Choice of Law by the Parties in Rome II: Rationale of the Differentiation between Consumer and Commercial Contracts

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ABSTRACT
The article explores Article 14 on choice of law by the parties in Rome II and the possibilities for party autonomy. There is a limit to party autonomy where both parties are not ‘pursuing commercial activities’, which is meant to protect weaker parties. This protection is not identical to the protection from party autonomy afforded weaker parties by the Brussels I and Rome I Regulations, and the author questions whether the differences are the result of careful thought. What is more, the protection given in Article 14 could be removed through ‘the back door’ via the reference to a contract concluded between the parties in Article 4(3) and other provisions of the Rome II Regulation.

Key words
Rome II Regulation, party autonomy, protection of weaker party

1. CHOICE OF LAW IN TORT – DOES IT HAPPEN?
For obvious reasons, a choice of law between the parties is much less common in the area of tort and other non-contractual obligations than it is in the area of contract. After all, prior to the event giving rise to the non-contractual claim the parties might never have met, and after a claim has arisen they will be less inclined to agree. However, non-contractual obligations often arise between parties who are also contractually linked with each other, and that contract will often contain a choice-of-law clause. By way of exception, that clause will explicitly refer to non-contractual obligations that may arise between the parties, eg excluding product liability. More often there will be a general clause along the lines of ‘disputes arising out of this agreement shall be decided according to X law’. Whether such a
clause also covers obligations arising between the parties that are non-contractual by their legal nature, but clearly connected to the agreement, is a question of interpretation of the contract. Examples of such non-contractual obligations that might arise between parties to a contract are claims in tort for misrepresentation, and other fraudulent behaviour or damage caused to the person or property of one contract party by the other contract party (or persons for whom the party is responsible) in the course of fulfilling the contract.

2. BACKGROUND

Party autonomy in the area of non-contractual obligations is a relatively new phenomenon in private international law. In the 1972 Draft EEC Convention on the Law Applicable to Contractual and Non-Contractual Obligations,1 no party autonomy was foreseen for non-contractual obligations. However, 30 years later party autonomy had become more in vogue and the Commission’s Preliminary Draft Proposal for a Council Regulation on the Law Applicable to Non-Contractual Obligations from 2002 contained a rule, which was more or less a copy-paste of the rule on choice of law in contract in the Rome Convention. This liberal approach encountered some criticism in consultations, and in the real proposal for a Rome II Regulation the parties were only free to agree on the applicable law ‘after their dispute arose’.2

In the negotiations leading up to the Rome II Regulation, several delegations argued in the Council Civil Law Committee that the provision was too restrictive and that it was only in relation to workers and consumers that a restriction was necessary. The European Parliament was also in favour of greater party autonomy. In the end a compromise solution was adopted in Article 14 of the Regulation, which allows for a choice of law for non-contractual obligations if the agreement is entered into after the event giving rise to the damage occurred. If all the parties are pursuing a commercial activity, an agreement may also be entered into before the event giving rise to the damage occurred if the agreement was ‘freely negotiated’.

3. CHOICE OF LAW CONTRACTS IN ROME II

Article 14 of the Rome II Regulation is open to party autonomy in that it allows choice-of-law agreements. Such agreements are open to all parties so long as the agreement is entered into after the event giving rise to the damage occurred. If they are entered into beforehand, they will only be upheld provided that (1) all parties ‘are pursuing a commercial activity’ and (2) the agreement was ‘freely negotiated’.

The wording used to define the personal scope of the rule (‘parties […] pursuing a commercial activity’) is different from ‘person acting in the exercise of his trade or profession’,

1. EEC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations (1973) 21 AJCL 587.
2. Commission, ‘Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations (“ROME II”)’ COM (2003) 427 final, p 36 (Art 10).
which is the wording that is used in Article 6(1) of the Rome I Regulation to define the counter-party in a consumer contract, but no difference appears to be intended. Parties that are not pursuing a commercial activity are first and foremost consumers, workers and trade unions.

This author has criticised the choice of the expression ‘freely negotiated’ since it gives the impression that only contracts entered into as a result of unlawful coercion are excluded.\(^3\) This is, of course, not the intended meaning; whether coercion has been of such a nature that it leads to the contract being void or voidable is to be determined by the law which would be applicable to the contract if it were valid.\(^4\) The purpose of the expression is to exclude standard contracts that have not been adopted as the result of individual and informed negotiations between the parties in which both parties had a say on the content. Standard contracts as such are not excluded.

If one of the parties is not pursuing a commercial activity or the agreement was not ‘freely negotiated’, a choice-of-law contract will only be upheld if it is entered into after the ‘event giving rise to the damage occurred’. This time factor is different from that used in the Brussels I Regulation, which ties admissibility to the point in time at which the dispute arises. In most cases such a choice-of-law agreement will be entered into in connection with a dispute; however, by way of example, a manufacturer of pharmaceutical products that has become aware of the potential danger of one of its products might want to enter into a compensation settlement with all those who have used the product in question even before any harmful effects have manifested themselves (and in the individual case, may never do).

4. RATIONALE BEHIND THE RULE

It is clear that the purpose of the limitation is to protect weaker parties, such as consumers and workers.\(^5\) The rule does not protect those weaker parties that are engaged in commercial activities. The rapporteur to the JURI Committee of the European Parliament suggested that choice-of-law clauses should only be valid if they were entered into between ‘traders of equal bargaining power’, but that proposal was thought to be lacking in legal certainty and was not adopted.\(^6\) As it is, there is only limited coherence in the protection of weaker parties against choice-of-court or choice-of-law contracts between the Brussels I, Rome I and Rome II Regulations.

In the Brussels I Regulation\(^7\) there are protective rules in matters relating to insurance, consumer contracts and individual contracts of employment. The Regulation stipulates

\(^3\) Michael Hellner, Rom II-förordningen: tillämplig lag för utomobligatoriska förpliktelser (1st ed, Norstedts Juridik 2014) 87 f. The Swedish version ‘frivilligt’ is even worse and translates into ‘voluntarily’.

\(^4\) Cf Art 10 of the Rome I Regulation – 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) \([2008]\) OJ L177/6.

\(^5\) Cf Recital 31 of the Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II) \([2007]\) OJ L199/40.

\(^6\) See for the proposal Provisional 2003/0168 (COD) PE 338.465 (15.3.2004).

\(^7\) Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters \([2012]\) OJ L351/1.
that choice of court clauses may not be to the detriment of the protected party8 unless they are entered into after the dispute has arisen.

In the Rome I Regulation, the rules on consumer contracts (Article 6) and individual employment contracts (Article 8) are similar in that they protect the consumer and the employee respectively against detrimental choice-of-law contracts. The parties may chose the law applicable to the contract, but such a choice does not deprive the protected party of the protection afforded to him/her by mandatory rules in the otherwise applicable law. It is irrelevant whether the choice-of-law agreement was entered into before or after a dispute arose. In the areas of contracts for carriage of passengers and insurance contracts party autonomy is allowed but the choice is limited in a fashion reminiscent of instruments on international family law.

It is easy to see that there are differences in terms of both the protection afforded in the three Regulations and in terms of who is protected. The protection afforded is only partially the result of a comprehensive and coordinated analysis of the need for protection of weaker parties, and a general overview would be most welcome.

5. IS THE PROTECTION EFFECTIVE?

As indicated initially, there will almost invariably be a contractual relationship between the parties in the cases where they have entered into a choice-of-law agreement before the event giving rise to the damage occurred. If one of the parties is not pursuing a commercial activity – typically a consumer or a worker – the contract will not be enforceable as concerns non-contractual obligations. The consequence of the unenforceability is that an objective choice of law is made, ie the applicable law is determined as though no agreement on the applicable law had been made.

However, if we turn to the rules in the Rome II Regulation concerning an objective choice of law, we find that the fact that there is a previous contractual relation between the parties has a decisive impact on the choice of law in many situations. And in those cases where there is a choice-of-law clause for non-contractual obligations, and that clause has been entered into before the event giving rise to the damage occurred, there will almost always also exist a contractual relationship between the parties. This is where the rule of exception in Article 4(3) risks rendering the protection in Article 14 toothless by letting party autonomy in through the back door.

The rule of exception in Article 4(3) specifies that if the tort/delict is manifestly more closely connected with another country than the country in which the event giving rise to

8. In matters relating to insurance, the protected party is a policyholder, the insured, or a beneficiary, Art 11(1)(b). In consumer contracts it is a consumer, Art 17(1). Note that the rule is not applicable to all consumer contracts. In individual contracts of employment, the protected party is not specified when the protected party is acting as applicant in proceedings. The text states that ‘the employer may be sued’ but not by whom, cf Art 21(1)(b). Typically the applicant would be the employee but the wording does not exclude that a trade union suing an employer in a matter relating to an individual contract of employment avail itself of the rule. The issue has not been clarified in the case-law of the ECJ but in Case C-396/13 Sähköalojen ammattiliitto [2015] OJ C118/6 the matter was touched upon in the application of the Posted Workers Directive and largely left to national law.
the damage occurred, the law of that country shall apply. An example given in the Article of what could be the basis for a manifestly closer connection is a pre-existing contract between the parties. The same is said for cases of product liability in Article 5(2). What is more, in the areas of unjust enrichment, negotiorum gestio and culpa in contrahendo, if there is a close connection between a pre-existing contract between the parties and the non-contractual claim, the law that governs the contract shall also govern the non-contractual claim; see Articles 10(1), 11(1) and 12(1).

Returning to the rule of exception in Article 4(3), if the pre-existing contract is deemed to constitute a manifestly closer connection to another country than the country the law of which would otherwise be applied, the law of that other country shall apply. Although the text does not explicitly say so, this would most likely lead to the application of the law that is applicable to the contract.9 Such an interpretation would sit well with the purpose of the exception, viz to lessen the importance of the characterisation of a rule as contractual or non-contractual.10 It is also a way to escape the tricky question of the law applicable to concurrent liability and rules on priority between contractual and non-contractual claims.11

If the pre-existing contract was entered into with a consumer or a worker, and that contract contains a choice-of-law clause designating some other law than the law that would apply in the absence of choice, the rule of exception in Article 4(3) could have the effect of circumventing the limitation on such contracts for non-contractual obligations in Article 14. The Commission observed this problem already in its proposal for a Rome II Regulation, but did not include a specific rule to solve it.12 It remains to be seen whether the courts will make a consumer and worker protective interpretation of the exception clause in Article 4(3). This author recommends that they do so.

9. Andrew Dickinson, The Rome II Regulation: The Law Applicable to Non-contractual Obligations (1st ed, Oxford University Press 2008) 344 (para 4.90).
10. Commission, COM (2003) 427 final (n 2) 12 ff.
11. Ivo Bach, ‘Article 4’ in Peter Huber (ed), Rome II Regulation: Pocket Commentary (1st ed, Sellier 2011) 102 (para 86); Michael Hellner (n 3) 127.
12. Commission, COM (2003) 427 final (n 2) 13.