solved differently in arbitration. It is widely accepted that parties could opt for the application of non-State rules, this compares to a flexible approach to the matter, even though, as rightly affirmed, the starting point is the same, since also arbitration “derives its effectiveness from State recognition”.

The view that arbitrators can apply rules different from State law has a general justification, based on the nature of this instrument of dispute resolution. In effect, in relation to the nature of the arbitration, the interpreter has to think of an argumentum a fortiori since one way of solving disputes by arbitrators consists of deciding the controversy ex aequo et bono, it must also be possible to solve a dispute by referring to non-State law, such as lex mercatoria or other principles of law. However, as rightly pointed out, this solution is tenable only where the conflict rules applicable by arbitrators are different from those to be applied by State courts, such as the Rome Convention: if the conflict of laws rules corresponded, the solution to the problem would have to be the same, i.e., impossibility of the parties to opt for non-State law as the law governing their relations.

The interpreter, on the issue at hand, needs to consider also the many international conventions on arbitration which allow the parties to choose, as the law applicable to their contract, even a non-State law, referring to it generally as “rules of law”. At the same time, Article 21 of the Rome Convention does “not prejudice the application of international conventions to which a Contracting State is […] a party”.

6. Conclusion

The dominant factor as regards the choice of the law applicable to an international contract is the interest of both parties in the applicability of the law most favourable to them. Even though it was suggested that, in order to overcome this problem, it would be useful to choose uniform law, such as the CISG, or transnational rules, such as the lex mercatoria or the Unidroit Principles, in my opinion this is not the solution to the problem.

In effect, on the one hand those rules do not fall within the realm of the party autonomy intended as an instrument of private international law, and, on the other hand, the text of Article 3 of the new Rome I Regulation that was eventually adopted does not contain any reference to the possibility of choosing non-State law as applicable law, unlike Article 3 of the 2005 Draft Regulation. This latter consideration means that there is still no space for a choice of non-State rules as the “law” applicable to international contracts.

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75 Chiomenti, supra note 25, at 147.


78 See, for example, the 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States. Its art. 42.1 establishes that: “The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law may be applicable.”