Rühl on Consumer Protection in Choice of Law

Giesela Rühl, who is a professor of law at the Friedrich-Schiller-University in Jena (Germany), has posted Consumer Protection in Choice of Law on SSRN. The abstract reads:

Consumer protection in choice of law is a fairly young concept. In fact, the idea that consumers might be as much in need of protection in choice of law as in other areas of law did not loom large before the second part of the 20th century. However, after the consumer protection movement gained pace in the 1960ies and 1970ies, academics, courts and legislators were quick to transfer the concept into choice of law. First legislative provisions were enacted in the 1970ies with § 41 of the Austrian Act of Private International Law as well as Article 5 of the European Convention on the Law Applicable to Contractual Obligations (Rome Convention). In the 1980ies Switzerland followed suit with the adoption of Art. 120 of the new Swiss Act on Private International Law.

Today, consumer protection in choice of law is an integral part of legal systems around the world. Thus, it comes as a surprise that up to now the pertaining rules and regulations have received very little attention from economic theory. Even though there is – by now – a substantial body of literature that deals with different aspects of conflict of laws from an economic perspective, the question of whether and – if so – how consumer should be protected in choice of law has been neglected.

In the paper at hand I fill this gap. More specifically, I analyse how choice of law rules should be designed in order to protect consumers in an efficient way. To this end, I proceed in three steps: In the first step I analyse the economic rationale for consumer protection in choice of law. I show that consumers are in need of protection because they suffer from information asymmetries. In the second step, I analyse how consumer protection can and should be afforded from an economic perspective. I focus on three mechanisms: first, self-healing powers of markets, second, duties of information, and, third, direct regulation of consumer contracts. I conclude that neither markets nor information duties are likely to limit the risks flowing from information asymmetries. As a result, I

argue that the economically best way to protect consumers is to directly regulate consumer contracts. In the third and final step, I therefore analyse different models of consumer protection in view of their economic efficiency. I conclude that the European model of limiting party autonomy with the help of the so-called preferential law approach (Art. 6 Rome I-Regulation) is a good economic compromise. The same holds true for the – in practice very similar – American model of limiting party autonomy with the help of the fundamental public policy doctrine (§ 187 Restatement (Second) of Conflict of Laws). Both models trump all other ways of regulating choice of law in consumer contracts, most importantly the Swiss solution of excluding party autonomy in consumer contracts all together.

The paper is forthcoming in the *Cornell International Law Journal*.