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The parties' choice of law for contracts under the Regulation of the European Parliament and of the Council (EC) No 593/2008 (Rome I).

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SUMMARY

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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) is one of the most prominent elements of the private international law of the European Union. It succeeded the 1980 Convention on the Law Applicable to Contractual Obligations (the "Rome Convention") which, for almost two decades, had proved to be a valuable instrument for the participant of the communitary common market. Due to its self-executing nature, the Rome I Regulation can be seen as a single set of uniform provisions which apply directly to all Member States of the European Union (except Denmark) and which – within its scope of application - replace the domestic rules.

Pursuant to Recital 11 of the Regulation preamble, one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations is the parties' freedom to choose the applicable law. Accordingly, article 3(1) Rome I Regulation provides that a contract shall be governed by the law chosen by the parties. Such a choice shall be made expressly or should be clearly demonstrated by the terms of the contract or the circumstances of the case. Thus, the Rome I Regulation embraces one of leading principles of contemporary private law: the principle of party autonomy. From the EU perspective, freedom of choice of applicable law, especially in the area of contracts, is seen as an essential component of the liberal model of internal market regulation.

Nevertheless, the supremacy of party autonomy does not amount to an unrestricted freedom of choice of law. Actually, the Rome I Regulation provides for a bigger number of restrictions than the Rome Convention did. First of all, like its predecessor, the Regulation maintains the traditional approach and allows to choose exclusively a domestic law of a given State. Secondly, the freedom of choice is limited with regard to contracts concluded with a weaker party (consumers and workers). And thirdly, one of the major novelties of the Regulation are the additional limitations of party autonomy concerning contracts for the carriage of passengers and some insurance contracts. As a result, articles 5(2) and 7(3), respectively, provide for a short list of laws that can be chosen for these particular contracts. Finally, by virtue of art. 3(3) and art. 3(4) of the Rome I Regulation, the choice of law in purely domestic cases, as well as the „intra-EU" cases, is subject to some specific limitations aimed at preventing the evasion of various mandatory rules.

These remarks raise ample necessity to reflect about boundaries of freedom of choice of law in matters of contractual obligations. In this context, it is argued that the system established for parties' choice of law in the Rome I Regulation is the compromise between different aims in European conflict law rules such as the predictability of the outcome of

litigation and certainty as to the law applicable on the one hand and on the other hand the adequate level of protection of weaker party. It is worth mentioning that all these goals contribute to the proper functioning of the internal market. Meanwhile, in practice some divergences between EU member states constitute a major impediment to effectiveness (*effet utile*) of the Regulation. Therefore, these issues will be the subject matter of the present Ph.D. thesis.

The doctoral dissertation has been divided into nine chapters. The first one focuses on general issues. The chapter discusses the origins of party autonomy in private international law which has to be distinguished from contractual autonomy at the level of substantive national law. In private international law (PIL), the choice of law as a connecting factor is a relatively new invention. Admittedly, there are other manifestations of party autonomy in the area conflict of laws, which are mentioned in the text, still the choice of law is the most important one. The last part of the chapter is the analysis of the doctrinal justifications for party autonomy that are presented in the light of empirical surveys. The discussion reveals that, in the vast majority of instances, parties are not really interested in the search of the „best law", but they are simply opting for their "home law".

The second chapter focuses on general developments concerning the parties' choice of law under EU law over recent years, most importantly on the transition from the Rome Convention to the Rome I Regulation. But although international contracts are the classic area of application of choice of law, the said mechanism has been also successfully used in other EU-Regulations in the field of non-contractual obligations, family law and the law of succession. Thus, the chapter discusses the extent to which the freedom of choice might be considered as supreme idea of the European private international law.

The third chapter deals with some basic issues related to interpretation and characterization and it is meant to give a proper background for more detailed analysis of Rome I Regulation. It is held that the method of autonomous characterization (interpretation) is the most appropriate one on the ground of Rome I Regulation.

The forth chapter is an attempt to explain the nature of the parties' choice of law as a specific legal act of private international law. It has to be remembered that the choice of law agreement is independent from the main contract and it is governed by its proper law. It is also worth analyzing whether the choice of foreign law in a purely domestic case amounts to a „real" choice of law or it works only as a reference by incorporation.

Chapter five describes the object of the *free* choice of law. Rome I Regulation does not implement any restrictions whatsoever as to a list of domestic laws from which parties can

choose the applicable law. However, it is universally accepted that art. 3 Rome I Regulation refers only to the law of a State. Non-state law, like the UNIDROIT Principles or the Principles of European Contract Law (PECL) cannot therefore be chosen. The chapter discusses whether this approach is in line with the needs of the parties.

The sixth chapter is focused on various modalities of the choice of law. It presents *inter alia* a very complex and controversial issues of tacit, subsequent and partial choice of law.

The seventh and eight chapters define the boundaries of freedom of choice concerning some categories of contracting parties which are meant to be protected by the conflict rules. First of all, pursuant to art. 6 (2) and 8 (1) Rome I Regulation a choice of law may not have the result of depriving the consumer or worker of the protection afforded to them by provisions that cannot be derogated from by agreement of the law which, in the absence of choice, would have been applicable. This "preferential law" approach limits the effectiveness of choice of law by the parties. Notwithstanding the fact that it may present the judge with difficult problems of comparison between the legal systems in question, the "favorability principle" is still the best instrument to protect weaker party at the level of PIL.

Secondly, in chapter eight the author tries to highlight the limitations introduced by articles 5(2) and 7(3) Rome I Regulation. These provisions provide a short list of laws that can be chosen in the carriage of passengers contracts and in insurance contracts covering mass risks situated in Member States. As it transpires from the discussion, despite the hopes of the European lawmakers, this type of restriction of party autonomy in this particular area might not ensure an adequate level of protection of passengers and policy holders.

The last chapter of the doctoral dissertation focuses on the impact of various mandatory rules on the freedom of choice of law. In the first place, art. 3 (4) of the Rome I Regulation is presented. The provision states that if the contract is connected exclusively with the territories of Member States, the parties' choice of law of a third State, shall not prejudice the application of mandatory provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement. The final part of the chapter mentions the restrictions of applicable law in situations where a particular legal instrument favours some other superior interests. These instruments are overriding mandatory provisions on the one hand (art. 9) and the *ordre public* clause on the other (art. 21). It is important to bear in mind, though, that both constructions will interfere with the functioning of all conflict-of-law provisions (not only with the parties' choice of law but also with the use of the objective connecting factors).

The deliberations presented in the doctoral dissertation has been primarily based on dogmatic and comparative (legal research) methods. Additionally, some elements of the economic analysis of Rome I Regulation have been employed. But special emphasis was put by the author on practical aspects of choice of law in contracts. In summary, the work attempts to present a possibly comprehensive overview of issues dealt with by the doctrine and the judicature of several Member States with regard to the choice of law in international contracts.

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