



International Comparative Law

One-Day Course of
The Hague Academy of International Law

4. Conflicts Rules for Contracts

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Overview

- A. Party Autonomy and its Limits
- B. Law Applicable in the Absence of a Choice
- C. Protection of the Weaker Party
- D. Form
- E. Public Policy and Internationally Mandatory Rules

Party Autonomy and Its Limits

party autonomy = parties can freely choose the applicable law

- “perhaps the most widely accepted private international rule of our time”

Weintraub, *Recueil des Cours* 187 (1984), 239, 271

e.g. Art 7 Inter-American Convention on the Law Applicable to International Contracts, Art 187 Restatement Conflict of Laws (Second), Art 3 Rome I Regulation, Art 7 Japanese Act, Art 116 Swiss PILA, Art 1210 Russian Civil Code, Art 41 Chinese Law

Party Autonomy and Its Limits

in most countries,

- mandatory laws can be deselected
- substantial connection to the chosen law not required

e.g. Art 41 Chinese Law on the Application of Laws:

The parties may choose by agreement the law applicable to a contract.

Party Autonomy and Its Limits

- other laws also contain limits to party autonomy
 - e.g. for domestic contracts

Art 3 Chinese Law

*In accordance with statutory provisions, the parties may expressly choose the law applicable to a civil relationship **involving a foreign element**.*

Art 3(3) Rome I Regulation

***Where all other elements** relevant to the situation at the time of the choice are **located in a country other than the country whose law has been chosen**, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.*

Law Applicable in the Absence of a Choice

- general principle:
the law of the country with the “closest connection” to the contract applies
other expressions “most significant relationship”, “closest ties”
e.g. Art 117(1) Swiss PILA, Art 9(1) Inter-Am. Conv., Art 1211(1) Russian Civil Code, Art 8(1) Japanese Act, Art 188(1) Restatement (Second), Art 4(3) Rome I, Art 41 phrase 2 Chinese Law

Law Applicable in the Absence of a Choice

differences in the application of the principle:

(1) habitual residence of the party that must effect the characteristic performance

Art 4(2) Rome I, Art 117 Swiss PILA, Art 1211(2) Russian Act, Art 8(2) Jap. Act, Art 41 phrase 2 Chinese Law

(2) various factors test

Art 9(2) Inter-Am. Conv., Art 188(2) Restatement

Law Applicable in the Absence of a Choice

Art 117 Swiss PILA

- (1) Failing a choice of law, contracts are governed by the law of the state with which they have the **closest connection**.*
- (2) Such a connection is deemed to exist with the **state of the habitual residence of the party having to perform the characteristic obligation** or, if the contract is entered into in the course of a professional or business activity, with the state of such party's place of business.*

Law Applicable in the Absence of a Choice

Sec 188 Restatement (Second) Conflict of Laws

*(1) The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the **most significant relationship** to the transaction and the parties under the principles stated in sec. 6.*

Law Applicable in the Absence of a Choice

(2) In the absence of an effective choice of law by the parties (see sec. 187), the contacts to be taken into account in applying the principles of sec. 6 to determine the law applicable to an issue include:

*(a) the **place of contracting**,*

*(b) the **place of negotiation of the contract**,*

*(c) the **place of performance**,*

*(d) the **location of the subject matter of the contract**, and*

*(e) the **domicile, residence, nationality, place of incorporation and place of business of the parties**.*

These contacts are to be evaluated according to their relative importance with respect to the particular issue.

Protection of the Weaker Party

- most systems protect the weaker party in the selection of the applicable law
- parties that are typically considered to be “weaker”:
 - 1. consumers**
e.g. Art 6 Rome I, Art 11 Japanese Act, Art 120 Swiss PILA, Art 1212 Russian Code, Art 42 Chinese Act, sec 1-301 UCC
 - 2. employees**
e.g. Art 8 Rome I, Art 12 Japanese Act, Art 121 Swiss PILA, Art 43 Chinese Act

Protection of the Weaker Party

- more **disputed** examples:
 1. **passengers**
Art 5(2) Rome I
 2. **insurance policy-holders**
Art 7 Rome I

Protection of the Weaker Party

- conditions for protection
 - (1) the notion of a “consumer”
 - acting for any **non-professional** purpose
EU: Art 6 Rome I
 - acting for **consumptive** purposes
Art 120 Swiss PILA
 - only contracts about **movable** things (including works, services) for **personal, family, household** or other purpose
Art 1212 Russian Civil Code

Protection of the Weaker Party

Art 6 Rome I

*(1) ... a contract concluded by a natural person **for a purpose which can be regarded as being outside his trade or profession** (the consumer)*

Art 120 Swiss PILA

*Contracts pertaining to goods or services of **ordinary consumption** intended for a consumer's personal or family use ...*

Art 1212 Russian Civil Code

*... a contract to which a party is a natural person using, acquiring or ordering or intending to use, acquire or order **movable things (works, services)** intended for personal, family, household or other purposes and not connected with the pursuance of entrepreneurial activity*

Protection of the Weaker Party

- example: a UK resident invests 50 mio CHF with a Swiss private wealth manager

Issue: consumer contract?

from EU point of view: yes

from Swiss point of view: no

from Russian point of view: no

Protection of the Weaker Party

- conditions for protection
 - (2) geographical link to consumer's domicile
 - some laws require that the entrepreneur exercises a **business activity** in the state of the consumer or targets this state
e.g. Art 6 Rome I, Art 1212 Russian Civil Code
 - others exclude consumer protection where the consumer **avails himself** of the state of the entrepreneur
e.g. Art 11 Japanese Act
 - others refer to the law of the place where a **good is transferred**
e.g. sec 1-301(e) US Uniform Commercial Code

Protection of the Weaker Party

Art 6 Rome I

*(1) ... a [consumer contract] shall be governed by the law of the country where the consumer has his habitual residence, provided that **the professional:***

(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or

(b) by any means, directs such activities to that country or to several countries including that country,

and the contract falls within the scope of such activities.

Protection of the Weaker Party

Art 1212 Russian Civil Code

*The selection of the law governing a [consumer contract] shall not cause deprivation of the natural person (consumer) of remedies relating to his/her rights which are provided by the imperative norms of the law of the country of the consumer's place of residence **if the consumer's contractor (the professional party) exercises its activity in the country of the consumer's place of residence or in any way focuses its activity on the territory of the country of the consumer's place of residence, provided that the contract is connected with such activities of the professional party.***

Protection of the Weaker Party

Art 11 Japanese Act

(6) The preceding paragraphs 1 through 5 are not applicable in any of the following cases:

*(i) the business operator's establishment which relates to the consumer contract is located in a jurisdiction other than the jurisdiction of the consumer's habitual residence, and **the consumer goes to the jurisdiction of the business operator's establishment and concludes a consumer contract in that jurisdiction, except where the consumer has been solicited by the business operator to conclude the consumer contract in that jurisdiction***

Protection of the Weaker Party

sec 1-301(e) UCC

If one of the parties to a transaction is a consumer, the following rules apply:

(1) An agreement referred to in subsection (c) is not effective unless the transaction bears a reasonable relation to the State or country designated.

(2) Application of the law of the State or country determined pursuant to subsection (c) or (d) may not deprive the consumer of the protection of any rule of law governing a matter within the scope of this section, which both is protective of consumers and may not be varied by agreement:

(A) of the State or country in which the consumer principally resides, unless subparagraph (B) applies; or

*(B) **if the transaction is a sale of goods**, of the State or country in which the consumer **both makes the contract and takes delivery of those goods**, if such State or country is not the State or country in which the consumer principally resides.*

Protection of the Weaker Party

CJEU case C-190/11 Mühlleitner

Facts:

- Austrian resident visits a German website to buy a car
- she travels to Germany and signs the contract there
- later, she claims that the car is defective

Issue: Is the buyer protected as a consumer (under the Brussels I Regulation)?

from EU point of view: yes

from Japanese and US point of view: no

Protection of the Weaker Party

- conditions for protection
 - (3) choice of law in consumer contracts allowed?
 - no choice of law
Art 120 Swiss PILA
 - application of mandatory rules in force at habitual residence of the consumer
Art 6 Rome I, Art 42 Chinese Act, sec 1-301(e) UCC
 - application of mandatory rules of habitual residence where consumer so chooses
Art 11 Japanese Act

Protection of the Weaker Party

Art 120 Swiss PILA

(2) No choice of law is allowed.

Art 6 Rome I

(2) ...the parties may choose the law applicable to a contract ... Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

Protection of the Weaker Party

Art 11 Japanese Act

*(1) Even if the law governing the formation and effect of a [consumer contract] is, according to a choice ... of law ... a law other than the law of the place where the consumer habitually resides, the **specific mandatory rules in the law of the consumer's habitual residence shall also apply** to matters subject to such mandatory rules with regard to the formation and effect of the consumer contract, provided that the consumer expresses his/her will to the business operator to the effect that such mandatory rules should apply.*

Form

- is treated separately in most systems
e.g. Art 13 Inter-American Convention, Art 11 Rome I, Art 10 Japanese Act, Art 1209 Russian Civil Code, Art 124 Swiss PILA
no special treatment: Chinese Law
- most follow the principle of *favor validatis*
= contract is valid if it satisfies either:
 - (1) the law of the place where the contract was entered into, or
 - (2) the law applicable to the contract

Form

Restatement (Second) Conflict of Laws, sec 199

- (1) *The formalities required to make a valid contract are determined by **the law selected** by application of the rules of § § 187- 188.*
- (2) *Formalities which meet the requirements **of the place where the parties execute the contract** will usually be acceptable.*

Form

Japanese Act, Art 10

- (1) The formalities of a juristic act shall be governed by the **law which applies to the formation of the act** ...*
- (2) Notwithstanding the preceding paragraph, a juristic act shall be formally valid if it conforms with **the law of the place where the juristic act was made**.*

Public Policy

- public policy has two aspects:
 - (1) general public policy (ordre public)
 - (2) internationally mandatory rules (lois de police or lois d'application immédiate)

General Public Policy

- **general public policy**
= limit to any foreign law application
 - protects the public order (*ordre public*) or “public policy”
 - also applies to contracts, but in this area violation of public policy rare
 - example: ‘perpetual claims’ violate German public policy

Internationally Mandatory Rules

- = **public policy rules, *lois de police* or *lois d'application immédiate***
= rules that apply regardless of the law otherwise applicable to the contract
 - see e.g. Art 5 Chinese Law, Art 9 Rome I, Art 18 et seq. Swiss PILA, Art 11 Inter-American Convention, Art 1192 Russian Civil Code
 - often protect crucial economic or social interests of the Community

Internationally Mandatory Rules

examples for internationally mandatory rules in the area of contract law:

- antitrust law
- protection of cultural heritage
- embargos
- export/import control (e.g. for weapons, drugs)
- provisions against bribery
- protection of distributors

Internationally Mandatory Rules



courts **MUST** apply internationally mandatory rules **of the forum**

e.g. Art 5 Chinese Law, Art 18 Swiss PILA, Art 1192(1) Russian Civil Code, Art 9(2) Rome I

courts **MAY** apply internationally mandatory rules of **third states**

e.g. Art 19 Swiss PILA, Art 9(3) Rome I, Art 1192(2) Russian Civil Code

Internationally Mandatory Rules

- obligation to apply rules of the forum

Art 18 Swiss PILA

*This Act is subject to those **mandatory provisions of Swiss law** which, by reason of their special aim, **are applicable regardless of the law referred to by this Act.***

Internationally Mandatory Rules

- faculty to apply rules of third state

Art 19 Swiss PILA

*1. When interests that are **legitimate and clearly preponderant** according to the Swiss conception of law so require, a **mandatory provision of another law** than the one referred to by this Act **may** be taken into consideration, provided that the situation dealt with has a close connection with such other law.*

*2. In deciding whether such a provision is to be taken into consideration, one shall consider its **aim and the consequences** of its application, in order to reach a decision that is appropriate having regard to the **Swiss conception of law**.*

Summary

1. Although the conflicts rules regarding contractual obligations resemble each other, the **specific details diverge**.
2. The conditions and limits of **party autonomy** are not universal.
3. There are many differences concerning the applicable law **in the absence of a choice**.
4. **Form** is not a problem as an alternative application of law is allowed.
5. **Internationally mandatory provisions** of the forum are always applied, those of a third state may be applied.