# Choice of law in commercial contracts and regulatory competition: new steps to be made by the EU?

*The recently published study titled 'European Commercial Contract Law', authored by Andrea Bertolini, addresses the theme of regulatory competition. It offers new policy recommendations to improve EU legal systems' chances of being chosen as the law governing commercial contracts.*

**The Study's main question**

The European Parliament's Committee on Legal Affairs has published a new study authored by Andrea Bertolini, titled 'European Commercial Contract Law' (the 'Study'). The Study formulates the main question as follows: 'why the law chosen in commercial contracts is largely non-European and non-member state law'. The expression 'non-European and non-member state' law is specified as denoting the legal systems of England and Wales, the United States, and Singapore, and more generally, common law legal systems. The Study states:

*It is easily observed how most often international contracts are governed by non-European law. The reasons why this occurs are up to debate and could be quite varied both in nature and relevance. Indeed, a recent study by Singapore Academy of Law (SAL) found that 43 per cent of commercial practitioners and in-house counsel preferred English law as the governing law of the contracts.*

Although the SAL's findings are immediately relativised, the Study is underpinned by the assumption (derived from the SAL's findings) that commercial parties frequently opt for common law. The trend of choosing non-European and non-member state law, the Study submits, is the main reason for enquiring into measures that can be taken to improve the chances of EU Member States' legal systems being chosen as the law governing commercial contracts:

*While the validity of such a study may be questioned, the prevalence of common law in international business transactions, emerging also from other reports and studies (see for a detailed discussion §§2.2 ff.), is one of the very reasons that led to need of performing the current analysis, and should be taken into account, so as to identify those elements that may be improved in the European and MS's regulatory framework for commercial contracts entered into by sophisticated parties.*

The endeavour to identify the points of improvement in the EU and Member States' regulatory frameworks for international contracts merits appreciation and is relevant to businesses and policymakers. Meanwhile, this endeavour implies a complex task. This task can be approached from different perspectives.

**The parties' perspective**

The question of what drives private parties to choose one legal system over another as the law governing their contract is an empirical question. It implies the need to conduct an empirical study, including surveys, interviews, or to use another quantitative or qualitative social science method. This method has been used in several empirical studies, which have provided various insights into the parties' attitudes to the choice of law in commercial contracts. To name a few important studies, these include the research by Stefan **Vogenauer** on regulatory competition through the choice of contract law in Europe, the research by Gilles **Cuniberti** on international market for contracts and the most attractive contract laws, and an empirical study of parties' preferences in international sales contracts conducted by Luiz Gustavo **Meira Moser**. Vogenauer's research focused on Europe (which included the United Kingdom at that time), while the studies by Cuniberti and Meira Moser had a broader ambit.

Despite the possibly empirical nature of the Study's main question, the Study neither uses empirical methods nor focuses on the parties' perspectives. Instead, it takes the policymakers' perspective.

**The policymakers' perspective**

The Study aims to 'identify possible policies to be implemented to overcome' the trend that 'the law chosen in commercial contracts is largely non-European and non-member state'. The findings are formulated as recommendations for policymakers who attempt to make their own legal systems attractive to parties

involved in international transactions. The recommendations address both substantive contract law and civil procedure (see inter alia point 2.1 on page 42). Within civil procedure, the Study leaves outside the scope conflict-of-law questions of the extent to which the courts upheld choice-of-law agreements or how various legal systems applicable to contract interpretation deal with the application of foreign law. By contrast, specific attention is paid to the efficiency of the national judiciaries.

Along with the discussion of substantive law, civil procedure and national judiciaries' efficiency, the Study looks for the reasons for (what it assumes to be) the low success rate of EU Member States' contract law in the pitfalls of the projects to harmonise contract law that have been undertaken over the last decades. The Study states from the outset:

*Indeed, **absent an autonomous European contract law**, business parties often elect other, non-European jurisdictions (often common law ones), to govern their contractual agreements.*

It goes on to identify 'the fate' of various attempts to harmonise contract law, such as soft law instruments (including the Principles of European Contract Law (PECL), the UNIDROIT Principles of International Commercial Contracts (UPICC), the Acquis Principles, the Draft Common Frame of Reference (DCFR), and the Common European Sales Law project. These are addressed in the first part of the Study, after which the contract laws of various legal systems are compared and coupled with a comparison of the functioning of the court systems. The method on which the Study bases its conclusions and recommendations is outlined as follows:

*To do so, it first provides an overview of the relevant academic and policy efforts underwent to formulate a European contract law (Chapter 1). Then it moves on to touch upon a broad spectrum of matters emerging both from international reports on the adjudication and the functioning of the courts systems, as well as from academic literature on matters that span from contract qualification, interpretation, integration, and some fundamental aspects of remedies (Chapter 2). It then provides a series of policy options (Chapter 3), European institutions could consider when attempting to alter this trend and ensure EU regulation a global role in commercial contracts too.*

**Regulatory competition, soft law, or de facto harmonisation?**

Placing harmonisation of contract law at the core of the discussion of regulatory competition is a fresh look at the (soft law) instruments harmonising contract law. However, it is a somewhat unexpected take on these instruments, because participation in regulatory competition, whereby a EU instrument would compete with third states' laws, does not appear to be the goal of any contract law harmonisation project. For instance, the UNIDROIT principles have harmonised commercial contract law worldwide. The instrument contains a number of rules rooted in the legal system of the United States (Uniform Commercial Code and States' case law) and has been endorsed by the UNCITRAL. The PECL and DCFR limit their scope to the EU, but at the time of these instruments' drafting, the United Kingdom was an EU Member State. Furthermore, PECL and DCFR are not confined to commercial contract law; they address contract law more broadly.

In contrast to these harmonisation projects, the Study appears to promote (without explicitly stating this) the de facto harmonisation by contract clauses and the need to foster party autonomy in the interpretation of contracts. If this is correct, this would be a very welcome recommendation, albeit not entirely novel. The Study states:

*Overall, the analysis is then used to lay out some **policy recommendations** that may only be broad in scope and point at one direction more than providing detailed solutions.*

*All efforts should aim at pursuing the **efficiency of the judiciary** on the one hand, and the **creation of a set of minimalist and – possibly – self-sufficient norms dedicated to the regulation of business contracts that prioritize legal certainty, foreseeability of the outcome, preservation of the parties will**.*

This and other recommendations are summarised on page 9 and provided on pages 76 ff, and are certainly worth reading.