Contractual Choice of Law in Contracts of Adhesion and Party Autonomy

Mo Zhang (*Temple University*) has posted "**Contractual Choice of Law in Contracts of Adhesion and Party Autonomy**" on SSRN; it originally appeared in the *Akron Law Review*, Vol. 41, 2007.

> *Contractual choice of Law in contracts of adhesion is an issue that poses great challenge to the conflict of law theory. The issue is also practically important because the increasing use of form contracts in the traditional "paper world", and particularly in the Internet based business transactions. In the US, the enforceability of contracts of adhesion remains unsettled and the choice of law question in the contracts as such is left unanswered. The article analyzes the nature of contracts of adhesion as opposed to the party autonomy principle in contractual choice of law, and argues that contracts of adhesion do not conform to the basic notion of party autonomy. The article suggests that the choice of law clause in contracts of adhesion shall not take effect unless adherents meaningfully agree. The article proposes a "second chance" approach for contractual choice of law in contracts of adhesion. The approach is intended to set a general rule that a choice of law clause in an adhesive contract shall not be deemed enforceable prior to affirmation of the true assent of adherent.*

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Alberta Court Analyzes Public

Policy Defence

In *Bad Ass Coffee Company of Hawaii Inc. v. Bad Ass Enterprises Inc.*, [2007] A.J. No. 1080 (Q.B.) (QL), available here, an Alberta Master was asked to recognize and enforce a Utah judgment. The Master first analyzed the issue of whether the Utah court had jurisdiction, holding that the defendants had submitted to its jurisdiction by making arguments on the merits of the dispute. The Master also, correctly in my view, held that in light of the submission, there was no need for the Canadian court to consider whether there was a real and substantial connection between Utah and the dispute: the submission itself was conclusive on the jurisdiction issue.

Most of the decision deals with the defendants' argument that the Utah judgment was contrary to the public policy of Alberta, particularly that expressed in its legislation about franchise agreements. The Alberta legislation provided, in part, that the law of Alberta applied to franchise agreements. The agreement between the parties had been expressly governed by the law of Utah, and the court in Utah had used that law to resolve the dispute.

The Master, after a lengthy analysis, concluded that the defence of public policy must remain narrow in scope. In doing so the Master relied on the Supreme Court of Canada's decision in *Beals v. Saldanha*. As a result, the Master concluded that the application of Utah law to the agreement, while a violation of the local Alberta statute, was not contrary to the "fundamental morality" of the forum. Principles of international comity meant that the courts of Utah had to be given scope to apply Utah law to the contract.

Bad Ass Coffee Company of Hawaii Inc. is headquartered in Salt Lake City, Utah. For more, follow this link. The company's name has to do with hard-working donkeys.

EP on the Green Paper on the Attachment of Bank Accounts

The European Parliament issued 08/10/2007 its tabled non-legislative report on the Green Paper on improving the efficiency of the enforcement of judgments in the European Union: the attachment of bank accounts (2007/2026(INI)). The report can be read here and here. See our previous posts here, here and here.

Assignments and Choice of Law in Australia

Assignments of choses in action can raise difficult choice of law issues, and readers may be interested in two decisions of the Federal Court of Australia that shed some light on this area.

In *Salfinger v Niugini Mining (Australia) Pty Ltd (No. 3)* [2007] FCA 1532 (8 October 2007), Heerey J considered the validity of a purported assignment of causes of action arising under Australian law pursuant to deeds of assignment governed by Canadian law. His Honour held that:

> *"Whether the causes of action in tort or equity are assignable is to be determined by the law under which the right or cause of action was created … In consequence, although both assignments in the present case included 'governing law' clauses, and were purportedly entered into in Canada, those clauses are not relevant in deciding whether the causes of action in question are assignable. That question is to be decided by the law of the place where the causes of action arose. As the causes of action relied on arose in Australia, Australian law is applicable."*

There is an interesting parallel between the recent decision and the earlier Full Federal Court case of *Pacific Brands Sport Leisure Pty Ltd v Underworks Pty Ltd*

(2006) 149 FCR 395; [2006] FCAFC 40, which concerned the assignment of contractual rights (not causes of action). There, the court was content to proceed on the assumption (without needing to decide) that such assignments are to be governed by the proper law of the underlying contract, rather than the proper law of the contract of assignment.

Saving the Hague Choice of Court Convention

William J Woodward Jr (Temple) has posted "Saving the Hague Choice of Court Convention" on SSRN. It is forthcoming in the *University of Pennsylvania Journal of International Law*, Vol. 29, 2008. Here's the abstract:

> *Developing an international regime that would require some level of international recognition or enforcement of the judgments of courts of other countries has been a goal for international lawyers, particularly those in the United States, for many years. Concluded in 2005, the Hague Choice of Court Convention may not be the gold ring, but it promises to make substantial improvements in international judicial dispute resolution and thereby add immensely to international economic well-being. Through the Convention, States will agree to recognize or enforce the judgments of other State parties, when those judgments follow valid choice of court agreements defined (and also regulated) in the treaty. Since most international trade begins with a contract, and since most of those contracts already contain dispute resolution provisions, the Convention may have delivered a great advance in this area. But it is obvious from the nature of the Convention that its success depends critically on widespread international acceptance of the Convention; if only a few States join it, the international system will not have become much better than it is now.*
>
> *Unfortunately, there have been no ratifications in more than two years since the Convention was concluded and it seems in danger of dying a slow death for*

lack of interest. Leadership by the United States, a primary advocate for an international accord, may be in order.

The problem is that the Convention, as drafted, will not find uniform, reliable enforcement within the United States. In two particular kinds of contracts covered by the Convention, franchise contracts and what I call mass market contracts, some choice of forum provisions are difficult or impossible to enforce in several U.S. states under current law. Some of this law has developed very quickly. The state of domestic law presents a compliance problem for the United States in the first instance if it joins the Convention, but that problem may be dwarfed by the very practical problem of leading other countries to join the Convention thereby ensuring its success. This will be very difficult if other States perceive the United States, owing to these developments, and the diversity in its state commercial law, making less of a commitment under the Convention than other States will make if they join the Convention.

After developing the state of the case law in the United States that will cause the problems, this article considers alternative solutions, concluding that the Convention itself supplies the best approach, one that the United States should embrace in its efforts to lead other countries in improving the international dispute resolution system.

Download the article, free of charge, from **here**.

Recognition and Res Judicata of US Class Action Judgments in European Legal Systems

Andrea Pinna (*Erasmus University Rotterdam*) has posted "**Recognition and Res Judicata of U.S. Class Action Judgments in European Legal Systems**" on

SSRN. The abstract reads:

> *Class actions are still a specificity of the U.S. law and allow individual plaintiffs to represent a group of others in a similar situation in a claim against a same defendant. Recently, transnational class actions, either against a foreign defendant or including foreign class members, have become popular. The author addresses the issue of the possibility of bringing such claims involving parties that are resident of a European country.*
>
> *United States that are traditionally known for the extraterritorial application of their laws and by easily retaining jurisdiction of their courts try to coordinate the legal systems involved by being concerned with the possibility of recognition in a foreign country of class action judgments. Therefore, the original question of the recognition and the Res Judicata effect of these judgments in European countries that do not know similar collective judicial procedures needs to be addressed.*

Download the article, for free, from **here**.

Same Sex Unions Within the Current Regulatory Framework of Serbian Private International Law

Gaso Knezevic and Vladimir Pavic (both at the University of Belgrade) have posted "**Same-Sex Unions Within the Current Regulatory Framework of Serbian Private International Law**" on SSRN (original citation: Y*ugoslav Law Year*, Vol. 3, 2006). Here's the abstract:

> *Recent introduction of fully-fledged homosexual marriages in certain countries like the Netherlands and Belgium have opened a range of issues which appear difficult to solve. This difficulty is, at least in case of Serbian law, compounded*

by inadequacy of existing regulation. While it is obvious that it would be impossible to, say, arrange a homosexual wedding in Serbia, grounding such contention in some clear-cut Serbian legislation appears to be a much harder task. This is due to the fact that relevant provisions of Serbian laws appear unclear or contradicting when they have to deal with homosexual marriages. While one should not doubt that Serbian legal system, as is, will reject homosexual marriages, it is impossible not to note the alarming level of legal insecurity surrounding relevant regulation. Unlikely explanations often appear to be the only way out, while technicalities are often more important than substance. While some of the problems have been solved through adoption of the new Serbian Constitution at the end of 2006, other can only be addressed through amendment of the PIL code.

Download the article from **here**.

German Federal Constitutional Court on the Service of Statements of Claim in American Class Actions

With order of 14 June 2007 the **German Federal Constitutional Court** (*Bundesverfassungsgericht*) decided not to admit constitutional complaints concerning the **service of statements of claim** in **American class actions** pursuant to the **Hague Service Convention**.

The facts of the case are as follows:

Against the complainant, an automobile manufacturer with its registered office in Germany, lawsuits were brought on the basis of the allegation that they had made agreements in violation of competition law preventing the import of motor vehicles from Canada to the US in order to keep the price level in the US market high. Based on the alleged violations of competition law, several class-action

lawsuits were filed in the US. In three of these actions, the plaintiffs requested the President of the competent German court as the central authority pursuant to Art. 2 Hague Service Convention to serve the statements of claim on the complainant according to Art. 5 Hague Service Convention.

After the orders for service had been made, the complainant asserted that the service of the statements of claim should not have been ordered because the objectives of the class actions violated the essential principles of a free state governed by the rule of law. Consequently, service should have been refused according to Art.13 (1) Hague Service Convention (para. 5). After legal remedies had failed before the Higher Regional Court (*Oberlandesgericht*) and the Federal Supreme Court (*Bundesgerichtshof*), the complainant filed constitutional complaints (that were consolidated for joint adjudication) alleging a violation of Art. 2 (1) Basic Law (*Grundgesetz*) in conjunction with the rule of law based on the assertion that the subject-matter of the domestic service are statements of claims in actions which were brought before the American courts without any basis and only for non-legal purposes. Thus, the service of such statements of claim should be rejected on the basis of Art. 13 Hague Service Convention for constitutional reasons. Further, the complainant asserts a violation of Art. 14 Basic Law (guarantee of property) since the service of a statement of claim was an encroachment on the asset base of the company due to the burden of costs associated with proceedings. In addition, a violation of Art. 12 (1) Basic Law (occupational freedom) is alleged since also the complainant's gainful activity were affected. Finally, the complainant argues that also its right to a hearing in court (Art. 103 (1) Basic Law) had been violated

The Federal Constitutional Court **did not admit** the constitutional claims for decision and held that

> *[t]he decisions of German state bodies which effectuate domestic service of foreign statements of claim may violate Article 2.1 of the Basic Law in conjunction with the rule of law principle if the objective pursued by the statement of claims violates essential principles of a free state governed by the rule of law. However, the class actions in this case do not satisfy this requirement. (para.13)*

The Court went on by stating that service may only be refused on the basis of Art.

13 Hague Service Convention under narrow circumstances.

> *According to the case-law of the Federal Constitutional Court, a limit might be reached where the objective pursued by the action "obviously violates essential principles of a free state governed by the rule of law" (BVerfGE 91, 335 (343); 108, 238 (247)). It is true that the First Senate of the Federal Constitutional Court has decided that the mere possibility of imposing punitive damages does not amount to a violation of essential rule of law principles (BVerfGE 91, 335 (343-344)). If, however, damages claims appear from the outset to violate the abuse of law principle, the possibility that the service of a statement of claim may be incompatible with the essential principles of a free state governed by the rule of law is no longer excluded. In such a case, it is possible that a German state body could through its application and interpretation of the reservation clause in Article 13.1 of the Hague Service Convention fundamentally misjudge and disproportionately limit the rights of a complainant. The standard which applies in this case is Article 2.1 of the Basic Law in conjunction with the rule of law. However, the Federal Constitutional Court has not yet conclusively determined whether the responsible state body may for constitutional reasons refuse service of a statement of claim whose purpose conflicts with essential principles of a free state governed by the rule of law (see BVerfGE 91, 335 (343); 108, 238 (248-249)). (para. 19)*

The Court held that in the present case this question had not to be answered since there was no violation of essential principles of a free state governed by the rule of law.

> *It is indeed true from the point of view of the German legal system that a defendant is subject to added burdens in an American class-action lawsuit. If, however, from the German perspective a plaintiff exploits the weaker position of a defendant to enforce his or her own rights, this alone will not be sufficient to substantiate an allegation that the plaintiff has committed an abuse of law; instead the objective and the specific circumstances of the legal action must indicate that there has been an obvious abuse of law – this is missing in the present case. (para. 20).*

The order of the First Chamber of the Second Senate (2 BvR 2247-2249/06) is available in English at the website of the Federal

Constitutional Court.

(Many thanks to Prof. Jan von Hein (Trier) for the tip-off.)

A New Mandatory Rule in the French Law of Torts

The French Supreme Court for private and criminal matters (*Cour de cassation*) has recognised a new mandatory rule in the French law of torts. As a consequence, the Court held that it applied necessarily, and that it was an exception to the applicable choice of law rule, i.e. the law of the place were the tort was committed.

Background

This new mandatory rule is in fact an entire scheme allowing victims of certain criminal offences (basically those resulting in personal injury) to claim compensation from a public fund. The fund compensates victims irrespective of any negligence committed by the tortfeasor. After payment, the fund is subrogated in the rights of the victim and may sue the torfeasor to recover the monies paid to the victim, but on condition that the torfeasor was liable to the victim in the first place.

The fund is obviously a French public fund. But it does not only protect French victims. It also protect foreigners when the offence was committed in France. For French victims, however, the statute does not lay down any territorial condition. It seems to follow that French nationals are eligible even when the offence was committed abroad.

The translation of the provisions of the French Code of Criminal Procedure which govern the scheme can be found here.

The case

In this case, the plaintiff was a French national who had suffered a loss in the United States. While jet-skiing, he was hurt by another jet-ski from behind. He sought recovery in France before the special body set up in each first instance court to rule on the eligibility of plaintiffs. What happened before this body is not known, but the Versailles court of appeal denied compensation. It held that the plaintiff had not demonstrated that the conduct which caused him harm could be characterised as a criminal offence under American law. In a judgment of 22 January 2007, the *Cour de cassation* reversed. It ruled that the content of American law was irrelevant, as the French rule was "of necessary application" (*loi d'application nécessaire*) and thus governed.

French conflict lawyers have traditionnally used several terms to refer to mandatory rules. The most famous internationally is certainly *lois de police*, but they have also been called rules of necessary application, or of immediate application. The concept, however, has always been the same. *Lois de police* are applied necessarily and immediately, as opposed to after determining whether the applicable choice of law rule provides for the application of French law. *Lois de police* are thus exceptions to the normal operation of the traditional choice of law rule, here the *lex loci delicti*.

The judgment justifies the characterization of the French scheme by stating that the rationale of the scheme is to establish a mechanism of national solidarity for victims of criminal offences, which compensates victims because of the existence of a specific social risk (criminality).

Comment

The characterization of the scheme as a mandatory set of rules is only partly convincing. Under the French theory of mandatory rules, a rule is considered mandatory when it is so important that the French legal order could not tolerate the application of any other rule. Here, it seems that the reason why French law must govern is different. The scheme does not really belong to the law of torts. It is a public scheme playing with French money. As with any public law, it is only for the State which instituted such fund to determine the conditions of its application. The application of French law is no exception to the choice of law rule governing torts. The issue of whether a French public fund should compensate a victim is not an issue of tort in the first place, but rather an issue of public law.

Norwegian Court of Appeal on Choice of Law

The Norwegian Court of Appeal (Borgarting lagmannsrett) recently handed down a decision on the question of Choice of law regarding the limitation period for money claims. The decision (Borgarting lagmannsrett (kjennelse)) is dated 2007-05-28, published in LH-2007-75346, and is retrievable from here.

Parties, facts and contentions

The plaintiff and distrainer, Østjydske Bank AS, domiciled in Denmark, served the defendant and distrainee, Joan Anni Myhre, domiciled in Norway, with a subpoena in a Norwegian Court of First Instance (Oslo byfogdembete), with the object of action to ask the court to force the defendant, by the seizure and detention of personal property, to perform an obligation to pay overdue loan of money, where upon the Court issued a distress warrant. Before the seizure was carried out, the defendant claimed the loan of money had been repaid so there subsequently was nothing to seize, where upon the Norwegian Court of First Instance reversed its first ruling. In response, the plaintiff appealed to the Court of Appeal and contended, in response to the defendant´s secondary argument, that the Danish law, on the limitation period for money claims with a limitation period of 5 years, was applicable, and, that in accordance with that law, the plaintiff still had the right to demand performance of payment since the limitation period to demand such performance was not exceeded. By contrast, the defendant contended in her secondary argument that Norwegian law, on the limitation period for money claims with a limitation period of 3 years, was applicable, and, that in accordance with that law, the plaintiff no longer had the right to demand performance of payment since the limitation period to demand such performance had been exceeded. This case note will solely venture into the question of the limitation period for money claims since only that question involved an issue of private international law.

Ratio decidendi of the Norwegian Court of Appeal

The Norwegian Court of Appeal, succinct in its ruling, stated that in an international contractual legal relationship, the starting point for the parties to resolve the question of choice of law, is the party autonomy. Since neither of the disputing parties contended the parties had made a choice of law in accordance with the rules of private international law and its rules for the party autonomy, the question of choice of law had to be answered in accordance with the Norwegian private international law and its individualising method after which the applicable law is designated in accordance with the State to which the contractual relationship has the most significant or strongest connection. Considering that the case at hand involved a loan from a Danish Bank to a person domiciled in Denmark at the time when the loan was granted, it followed from the individualising method that Danish law was applicable.