“The Nature and Enforcement of Choice of Law Agreements” (2018) 14 Journal of Private International Law 500-531

This blog post presents a condensed version of Dr Mukarrum Ahmed’s (Lancaster University) article in the December 2018 issue of the Journal of Private International Law. The blog post includes specific references to the actual journal article to enable the reader to branch off into the detailed discussion. The journal article is a companion publication to the author’s recent book titled The Nature and Enforcement of Choice of Court Agreements: A Comparative Study (Oxford, Hart Publishing 2017).

The article examines the fundamental juridical nature, classification and enforcement of choice of law agreements in international commercial contracts. At the outset, it is observed that choice of law considerations are relegated to a secondary position in international civil and commercial litigation before the English courts as compared to international jurisdictional and procedural issues. (See pages 501-503 of the article) Significantly, the inherent dialectic between the *substantive* law paradigm and the *internationalist* paradigm of party autonomy is harnessed to provide us with the necessary analytical framework to examine the various conceptions of such agreements and aid us in determining the most appropriate classification of a choice of law agreement. (See pages 504-508 of the article and Ralf Michaels, ‘Party Autonomy in Private International Law – A New Paradigm without a Solid Foundation?’ (2013) 15 *Japanese Yearbook of Private International Law* 282) In binary terms, we are offered a choice between choice of law agreements as mere “factual” agreements on the one hand or as promises on the other. However, a more integrated and sophisticated understanding of the emerging *transnationalist* paradigm of party autonomy will guide us towards a conception of choice of law agreements as contracts, albeit contracts that do not give rise to promises *inter partes*. This coherent understanding of both the law of contract and choice of law has significant ramifications for the enforcement of choice of law agreements. It is argued that the agreement of the parties on choice of law will be successful in contracting out

of the default choice of law norms of the forum and selecting the applicable law but cannot be enforced by an action for "breach" of contract.

It is argued that the emerging *transnationalist* paradigm of party autonomy supports a conception of choice of law agreements which borrows from both the *internationalist* and *substantive* law paradigms of party autonomy but cannot be comprehensively justified by either. This assimilated and coherent understanding of choice of law and the law of contract has led to the conclusion that the choice of law clause is a procedural contract but a contract nonetheless. (See Jürgen Basedow, *The Law of Open Societies: Private Ordering and Public Regulation in the Conflict of Laws* (Brill Nijhoff 2015) 145 and Maria Hook, *The Choice of Law Contract* (Oxford, Hart Publishing 2016) Chapter 2)

Professor Briggs' promissory analysis of choice of law agreements is a seminal contribution to legal scholarship. (See Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (OUP 2008) Chapter 11) However, it is unlikely that the parallel existence of choice of law agreements as privately enforceable agreements will attract the attention of the CJEU and the EU legislature. The common law judicial authority coupled with the preponderance of opposing academic opinion has meant that the conventional "declaratory" classification of choice of law agreements has prevailed over the "promissory" approach. (See pages 508-517 of the article; *Ace Insurance v Moose Enterprise Pty Ltd* [2009] NSWSC 724 (Brereton J); *Navig8 Pte Ltd v Al-Riyadh Co for Vegetable Oil Industry* (*The Lucky Lady*) [2013] EWHC 328 (Comm), [2013] 2 Lloyd's Rep 104, [2013] 2 CLC 461 (Andrew Smith J)) In assessing the relevance and significance of attributing an obligation to adhere to the chosen law in a choice of law agreement, the *internationalist* paradigm's understanding of the fundamental nature of private international law rules and their inherent function has helped develop the counterargument.

If the choice of law regime of the forum is conceptualised as a set of secondary rules for the allocation of regulatory authority, the descriptive, normative and interpretive narrative of the promissory perspective loses its perceived dominance and coherence as it fails to yield a complete and satisfactory justification for what we really understand by those rules. In the mantle of secondary power conferring rules as opposed to primary conduct regulating rules, choice of law rules perform a very significant public function of allocating regulatory authority. From this perspective, it is misplaced and misconceived to interpret choice of law clauses as

promissory in essence. The promissory justification does not adequately account for the authorisation of party autonomy by the choice of law rules of the forum, the supervening application of the laws of the forum and other states and ultimate forum control. (See pages 517-524 of the article) Moreover, the pragmatic attractiveness of anti-suit injunctions and claims for damages for breach of choice of law agreements may be unsound in principle from the standpoint of a truly multilateral conception of private international law based on mutual trust or a strong notion of comity. An international private international law will always seek to promote civil judicial cooperation between legal systems rather than encourage the clash of sovereign legal orders by interfering with the jurisdiction, judgments and choice of law apparatus of foreign courts. (See pages 524-529 of the article)

To reiterate, the more reconciled *transnationalist* paradigm of party autonomy strikes a balance between the competing demands of the *internationalist* and the *substantive* law paradigms. It is argued that a conception of a choice of law agreement as a contract, albeit one that does not give rise to any promises *inter partes* provides an appropriate solution.

On the one hand, the choice of law agreement is a legally binding contract as opposed to a mere "factual" agreement. On the other hand, the function of this agreement is not to regulate private law rights and obligations *inter partes*: it is to contract out of the forum's default choice of law norms and to select the applicable law. Such a contract will not contradict the intrinsic logic of choice of law rules because the international allocative function remains paramount and is not compromised in any way by promises *inter partes*. The fact that the choice of law agreement is a contract which only gives rise to procedural consequences does not mean that it is not a contract *per se*. (See pages 530-531 of the article)