

Strong on Procedural Choice of Law

Stacie Strong (University of Missouri School of Law) has posted Limits of Procedural Choice of Law on SSRN.

Commercial parties have long enjoyed significant autonomy in questions of substantive law. However, litigants do not have anywhere near the same amount of freedom to decide procedural matters. Instead, parties in litigation are generally considered to be subject to the procedural law of the forum court.

Although this particular conflict of laws rule has been in place for many years, a number of recent developments have challenged courts and commentators to consider whether and to what extent procedural rules should be considered mandatory in nature. If procedural rules are not mandatory but are instead merely “sticky” defaults, then it may be possible for commercial actors to create private procedural contracts that identify the procedural rules to be used in any litigation that may arise between the parties.

This Article considers the limits of procedural choice of law as both a structural and substantive matter. Structural concerns involve questions of institutional design and the long-term understanding of a sovereign state prerogative over judicial affairs. Structural issues are considered from both a theoretical perspective (including a comparison of consequentialist and deontological models) and a practical perspective (including a discussion of relevant decisions from the Third and Seventh Circuit Courts of Appeals). Substantive concerns focus on matters of individual liberty and the content of fundamental due process rights. These issues are analyzed through analogies to certain non-derogable procedural rights that exist in international commercial arbitration.

This Article addresses a number of challenging questions, including those relating to the proper characterization of different procedural rules (i.e., whether certain procedures are public or private in nature), the core duties of judges and state interests in procedural uniformity and efficiency. Although the discussion focuses primarily on procedural autonomy in international commercial litigation, many of the observations and conclusions are equally

applicable in the domestic realm.

The paper is forthcoming in the *Brooklyn Journal of International Law*.