

Commercial Choice of Law in Context: Looking Beyond Rome (article)

A new article by Dr. Manuel Penadés Fons, London School of Economics, has been published at the Modern Law Review, (2015) 78(2) MLR 241-295.

Abstract

English courts are frequently criticised for their flexible approach to the finding of implied choice and the use of the escape clause in the context of the Rome I Regulation/Convention on the law applicable to contractual obligations. This paper argues that such criticism is misplaced. Based on empirical evidence, the article shows that those choice of law decisions are directly influenced by their procedural context and respond to the need to balance the multiple policy issues generated by international commercial litigation. In particular, English decisions need to be assessed in light of three distinct factors: the standard of proof required at different stages of the procedure in England, the national policy to promote England as a center for commercial dispute resolution and the incentives to export English law in certain strategic industries. The use of implied choice and the escape clause to achieve these ends constitutes a legitimate practice that does not frustrate the aims of the EU choice of law regime.