

Nudging in Private International Law: The Design of Connecting Factors in Light of Behavioural Economics

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Cross-border disputes are particularly complex due to the challenges involved in understanding and deciding on the applicable law and international jurisdiction. Contrary to this reality, it is commonly assumed that all private parties are capable of rational choices in pursuit of efficiency, which however disregards the fact that humans are not always guided by rationality but can be affected by psychological biases. Acknowledging 'bounded rationality' in cross-border cases calls for reconsidering the way private international law determines which law shall apply and which court may hear the case. In particular, it requires analysing connecting factors from this new perspective, thus appreciating the significance of how bounded rationality affects private parties in choosing a law or court or abstaining from choice.

In an English paper published in *RabelsZ* volume 1/2022 of mine, such a new approach is pursued based on the insights of behavioural economics, which have been neglected in private international law to date. Looking at the existing EU instruments, the paper investigates how the connecting factors of the Rome and Brussels Regulations are designed to 'nudge' private parties towards a particular jurisdiction, both with regard to subjective and objective connecting factors. Special consideration is given to the requirements of nudging to justify its libertarian paternalism. Particularly illustrative is the application of behavioural insights to the paradigmatic area of consumer protection.

The paper finds that, amending the traditional economic analysis and its assumption of rational decision-making in pursuit of efficiency, behavioural economics contributes a more realistic understanding of private international law and its connecting factors. Objective connecting factors in the Rome and Brussels Regulations, such as the habitual residence or domicile of a particular party to the

case in addition to more specific factors, are relied upon in the absence of a valid choice of law or court by the parties. These objective connecting factors can be understood as the lawmaker's nudges towards a predetermined jurisdiction for the benefit of the parties, and not merely for the sake of individual efficiency. Behavioural economics appreciates that objective connecting factors are majoritarian default rules, but unlike the traditional economic understanding of this term and its hypothetical consensus explanation, the new perspective can openly acknowledge that default rules are set by the lawmaker, who is legitimised by the majority, as a form of libertarian paternalism. Yet, because of their characteristic as a safety net, which still allows the parties to make deviating arrangements, the objective connecting factors are defaults which serve as both choice-preserving and debiasing decisions without being coercive.

Subjective connecting factors, which enable and regulate party autonomy with regard to choice of law and court, are to be conceived as choice architecture from the perspective of behavioural economics. This understanding is to be preferred to previous explanations which draw on a naturalist or positivist reasoning in analogy to substantive private autonomy or which solely proclaim individualist freedom striving for efficiency. By ensuring a choice-preserving design which complements the default rules, the lawmaker can be understood to pursue nudging by providing for a suitable and legitimised choice architecture that steers the choice of law and court. From this perspective, the regulation and limitations of party autonomy are to be seen as measures of libertarian paternalism which intend to protect private parties from their own fallibility and from exploitation by others when making choices.

In response to existing criticism against nudging as a form of libertarian paternalism, the requirements of transparency and a choice-preserving design have proved particularly important. They are met by providing for specific and general defaults (sector-specific and residual objective connecting factors) alongside a choice architecture with clear validity