Symeonides on Party Autonomy in Rome I and II

Dean Symeon Symeonides has posted Party Autonomy in Rome I and II from a Comparative Perspective on SSRN. The abstract reads:

> *This essay discusses the modalities and limitations of party autonomy under the Rome I Regulation on the Law Applicable to Contractual Obligations (and secondarily Rome II) on the one hand, and the Second Conflicts Restatement, on the other hand. The comparison reveals the differences between the legal cultures from which these documents originate and which they are designed to serve.*
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> *The Restatement opts for under-regulation, reflecting a typically American skepticism toward a priori rules and a high degree of confidence in the courts' ability to develop appropriate solutions on a case-by-case basis. That confidence finds its justification in the fact that American state and federal judges share the same legal training and tradition and have long experience in working with malleable "approaches". The drafters had hoped – but could not mandate – that, over time, judges would develop similar solutions and thus eventually provide a modicum of consistency and predictability. Four decades later, the extent to which that hope has materialized remains debatable.*
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> *In contrast, Rome I reflects the rich continental experience in crafting a priori rules and a reluctance to entrust courts with too much discretion. This reluctance finds additional justification in the fact that Rome I is designed to serve a plurilegal and multiethnic Union, one that brings together uneven legal traditions. As a result, Rome I consists of many detailed black-letter rules, subject to few narrow escapes according little judicial flexibility, and aims at greater consistency and predictability.*
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> *At the same time, the drafters of Rome I deserve praise for having the political courage and legal acumen to devise a series of specific rules explicitly designed to protect consumers, employees, passengers, and insureds. As the discussion in this essay illustrates, however, these rules work quite well in the case of consumers and employees, but not so well in the case of passengers, insureds,*

and other presumptively weak parties, such as franchisees. Even so, one might well conclude that it is preferable to have rules protecting weak parties in most cases (even if those rules do not work well in some cases), rather than not having any such rules, as is the case with the Restatement and American conflicts law in general.

The paper is forthcoming in *Convergence and Divergence in Private International Law – Liber Amicorum Kurt Siehr* (2010).