The law applicable to contractual obligations in consumer contracts of adhesion in Ghana

by

Ethel Fiattor

Submitted in fulfilment of the requirements for the degree

LL D

in the Faculty of Law,

University of Pretoria

August 2023

Supervisor: **Prof Elsabe Schoeman**

DECLARATION OF ORIGINALITY: UNIVERSITY OF PRETORIA

Full names of Student: **Ethel Fiattor**

Student No: **19387408**

Declaration

1. I understand what plagiarism is and am fully aware of the University's plagiarism policy.
2. I declare that this **thesis** is my own original work. I have properly referenced my sources as per departmental requirements, in the various instances in which I have used other people's work (either from a printed source, internet source, or elsewhere).
3. I have not used work that was previously produced by another student to submit as my own.
4. I have not permitted, and will not permit, anyone to copy my work with the intention of passing it off as his or her own work.

Signature of student:

Signature of supervisor:

Table of Contents

Abstract

This thesis argues for the inclusion of adequate choice of law rules for consumer adhesion contracts to ensure suitable protection measures for weaker parties in Ghana. To this end, the research seeks to add to existing literature by engaging in a comparative study of the legal development of choice of law rules in the jurisdictions of the European Union (EU), the United States of America (US/USA) with specific reference to California, and China. This study will assist in developing a theoretical framework to advance the jurisprudence of choice of law rules in consumer adhesion contracts in Ghana.

The research considers the choice of law rules specifically in Articles 6 and 9 of Rome 1 where special rules have been promulgated to ensure the further protection of the consumer. Rome I ensures that the parties to a consumer contract may decide on the applicable law in accordance with Article 3 of Rome I. However, there are additional provisions to ensure the consumer's protection in the form of mandatory provisions of the law applicable in the absence of a choice of law which under Rome I is the law of the country of the consumer's habitual residence.

The Restatement (Second) as it applies in California was designated for the comparative study. Sections 187 and 188 of the Restatement (Second) grant the parties to a consumer contract autonomy to incorporate a choice of law clause in their contract indicating the choice of the law of a particular state to govern their contract thereby limiting party autonomy in consumer contracts to the substantive provisions of the law of the state of their choice. The Restatement (Second) enhances the policies that are fundamental to the state with a material interest in the contract.

The Chinese choice of law rules on consumer contracts follow the position in Rome I but are not as developed as regards interpretation and application of the 2010 Conflicts Statute and terminology. The promulgation of Article 42 provides expressly that a consumer contract is governed by the law of the consumer's habitual residence. Article 42 further provides that the consumer contract is also governed by the law of the place where the commodity or the service is provided in absence of a choice by the parties. With respect to mandatory rules and public interest, China promotes policies that are fundamental to the state by ensuring the application of their mandatory rules and public interest.

The research arrives at the conclusion that Rome I is the preferred standard worth emulating when developing a theoretical framework for Ghana. The absence of a Consumer Protection Act in Ghana will lead to the application of harsh common law principles of contract law which will not ensure the protection of weaker parties. Therefore, it is suggested that Ghana establish a consumer protection act in which choice of law rules on consumer adhesion contracts must be included.

In light of attaining justice, the research equally considered through a comparative lens the effects of conflicts justice as against material justice in choice of law and arrived at

the conclusion that choice of law rules must strive to attain a result-oriented form of justice in deciding the applicable law in consumer adhesion contracts. Recommendations are made to the effect that a theoretical framework mirroring the development of Rome I on the special rules for consumer adhesion contracts, which are tailored to suit the specific form of consumer transactions in Ghana, is best suited to consumer adhesion contracts and the protection of weaker parties in Ghana.

Keywords
Choice of law, contracts of adhesion, international commercial law, the proper law of a contract, mandatory rules, party autonomy, public policy, the law applicable to contractual obligations, consumer contracts.

Acknowledgments

First to God almighty the creator of heaven and earth, I am eternally grateful for the grace of salvation through the death and resurrection of our Lord Jesus Christ and the fellowship of the Holy Spirit who has been my companion throughout my life and living it and my academic journey.

I wish to take this opportunity to express my profound gratitude to the Faculty of Law, University of Pretoria for generously funding my doctoral research. I am most grateful to the University for providing the necessary resources (human, financial, and literature) which enabled me to advance my academic career and make a worthy contribution to the development of private international law.

To my mother, Bernice Segbe, my Iyawome, my Maamee, my lover as I endearingly call her. God bless you. May you live long to enjoy the fruits of your labour! Your perseverance through a strong patriarchal system and success taught me self-worth, independence and nonchalance to any form of discrimination. Your insistence on selecting battles wisely taught me to focus on the goal. You always say: "Child, you do not stop to throw a stone at every barking dog on this journey of life. They are a destruction from the pit of hell! Know your worth and no one can take your power! Focus on the goal!" Mummy, God has done it! We made it! I love you!

To my supervisor, the Dean of the Law Faculty of the University of Pretoria, Prof Elsabe Schoeman, words fail me. Thank you for your support, encouragement, and patience. A fountain of resilience, determination, and integrity into which I have been fortunate to tap. I am humbled by the opportunities afforded me under your tutelage and supervision. Our interaction has instilled in me a superior level of confidence, diligence, and consistency. Thank you.

To my academic mentors Prof Kwame Frimpong, Prof Obeng Mireku, Prof Phillip Ebo Bonzi-Simpson, Prof Jan Neels, Professor Dr Dr Dr hc Mult Michael Martinek, and Prof Babatunde Fagbayibo, I am grateful for your guidance and contribution to my academic career thus far. I am a blessed child who has stood on the wings of my fathers because you availed yourselves to me and gave me an opportunity at an academic career. Thank you.

To my family, especially my sisters, thank you for supporting my academic journey throughout the years. Your love for me is unmatched. You all have sacrificed in diverse ways to push me so I could attain heights. You are the bridges to my success thus far. May the good Lord grant you your heart's desires, guide you and protect you for me. Thank you.

To my spiritual fathers, Prophet Romeo Akrofi Asare, Apostle Joshua Selman Nimmack, Pastor Kenny Attah Pie and Mrs Attah Pie, Pastor Jerry Eze and Pastor Mrs Eno Jerry Eze, Pastor Kingsley Okonkwo and Pastor Mildred Kingsley-Okonkwo, you are the spiritual watchmen and watchwomen that God has set over my life. Thank you for your profound spiritual guidance, teachings, prayers, and exposure to deep Bible

applicable truths! Your thoughts and prayers have kept me safe and sound on this journey. I honour and appreciate you. God bless you.

To my medical doctors, Dr Maracha Igaza, Dr Chamisa and Dr DJ Decompose, I am grateful to you for seeing me through my surgery and recovery process on this journey. You took care of my health which was a major challenge on this journey. For this I am grateful.

An appreciation to myself: Hadassah! I am truly the beloved child of God! The Lord has always been and always will be my strength! For they who know their God, shall be strong and they shall do exploits! May you grow to understand the strength that God has reposed in you. Ethel, you are a mighty woman of valour.

Abbreviations

AfCFTA	African Continental Free Trade Area
American Restatement /Restatement (Second) of laws of the American Law Institute (1981)	Restatement (Second) of the Conflicts
Brussels Regime/Brussels I (Recast) Regulation	Council Regulation (EU) 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast) [2012] OJ L351/1
Chinese/China's private international law	Law of The People's Republic of China on The Laws Applicable to Foreign-Related Civil Relations (Adopted at the 17th session of the Standing Committee of the 11th National People's Congress, 28 October 2010)
CISG	The United Nations Convention on the International Sale of Goods (2011) United Nations Publication Sales No. E.10.V.14 Isbn 978-92-1-133699-3
CJEU/European Court	Court of Justice of the European Union
EU	European Union
Lugano Convention	Convention on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters of 2007 OJ L 339/3, 21.12.2007, OJ 2009, L 147/5
PICC	The UNIDROIT Principles of International Commercial Contracts (2016), International Institute for the Unification of Private Law (UNIDROIT), Rome info@unidroit.org ISBN: 978 - 88 - 86449 - 37 – 3
PRC	People's Republic of China
Rome Convention	Council 80/934/EEC: Convention on the law applicable to contractual obligations opened for signature in Rome on 19 June 1980 / Consolidated version CF 498Y0126(03)
Rome I	Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6)
SPC	The Superior People's Court of China

The Constitution 1992	Constitution of the Republic of Ghana
The Hague Convention	Hague Principles on Choice of Law in International Commercial Contracts (approved on 19 March 2015)
UCC	Uniform Commercial Code
UK	United Kingdom of Great Britain and Northern Ireland
USA/America	United States of America

Chapter One: Introduction

1 Title

"The law applicable to contractual obligations in consumer contracts of adhesion in Ghana".

The absence of a context-specific consumer protection legislation in Ghana provides an opportunity to infringe on the right of consumers in business trade and commerce.[1] The legal regime on consumer protection is characterised by complexities of accessing fragmented laws from different sources.[2] An attempt to address issues of consumer rights led to the adoption of a consumer protection policy 2014 in Ghana that aims to provide a tailored regime for consumer protection due by identifying the deficiency in law.[3]

The Ministry of Trade and Industry supervised the development of proposals for a Consumer Protection Bill in 2015, which was drafted by a legal consultant and submitted to the Attorney-General's Department in 2016.[4] The Bill aims to guarantee consumer rights and remedies, including the right to cancel or amend contracts, disclosures of consumer information, and protection from unfair trading practices.[5] The drafting process is currently in its early stages, with the final enactment expected in Parliament.[6]

[1] Yidana 2020 *LRRQ* 324.
[2] Yidana (n 1) 326.
[3] Yidana (n 1) 335
[4] Dowuona-Hammond 2018 *JCP* 338.
[5] Dowuona-Hammond (n 4) 338.
[6] Dowuona-Hammond (n 4) 338.

The proposed consumer protection bill should consider choice of law on consumer adhesion contracts to afford some protection to weaker parties by regulating the parties' choice of some laws and or restricting the effects of parties' choice of law. Thus, the need to consider a theoretical framework as a proposed guide which Ghana should consider in drafting choice of law rules in the consumer protection bill.

2 Background to the study

Society is made up of co-dependent individuals with a variety of motives.[7] As humans we are prisoners of our 'schizophrenic' conditions, constantly shifting and ever inconsistent in how we act.[8] When entering into contracts this unpredictable behaviour can lead to the exploitation of the weaker party. In terms of both domestic and private international law, exploitation in contractual agreements is a matter of concern as regards the protection of vulnerable parties.[9] Where domestic regulations are involved there is some – albeit inadequate – respite in that the regulations protect weaker parties based on their weaker bargaining power. A typical example is the USA's Uniform Commercial Code which provides that if one of the parties to a transaction is a consumer (weaker party) an agreement on the applicable law is not effective unless the transaction bears a reasonable relation to the state or country designated.[10]

Choice of law in a contract is arguably more perplexing than in almost any other area of private international law because of the importance of party autonomy, the diversity of connecting factors, and the wide variety of different contractual issues. The problem

[7] Bigwood *Exploitative Contracts* 25.
[8] Bigwood (n 7) 25.
[9] Bigwood (n 7) 1.
[10] S 1-301 (1) of the Uniform Commercial Code of 2001. Also see Tang *Parties' Choice of Law in E-Consumer Contracts* 115.

of choosing a governing law is even more complicated in adhesion contracts where a party to the contract is in a weaker bargaining power. In private international law it is worth considering whether the weaker parties in contracts of adhesion have the autonomy to negotiate the law that governs the contract. A judge may resort to the mandatory rules of a forum (only if they apply to a cross-border scenario) to afford some protection to weaker parties in contracts of adhesion. But the issue arises as to whether these mandatory rules will adequately protect weaker parties.

A case which illustrates some of the problems this research seeks to address is *A&M Produce Co v FMC Corp.*[11] In this case A&M, the plaintiff, decided to start a tomato business. They searched for weight-sizer machines and received bids from two companies. The first bid was from Decco and the second from FMC Corporation, the defendants. Only the machine from Decco included variable speed control and a cooler. The plaintiff accepted the second bid and signed a contract drafted by the defendant which included a disclaimer for consequential damages. The machine was duly installed, and the plaintiff then realised that the device was not working as advertised. The plaintiff twice placed crops in the machine and on both occasions the crops were damaged.

The plaintiff decided to mitigate its losses by selling the tomatoes, but this failed as they were rejected as not being cannery tomatoes. The defendant attempted to resolve the problem by starting and stopping the machine at intervals, but this delayed the production process. A&M offered to return the machine to the defendant and reclaim the down payment made on the machine and freight costs. The defendant

[11] *A&M Produce Co v FMC Corp* 1982 135 Cal Ct App 3d para 479.

declined the offer and counterclaimed demanding that the plaintiff pay the balance outstanding on the machine. The plaintiff sued the defendant. In the trial court, the judge decided that the clause containing a disclaimer for consequential damages was unconscionable and the jury ruled for the plaintiff. The defendant argued that the trial court had erred in its decision. In addressing this issue, the court of appeal enquired into the nature of the unconscionability doctrine.

The court of appeal found that the Uniform Commercial Code did not attempt to define what is or is not "unconscionable" in precise terms. Nevertheless, the word "unconscionability" is recognised to include an absence of meaningful choice on the part of one of the parties and contract terms that are unreasonably favourable to the other party. The court of appeal also indicated that the unconscionability doctrine has both a "procedural" and a "substantive" element. The procedural element focuses on two factors: "oppression" and "surprise". Oppression arises from an unequal bargaining power which results in no actual negotiation and "an absence of meaningful choice".[12] Surprise involves the extent to which the supposedly agreed-upon terms of the bargain hide in a prolix printed form drafted by the party seeking to enforce the disputed terms.

In the court's view the mere fact that a contract term is not read or understood by a non-drafting party, or that the drafting party occupies a superior bargaining position will not entitle a court to refuse to enforce the contract. Although, arguably, the contract terms are not actively negotiated between the parties and fall outside the "circle of assent", commercial practicalities dictate that unbargained terms will not be

[12] *Williams v Walker-Thomas Furniture Company* 350 F 2d para 449.

enforced if they are also substantively unconscionable. The court then considered what would constitute substantive unconscionability. It determined that there is no precise definition of substantive unconscionability and in most instances the court relies on judicial precedent or its discretion to define what constitutes substantive unconscionability.

The court's finding suggests that, in contracts of adhesion, the principle of sanctity of contract can be used to mitigate the unfairness to weaker parties. However, not all levels of unfairness warrant setting aside the obligations that a contract of adhesion imposes on the weaker party – the level of unfairness required is that of substantive unconscionability, the definition of which is in the hands of the court. It is precisely this problem that this research seeks to address regarding contracts of adhesion within consumer contracts. The study suggests a workable solution on choice of law rules in adhesion contracts which will maintain the sanctity of these contracts.

2.1 Rationale

This research aims to explore the possibility of providing a workable solution for choice of law rules in contracts of adhesion and to provide a balance between preserving the sanctity of contracts of adhesion and protecting weaker parties to such contracts. A British judge, while retaining adequate respect for the sanctity of contract and maintaining a workable balance between providing appropriate consumer protection for signatories of contracts of adhesion, stated that:[13]

> A theme that runs through our law of contract is that the reasonable expectations of honest men must be protected. It is not a rule or a

[13] *First Energy (UK) Ltd v Hungarian International Bank Ltd* 1993 2 Lloyd's Rep 194 553 para H.

> principle of law. It is the objective that has been and still is the principal moulding force of our law of contract. It affords no license to a judge to depart from the binding precedent. On the other hand, if the *prima facie* solution to a problem runs counter to the reasonable expectations of honest men, this criterion sometimes requires a rigorous re-examination of the problem to ascertain whether the law does indeed compel demonstrable unfairness.

This research aims to formulate choice of law rules for consumer contracts by analysing the laws of various jurisdictions on choice of law in consumer contracts of adhesion. The outcome suggests a theoretical framework that preserves the sanctity of consumer contracts of adhesion and ensures the protection of weaker parties in such contracts in Ghana. The study explores the viability of such an instrument to protect weaker parties to consumer contracts of adhesion in international commercial law. The research also considers whether the proposed framework safeguards the sanctity of consumer contracts of adhesion in Ghana. Arguments in support of why such an instrument is necessary are advanced as founded on the goals of private international law – to attain certainty, predictability, and uniformity of result in conflict of laws issues.[14]

3 Aim and objectives

3.1 Research question

The research question is: Can a theoretical framework on choice of law rules relating to consumer contracts of adhesion be developed for Ghana by considering the legal development of choice of law rules for these contracts in the EU, the USA (California), and China?

[14] Batiffol 1966-1967 *AJCL* 159-163.

The aim is to formulate choice of law rules governing consumer contracts of adhesion and develop a theoretical framework to resolve the problem of choice of law rules and ensure the protection of weaker parties in Ghana. The research takes the form of a comparative analysis of the legal instruments in the European Union (EU), the United States of America (USA) with specific reference to California, and China to resolve the problem of choice of law in adhesion contracts and ensure the protection of weaker parties while preserving the sanctity of contracts of adhesion. The focus is on consumer contracts. The research draws inspiration from the fact that in private international law weaker parties who enter into cross-border contracts, have limited autonomy to decide on the law that governs the terms and conditions of their contract.[15]

Before a dispute arises, parties to a contract can negotiate what law will govern the contract (through choice of law clauses), and the procedural aspects of the conflict (through jurisdiction clauses).[16] This negotiation is not possible in consumer contracts of adhesion. Various laws, treaties, conventions, and model laws serve as guidelines

[15] Agarwal 2007 *IIMA* 6.
[16] Sandberg *Jura novit arbiter? How to apply and ascertain the content of the applicable law in international commercial arbitration in Sweden* 7.

for parties' choice of law in a contract.[17] Whether these guidelines are transferrable to contracts of adhesion needs to be considered.[18]

Certain jurisdictions have introduced solutions to resolve the problem of injustice meted out to weaker parties in contracts of adhesion. The EU has embarked on unifying laws by promulgating Rome I as a solution.[19] Rome I provides unique choice of law rules on consumer contracts of adhesion to afford some protection to weaker parties and maintain the sanctity of cross-border transactions.[20] This research therefore considers the potential for the development of a theoretical framework for choice of law rules in consumer contracts of adhesion in Ghana.

4 Literature review

The principle of consumer protection in choice of law is a relatively young concept.[21] The need to protect consumers in the sphere of choice of law was not popularly acknowledged before the second half of the 20th century.[22] The concept is essential to the study as contracts of adhesion shift risks to the consumer based on the absence

[17] Some of these laws include, Council Regulations (EC) No 593/2008 of The European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), which unifies the choice of law rules applicable to contractual obligations; The Hague Principles on Choice of Law in International Commercial Contracts which provides that the instrument sets out general principles concerning choice of law in international commercial contracts (The Hague Convention) that affirms the principle of party autonomy with limited exceptions and may be used as a model for national, regional, supranational, or international instruments; The United Nations Convention on the International Sale of Goods (CISG) which provide that the Convention applies to contracts of sale of goods between parties whose places of business are in different states when the states are contracting states; or when the rules of private international law lead to the application of the law of a contracting state; The UNIDROIT Principles of International Commercial Contracts (PICC) which sets out the general rules for international commercial contracts, amongst other things.
[18] Yasmin 2016 *IRJEISR* 36.
[19] A 6 of Rome I (n 17).
[20] A 6 of Rome I (n 17).
[21] Rühl 2011 CILJ 570.
[22] Rühl (n 21) 570.

of negotiations and this underlies the need for protection.[23] Upon gaining popularity in the 1960s and 1970s, academics, courts, and legislators instantly transferred the concept to private international law.[24]

The protection of weaker parties in contracts of adhesion complicates parties' choice of law in cross-border commercial contracts. Legal instruments enacted in the 1970s provided some solutions. Examples include section 41 of the Austrian Act on Private International Law and Article 5 of the Rome Convention.[25] These moves marked the first steps in solving the problem of parties' choice of law in contracts of adhesion.[26] In the 1980s, Switzerland followed suit by adopting Article 120 of the new Swiss Act on Private International Law.[27] The protection of weaker parties in respect of choice of law in cross-border contracts has since taken root as an issue for discussion among the legal fraternity on a global scale.[28]

Some authors have considered the issue in light of the obligations a contract imposes on the parties based on the legal principle of *pacta sunt servanda*.[29] Bigwood provides a detailed and sophisticated conceptual account of how the concept of exploitation features in contracts of adhesion and its effect on enforcing contractual obligations generally.[30] Another publication has explored consumer protection in Europe in the context of the Consumer Rights Directive, efforts to consolidate the consumer

[23] Rickett and Telfer *International Perspectives on Consumers' Access to Justice* 5.
[24] Rühl (n 21) 570.
[25] Rühl (n 21) 570.
[26] Rühl (n 21) 570.
[27] Rühl (n 21) 570.
[28] Rickett and Telfer (n 23) 1.
[29] Bigwood (n 7) 1.
[30] Bigwood (n 7) 3.

contracts, and the Draft Common Frame of Reference.[31] Other research has also dealt with private international law rules for electronic consumer contracts.[32] It focused on the need to extend substantive consumer protection to the electronic environment due to the "inequality of bargaining power" experienced by consumers when contracting by electronic means with sellers in foreign jurisdictions.[33]

Other legal theorists have provided insights into a wide array of consumer topics to promote awareness of the options available to protect consumers legally. Their aim is to cast more light on the underlying policy choice that needs to be made and to provide practical examples of consumer protection regimes.[34] Hill sought to assess whether adequate avenues are available to resolve disputes arising from cross-border consumer contracts effectively.[35] Weatherill, in his acclaimed work, provides a comprehensive introduction to all facets of the EU's involvement in consumer law and policy.[36] He opines that consumers must benefit from the EU's economic integration project which allows them to enjoy wider choice and improved quality. Yet, they need protection from the dangers that flow from the malfunctioning of products and unfair markets.[37]

The EU's consumer laws and policies attempt to have the best of both worlds. Thus, they aim to provide a liberalised yet properly regulated trading space for Europe.[38]

---

[31] Devenney and Kenny "European Consumer Protection: Theory and Practice" in Devenney and Kenny *"European Consumer Protection: Theory and Practice"* 437.
[32] Gillies *Electronic Commerce and International Private Law* 1.
[33] Rickett and Telfer (n 23) 1.
[34] Black *Handbook of Research on International Consumer Law* 1.
[35] Hill *Cross-Border Consumer Contracts* vii.
[36] Weatherill *EU Consumer law and policy* 61.
[37] Gillies (n 32) 24.
[38] Gillies (n 32) 24.

The approach of the EU to consumer law serves as a formidable move worth emulating. Ghana is a trading partner with the EU and other countries which have promulgated well-researched and selectively drafted choice of law regimes to protect their interests in cross-border relationships. There is a need for Ghana to implement conflict rules that aim at providing a conducive environment to promote the protection of consumers in contracts of adhesion. This research inquiries into the EU's consumer laws and policies to protect consumers and to identify measures worth considering in developing similar provisions for Ghana.

Also, it has been argued that the processes of a consumer transacting in contracts of adhesion and a citizen voting to elect a political candidate bear some similarities as regards the exercise of the right to contractual freedom. As a result of these similarities, a comparison is drawn between the different approaches established to balance contractual freedom and protection of the weaker party, determine which is more effective in electronic consumer contracts, and develop an international model based on current approaches.[39] Barnes highlights the similarities between the two approaches concerning the meaningfulness of consent and considers the enforceability of this consent despite the unanticipated outcomes of the decision.[40]

Other discussions concentrate on the issue of contracts of adhesion and the protection of fundamental human rights.[41] Hopkins argues that private law's endorsement of inequality is illustrated in contractual transactions where one of the parties transacts from an incontestable position of power. In such an event there is a high likelihood of

[39] Barnes "Consumer Assent to Standard Form Contracts and the Voting Analogy" (2010) *WVLR* 842.
[40] Barnes (n 39) 843.
[41] Hopkins 2003 *TSAR* 153.

the infringement of the commercial rights of the weaker parties.[42] This study is of interest to the extent that Hopkins suggests that private law supports the infringement of the contractual rights of weaker parties in consumer contracts. This notion is similar to the proposed research in that contracts of adhesion may be a tool for the infringement of fundamental human rights, especially in regard to choice of law. However, Hopkins's work also differs considerably from this proposed research in that he considers the philosophical theory developed to ensure that stakeholders do not use private law to infringe on the commercial rights of weaker parties. This research, on the other hand, seeks to inquire into the extent to which private international law allows parties a choice of law and whether there are provisions for the protection of weaker parties in consumer adhesion contracts in Ghana.

Various legal fields focus on protecting weaker parties in determining the applicable law. These fields include employment contracts, insurance contracts, hire-purchase agreements, rental agreements, and contracts of lease. In this research, the emphasis is on consumer adhesion contracts. The goal is to assess the position in the EU, the USA, and China and to determine whether they afford protection to the weaker parties and preserve the sanctity of consumer contracts of adhesion.

The EU has taken steps towards the unification of choice of law and ensuring the protection of weaker parties within the EU. Consequently, contracts involving weaker

[42] Hopkins (n 41) 153 further argues that: "When the sanctity of contract rule is used to uphold harsh and oppressive standard-form contracts, as happens on a fairly regular basis in our courts, then the private law is in effect facilitating an abuse of power by the party in a stronger bargaining position. The unequal bargaining power makes it easy for powerful private institutions like banks and insurance companies to infringe upon the fundamental human rights of the weakest and most ignorant members of our society. These contracts, with their standardised provisions, are described by the French as *contracts d'adhesion*..."

parties should be protected by conflict rules more favourable to their interests than the general rules.[43] The provisions focus specifically on contracts of adhesion and provide that the conflict rules should make it possible to cut the cost of settling disputes involving relatively small claims and take account of the development of distance-selling techniques.[44] To this end, the Recital explains that: [45]

> Consumers should be protected by such rules of the country of their habitual residence that cannot be derogated from by agreement. The consumer contract has been concluded due to the professional pursuing her commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing her commercial or professional activities in the country where the consumer has her habitual residence, directs her activities by any means to that country or to several countries, including that country, and the contract is concluded as a result of such activities.

Article 6 of Rome I, which replaced Article 5 of the Rome Convention, has introduced a series of modifications.[46] One of the significant modifications is that a consumer contract is defined more accurately by describing the consumer as a natural person entering into a contract for purposes outside her trade or profession.[47] The definition also encapsulates a description of the other party (the professional) who, as opposed to the consumer, may be either a natural person or legal entity acting in her or its trade or profession.[48] Also, there is no longer a short and closed list of contracts falling under the special provision for consumer contracts. Instead, what used to be the exception has turned into the standard. Under Rome I, every type of contract can be a consumer contract, except insurance contracts.[49]

---

[43] R 23 of Rome I (n 17).
[44] R 24 of Rome I (n 17).
[45] R 25 of Rome I (n 17).
[46] Volker 2011 *JLC* 249.
[47] Volker (n 46) 249.
[48] Volker (n 46) 249.
[49] A 6(4) of Rome I (n 17). Also see Volker (n 46) 250.

The research explores the reasoning behind the promulgation of Article 6 of Rome I to establish whether it has achieved its aim. The study further considers how the European Court of Justice of the EU (CJEU) has applied Article 6 to maintain the protection of weaker parties and preserve the sanctity of contract. In light of developing a theoretical framework, the research reflects on some benefits to Ghana in promulgating a statutory provision similar to Article 6 of Rome I.

The research focuses on the position of California in the USA which applies the Restatement (Second)[50] and the Uniform Commercial Code Contract to the extent that it is in the interests of the state. The USA did not at first generally recognise the principle of party autonomy, although universally acknowledged, as the principle underlying contractual obligations.[51] Specifically, the drafters of the First Restatement rejected the principle of party autonomy. Their view was that party autonomy licensed the parties to engage a private legal instrument.[52] Although the drafters of the First Restatement rejected the principle of party autonmy, it had already taken root in both transactional and judicial practice.[53]

The principle of party autonomy was only recognised during the drafting of the Restatement (Second), specifically in section 187,[54] which marked the era of bringing the conflict rules of the USA in line with other western legal systems. If parties decide on an express choice of law governing their contract, the law of the state chosen by the parties to govern their contractual rights and duties applies only if the specific

[50] Restatement (Second) of the Conflicts of laws of the American Law Institute of 1971.
[51] Symeonides *American Private International Law* 167.
[52] Symeonides (n 51) 197.
[53] Symeonides (n 51) 197.
[54] S 187 of the Restatement (Second) (n 50).

matter is one that the parties can resolve by a specific clause in their agreement indicating that the selected state's law should govern that specific matter. Section 187 also lists further grounds under which the express choice of law by the parties is applied in contractual obligations.[55] The state of California is worth considering on the basis of its application of the Restatement (Second).

The selection of the state of California for comparative purposes is contingent on the fact that the judicial processes on choice of law rules provide a suitable ground for a concrete comparative analysis. Californian courts have repeatedly engaged the "substantial relationship" and "strong policy" tests without direct reference to the Restatement (Second).[56] The courts in California that have cited the Restatement (Second) of Conflict of Laws have concentrated on section 187(2), as have the courts in other jurisdictions.[57] This provides a formidable ground for a concrete comparative analysis with Rome I. Notably, while the EU has promulgated a uniform law which regulates choice of law rules in consumer contracts,[58] the USA mandates the application of state law, whether it is the domestic laws of the state or the laws of the UCC domesticated to form part of the laws of the state.[59]

Rome I seeks to enforce the law chosen by the parties restrictively[60] and, in the absence of choice, provides for special rules to govern consumer contracts.[61] The

---

[55] S 187 of the Restatement (Second) (n 50).
[56] *Frame v Merrill Lynch, Pierce, Fenner & Smith Inc* 1971 20 Cal App 3d para 673. See generally *Hall v Superior Court* 1983 150 Cal App 3d; *Ashland Chemical Co v Provence* 1982 129 Cal App 3d.
[57] *Frame v Merrill Lynch, Pierce, Fenner & Smith Inc* 1971 20 Cal App 3d para 673. See generally *Hall v Superior Court* 1983 150 Cal App 3d; *Ashland Chemical Co v Provence* 1982 129 Cal App 3d.
[58] Preamble to Rome I read with RR 1, 2, 3, 45 and 6, and A1 of Rome I (n 17).
[59] S 188(1) of the Restatement (Second) (n 50).
[60] A 3, 4 and 6(1) of Rome I (n 17).
[61] A 6 of Rome I (n 17).

Restatement (Second) as it applies in California circumvents the choice by the parties[62] to apply the specific California state law on consumer contracts based on the principles of "substantial relationship" and "state policy".

In China, the private international law rules[63] provide, specifically in Article 41, that:

> The parties may by agreement choose the law applicable to their contract. In the absence of any choice by the parties, the law of the habitual residence of a party, whose performance of the obligation is most characteristic of the contract, or the law of the place most closely connected with the contract, shall be applied.[64]

This provision addresses the problem of choice of law in contracts of adhesion. On consumer contracts, Article 42 states:

> A consumer contract is governed by the law of the consumer's habitual residence. Where the consumer chooses the law of the place where the commodity or the service is provided, or where the business operator does not engage in any business activity in the habitual residence of the consumer, the law of the place where the commodity or service is provided shall be applied.[65]

This research proposes a suitable statutory intervention to address choice of law rules in contracts of adhesion, specifically consumer contracts, to ensure the protection of weaker parties in Ghana. The focal point is to compare the relevant laws of the EU, the USA (California), and China and develop a theoretical framework for conflict of laws in consumer contracts of adhesion that will ensure the protection of weaker parties while safeguarding the sanctity of contract in Ghana.

---

[62] S 187(a) and (b) of Restatement (Second) (n 50).
[63] Law of The People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (adopted at the 17th session of the Standing Committee of the 11th National People's Congress 28 October 2010).
[64] S 41 of the Law of The People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 63).
[65] S 42 of the Law of The People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 63).

5 Research Context

5.1 Chapter one

This thesis has seven chapters. The first chapter, the introduction, sets out the research questions and an exposition of the research methodology. The introductory chapter captures the aim of this research, offers a literature review, and identifies expected outcomes.

5.2 Chapter two

Chapter two addresses the jurisprudence of party autonomy in private international law and the principle of freedom of contract. The study traces the development of party autonomy to show how this modern-day theory came to be accepted, especially in the discipline of private international law. The thesis concentrates on choice of law rules in private international law and also addresses the notion of the objective proper law and how courts have handled these issues.

The study further debates the courts' position on agreements within contracts of adhesion. Arguments regarding the unfairness that exists in these contracts and the role of the courts in resolving these issues are matters of concern. Lord Diplock pointed out in *Schroeder Music Publishing Co Ltd v Macaulay*[66] that there are two types of contract of adhesion. This research focuses on the second which provides that "as a result of the concentration of particular kinds of business in relatively few hands, another kind of contract of adhesion has emerged".[67] The terms of this type of contract are not open to negotiation between the parties or approved by any organisation representing the interests of the weaker party. They have been decided by the party

[66] *Schroeder Music Publishing Co Ltd v Macaulay* 1974 1 WLR 308 1316 para E.
[67] *Schroeder Music Publishing Co Ltd v Macaulay* 1974 1 WLR 308 1316 para E.

whose bargaining power, either applied alone or in combination with others providing comparable goods or services, enables it to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it."[68]

Tillotson[69] has proposed that "the consumer, who through economic necessity must frequently take rather than leave standard conditions for the supply of essential goods and services, requires that her interest in goods and services of reasonable quality obtainable at reasonable prices and on fair terms be protected".[70] This chapter discusses the legal history behind contracts of adhesion, as well as the rationale and purpose of these contracts. The research explores the parties' involvement in negotiating contracts of adhesion and the legal implications for all parties.

The chapter's emphasis is on whether contracts of adhesion infringe on the rights of the weaker parties to the contract or whether these contracts are necessary measures to ensure business efficacy. It also reflects on the exploitative nature of adhesion contracts and the effect these forms of exploitation have on consumer contracts. In *A&M Produce Co v FMC Corp*[71] it was stated that "one suspects that the length, complexity, and obtuseness of most standard form contracts may be due at least in part to the seller's preference that the buyer will be dissuaded from reading that to which he is supposedly agreeing".

5.3 Chapter three

[68] *Schroeder Music Publishing Co Ltd v Macaulay* 1974 1 WLR 308 1316 para F.
[69] Tillotson *Contract Law in Perspective* 80.
[70] Tillotson (n 69) 80.
[71] *A&M Produce Co v FMC Corp* 1982 135 Cal App 3d 473 para 490.

Chapter three looks at the EU's position on contracts of adhesion. The discussion concentrates on the EU's choice of law rules for these contracts and the role these rules play in international commercial contracts. This chapter considers whether the EU laws on adhesion contracts afford adequate protection to the rights of weaker parties to such contracts. Rome I contains choice of law rules for consumer contracts in the EU.[72] The study reviews and analyses these provisions to determine whether Rome I has impacted positively or otherwise on commercial activities within the region. The courts' use of Rome I to resolve disputes arising from consumer contracts receives particular attention. The chapter recognises EU members which have not opted into Rome I. With the UK exiting the EU, Denmark remains the only member of the EU that has not opted into Rome I. The study investigates the legal position in Denmark and concludes by identifying the strengths and weaknesses of the measures put in place by the EU.

5.4 Chapter four

Chapter four looks at the situation in one of the states of the USA. It identifies the strengths and weaknesses of California's position on consumer contracts of adhesion. A point worth noting is California's choice of law rules on consumer contracts which include the UCC and the Restatement (Second). The research identifies laws which promote consumer contracts and protect weaker parties. An investigation into whether the state laws of California on consumer contracts of adhesion ensure the sanctity of contract while protecting weaker parties is necessary, and the application of these laws by the Californian courts to resolve disputes is examined.

[72] AA 6 and 9 of Rome I (n 17).

5.5 Chapter five

Chapter five aims to evaluate consumer contracts of adhesion in the PRC. The chapter debates choice of law rules on consumer contracts in China. The role these laws have played in Chinese private international law and how the courts have used these provisions to resolve disputes arising from contracts of adhesion relating to China are explored. The study reflects on whether the legal instrument regulating consumer contracts of adhesion and disputes arising from them has offered adequate protection for weaker parties generally. It examines mandatory rules and state policies that serve as a limitation on party autonomy and a means of protecting weaker parties. The chapter identifies the strengths and weaknesses of the position taken by China regarding consumer contracts of adhesion.

5.6 Chapter six

In Chapter six the focus shifts to Ghana. Ghana was selected for study on the basis of the vast international commercial transactions concluded between the state, the EU, the USA, and China. In 1918, in the aftermath of the First World War, the Berlin Conference partitioned Africa between the victorious colonial powers.[73] The Berlin West Africa Conference of 1884-1885 has assumed a canonical place in historical accounts of late 19th-century imperialism. As a result, Britain gained territories in West Africa, including the Gold Coast (present-day Ghana).[74] Ghana is rich in deposits and reserves of natural resources such as gold, crude oil, cocoa, timber, and diamonds.

[73] Craven 2015 *LRIL* 32.
[74] For general accounts of the Berlin Conference and the partition of Africa see Keltie the Partition of Africa; Fitzmaurice *The Life of Granville George Leveson Gower*; Keith *The Belgian Congo and the Berlin Act*; Crowe *The Berlin West African Conference* 1884-1885.

Most industries that require these natural resources to produce refined and finished goods are located in the designated counties, hence the importance of cross-border transactions.

Research has revealed that Ghana does not have a legal instrument governing choice of law in consumer contracts of adhesion. It is essential to explore and develop a conflict of laws regime for Ghana to support weaker parties who enter into consumer contracts of adhesion. The countries selected for the comparative study have well-established conflict of laws rules for cross-border transactions. This necessitates the development of a conflict of laws regime that will protect weaker parties who engage in international contracts of adhesion, in particular in light of the very limited literature available on these contracts and the protection of weaker parties despite the extensive use of these international commercial contracts in transactions involving parties in EU, the USA, and China.

The importance of developing a legal framework that ensures legal certainty in cross-border relationships involving consumer contracts of adhesion in Ghana cannot be over-emphasised. This chapter explores choice of law rules for consumer contracts in Ghana and the role these rules will play in private international transactions involving Ghanaians. The study makes recommendations for developing a theoretical framework of choice of law rules for consumer contracts in Ghana – an initiative in line with the purpose of private international law which is to achieve uniformity in the application of laws to solve disputes concerning consumer adhesion contracts.

The chapter focuses on whether conflicts justice can be achieved through proper conflict rules. Choice of law rules determine which national laws apply in private

international law issues involving multiple jurisdictions.[75] Given the shared nature of cross-border relations, choice of law rules play an enormous role in securing justice in the transnational sphere.[76] This notion is premised on Juenger's question of: [77]

> whether the objective of private international law is simply to choose the state that should provide the applicable rule without regard to its content and the substantive quality of the solution it produces or whether it should seek to produce the best substantive solution for the particular multistate case without regard to its foreign elements.[78]

Juenger's question has led to a debate in conflict of laws circles spanning two theoretical paradigms known as "conflicts justice" and "material justice".[79] The principle of conflicts justice is premised on the function of private international law to ensure that a dispute is resolved according to the state's law with the "most appropriate" relationship to the dispute.[80] This school of thought holds that contact between the state from which that law emanates and the dispute at hand is designed to meet specific, usually pre-defined, choice of law criteria. Applying that law is considered proper, irrespective of the actual quality of the solution it delivers.[81] Whether the answer is positive or otherwise depends on the inherent goodness or inadequacy of the applicable law which is something in which private international law cannot interfere.[82]

[75] Banu 2019 *VJTL* 1.
[76] Banu (n 75) 1.
[77] Symeonides 2001 *ICLTM* 2.
[78] Symeonides (n 77) 2.
[79] Symeonides (n 77) 2.
[80] Symeonides (n 77) 2.
[81] Symeonides (n 77) 2.
[82] Symeonides (n 77) 3.

Material justice, on the other hand, developed from the principle that cross-jurisdictional cases do not differ qualitatively from domestic cases and that judges must uphold their responsibility to resolve disputes justly and fairly when a case involves foreign elements.[83] Deciding foreign disputes in a substantively fair and equitable manner must be an objective of private international law as it is of domestic law. Therefore, private international law must be subject to a less stringent standard of justice – so-called "conflicts justice" – but must strive to attain "material or substantive justice".[84] This view rejects the traditional assumption that the indicated law of a state is necessarily the appropriate law and instead directly scrutinises the applicable law to determine whether it produces the "proper" result which in the specific case will result in justice.[85] Again, opinions differ on defining the "appropriateness" of the outcome. This notwithstanding, various versions of this view agree that appropriateness is determined in material rather than spatial terms.[86]

This research considers whether the instruments in this comparative research achieve conflicts justice, material justice, or both. The chapter also reflects on and assumes that the dilemma between conflicts justice and material justice should not be resolved in an "either-or" manner. Instead, the premise of material justice considerations should be approached as a factor worthy of guiding the pursuit of conflicts justice and exploring when and how such concerns should take preference.

[83] Symeonides (n 77) 3.
[84] Symeonides (n 77) 3.
[85] Symeonides (n 77) 3.
[86] Symeonides (n 77) 3.

5.7 Chapter seven

Chapter seven, the concluding chapter, brings the research together by summarising the various chapters dealing with the comparative analysis of the selected jurisdictions. The final chapter presents recommendations for the development of a theoretical framework based on the concepts mentioned, tailored to regulate choice of law in contracts of adhesion in Ghana by drawing on the comparative study in the preceding chapters.

6 Research methodology

Comparative law has been described as "an intellectual activity with the law as its object and comparison as its process".[87] Conflict of laws is intimately related to comparative law and represents an aspect of the latter.[88] It is futile to talk of characterisation, qualification, or choice of law, without having some insight into foreign legal systems.[89]

Comparative law functions as the discipline that attempts to understand the various legal systems in their totality and their relationship to one another but without necessarily trying to avoid or minimise the existing differences between them. The theme of comparative law is approached in three parts. First, comparative law deals with the actual comparison of legal systems and the discovery, explanation, and evaluation of their similarities and differences.[90] Second, the theme of comparative law revolves around the influence of legal systems on one another, especially the

[87] Valentina 2016 *AIILA* 19.
[88] Auld 1949 *UTLJ* 85.
[89] Auld (n 88) 85.
[90] Michaels 2011 *OHEPL* 1.

reception of law, whether of individual legal institutions or entire legal systems.[91] Third, comparative law involves the development of a general theory of law.[92] Thus, comparative law is the discipline which attempts to understand the various legal systems and traditions in their entirety and in their interaction with each other, without automatically trying to avoid or minimise the differences between them. According to some writers, comparative law was popular in the early 20th century and is once again gaining attention today.[93]

Based on the themes of comparative law discussed above, this research seeks to compare the legal systems of the EU, the USA (California), and China regarding choice of law rules in consumer contracts of adhesion. The work aims to discover, explain, and evaluate the similarities and differences that exist in these three systems. The outcome of this evaluation will form the basis for developing a framework for choice of law that is appropriate for transborder consumer contracts in Ghana. The reason for the selection of Ghana can be explained by the vast number of international commercial transactions between parties from Ghana, the EU, the USA, and China. A desk research method is the primary approach for this research, and a comparative approach is adopted throughout the investigation.

[91] Michaels (n 90) 1.
[92] Michaels (n 90) 1.
[93] Michaels (n 90) 1.

Chapter two: The jurisprudence of adhesion contracts in private international law

1. Introduction

A contract is an agreement born of the will of two or more parties which a court will enforce willingly.[1] Whether a court will waive the obligations of a weaker party in a consumer contract of adhesion is uncertain. At best, the courts consider the surrounding circumstances of each dispute to reach a decision.[2] Sir Anthony Mason made a similar assertion in regard to the terms of a contract in *Codelfa Construction v State Rail Authority*[3] where he stated that the evidence of surrounding circumstances are permissible to support the interpretation of the contract amid ambiguity.[4]

It is worth considering whether a contract of adhesion is a consensual agreement or an agreement in which one party is forced into a "take-it-or-leave-it" situation.[5] Enforcing a contract by a court is premised on whether parties contracted willingly; the rights and obligations created by such an agreement are binding provided it falls within the remit of the law of the enforcing court.[6] The principles of autonomy in private international law and freedom of contract guarantee that parties to a contract have the autonomy to decide its terms and conditions, including the proper law of the contract per the law in a particular country.[7] Deliberating on whether these principles

[1] McKendrick *Contract Law. Textbook, Case and Materials* 4.
[2] *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337 para 21.
[3] *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337 para 22.
[4] *Codelfa Construction v State Rail Authority* (1982) 149 CLR 337 para 22.
[5] Lord Diplock in *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 308 1316 para c.
[6] McKendrick (n 1) 11.
[7] McKendrick (n 1) 11.

exist in contracts of adhesion so as to afford parties the right to choice of law is important.

1.1 Focus of the chapter

This chapter considers the jurisprudence of party autonomy in private international law by examining how this modern-day theory came to be accepted. An argument on the principle of freedom of contract and how the theory informs the principle of autonomy is considered. This argument is based on the assumption that party autonomy is the by-product of the principle of freedom of contract. Therefore, an argument for determining the proper law of the contract considering the development of an express choice of law and implied choice of law is necessary. Other sections of the chapter involve a jurisprudential discussion of choice of law rules in private international law.

The concept of the objective proper law and how the court deliberates on this matter are addressed. A brief history of contracts of adhesion and how this type of contract developed is included. The study considers various agreements where contracts of adhesion are used and the courts' position on such contracts. Opinions regarding unfairness in contracts of adhesion are considered. The development of mandatory rules has served as a measure to limit the exercise of party autonomy and to protect weaker parties in consumer adhesion contracts. There is, therefore, a brief discussion of mandatory regulations and their application.

The chapter deals with the exploitative nature of adhesion contracts and their effect on consumer contracts. It also focuses on the extent to which adhesion contracts infringe on the rights of weaker parties. The research proposes some solutions to curb

the situation of exploitation. This chapter provides a general summary of the jurisprudential issues underpinning choice of law rules in contracts of adhesion.

2. Party autonomy, freedom of contract, and contracts of adhesion in private international law: A jurisprudential approach

2.1 Jurisprudence

Jurisprudence is that branch of law which deals with philosophical questions about the law.[8] In its broadest sense jurisprudence means the science of law.[9] Some have also argued that jurisprudence involves the study of questions on the nature of laws and legal traditions, the relationship of law to justice and morality, and the social nature of law. A discussion of jurisprudence involves understanding and using philosophical and sociological theories and findings in their application to law and uncovering what law means.[10] The study of jurisprudence seeks to promote critical thinking about law and its purpose. It is not a study of legal rules but rather a reflection on law.[11]

The fundamental aim of jurisprudence is critically to examine what the law "is" and what law "ought to be".[12] The research seeks to uncover the reasoning behind the application of the principles of party autonomy and freedom of contract in adhesion contracts within a jurisprudential context. The study engages with how the principle of autonomy developed from the early European Middle Ages to become what is today known as modern-day party autonomy. The research traces judicial precedence and

[8] Salmond *Jurisprudence or The Theory of The Law* 1.
[9] Meyerson *Understanding Jurisprudence* 1.
[10] Hart *Essays in Jurisprudence and Philosophy* 21-22.
[11] Goolam 2010 *RUFL* 1.
[12] Goolam (n 11) 1.

the position of the courts on the principle of party autonomy. Further deliberation on the freedom of contract is also necessary.

2.2 The jurisprudence of legal autonomy in European Middle Ages

Jurisprudential accounts of autonomy are associated with the philosophical theory of free will and determinism.[13] The oldest illustration of autonomy in law is seen in the early European Middle Ages when law and its application relied on tribal or ethnic affiliation rather than national and jurisdictional location.[14] The earliest origin of private international law can be traced to the emergence of tribal laws in Italy following the disintegration of the Roman Empire.[15] During this period an individual's status was used as the basis for determining the significance of personal identity in legal relationships. This identity was generally viewed as an objectively identifiable question of fact – an inquiry whether an individual was a member of a particular community's legal order.[16] It was not expected that this approach would pave the way for autonomy in contract law because submitting to a legal order was part of the social contract under which individuals could gain protection or status.[17]

Although not a true reflection of party autonomy, this move is recognised as the most significant early ancestor of choice of law. This position developed the recognition that in civil disputes a party could pronounce her ethnicity,[18] known as a *professiones iuris* (statements of the personal law of an individual), and in so doing to some extent

[13] Frosch (1971) *KLJ* 350-371.
[14] Mills *Party Autonomy in Private International Law* 44.
[15] Kalenský *Trends of Private International law* 46-49.
[16] Mills (n 14) 44-45.
[17] Mills (n 14) 45.
[18] Faulkner *Law and Authority in the Early Middle Ages* 12; Kalenský (n 15) 46.

determine what law governed her legal relations.[19] It would have been possible for parties to make mutual declarations in this format although it is uncertain whether this occurred in practice. However, the *professiones iuris* was not limited to court proceedings but can also be found in written documents from this period, suggesting a role more akin to a choice of law agreement.[20] To the extent that party autonomy was thus given effect, it took place in the shadows as a legal fiction compatible with the theory that regulatory power vested in sovereign tribal leaders.[21] A position which suggests that personal status could or should be a matter of individual freedom or choice.[22]

In considering individual choices, legal scholars regard the principle of autonomy as the end product of the theory of freedom of contract.[23] This view dates from an era in which large population movements occurred after the collapse of the Roman Empire. The steps taken during this period to find a practical solution to the problem of identifying what law applied where a foreign element was present[24] serve as the roots for certain of the modern principles and practical arguments for party autonomy.[25] One author has argued that this step provided the most straightforward solution where, due to migration and varying levels of integration into diverse social groups, issues of personal individuality were difficult to determine as an objective fact.[26]

[19] Mills (n 14) 45.
[20] Kalenský (n 15) 46-49.
[21] Mills (n 14) 45.
[22] Mills (n 14) 46.
[23] Mills (n 14) 46.
[24] Kalenský (n 15) 49.
[25] Mills (n 14) 46.
[26] Mills (n 14) 46.

2.3 Statutist view on jurisprudence of legal autonomy

The party autonomy theory in choice of law was considered by the statutist approach which developed in France during the sixteenth century.[27] The statutist method advocates that statutory interpretation should determine whether a statute that applies to foreign facts is inconsistent or otherwise with established principles of choice of law.[28] One proponent of this approach, Dumoulin, distinguished between statutes according to whether they govern a particular area of law or with a different substantive law, and developed his theory of the autonomy of will.[29]

Based on his view, Dumoulin became the first jurist to oppose the rigidity of *a priori* given points of contact in the sphere of the law of obligations and advocated for the principle of flexibility in considering problems of conflict of laws to be applied in legal practice.[30] Dumoulin generally followed the statutist approach but emphasised the importance of agreements between parties. As the founder of modern party autonomy,[31] he contended that the parties' intention was the foundation of all determinations regarding which statutes should apply to a particular legal relation – a reflection of the subjective intention of the parties which determined the applicable law.[32] For Dumoulin, the interpretation of the relevant statutes reflected a fictional tacit agreement between the parties.[33]

---

[27] Mills (n 14) 46.
[28] Nygh *Autonomy in International Contracts* 3.
[29] Kalenský (n 15) 65.
[30] Kalenský (n 15) 66.
[31] Mo Zhang 2006 *EILR* 511 n 3.
[32] Nygh (n 28) 4.
[33] Mills (n 14) 47.

Although Dumoulin is generally considered a proponent of the statutist approach,[34] one could argue that he introduced a subtle but significant shift from considerations of a state's power to decide which laws are applicable to contracts based on his emphasis on the parties' agreed choice.[35] Dumoulin moves towards considering individual fairness or giving effect to a private agreement. His philosophy and his goal were to justify the application of foreign law based on considerations internal to the parties themselves rather than on the power of sovereigns over them.[36] He also recognised the validity of an express choice of law by the parties. Although the discussion above appears to reflect Dumoulin's theory, it has been argued that a close assessment of his theory reveals that he applied the implied intention of the parties as a mechanism which would point to the place of performance rather than the place of contracting.[37]

2.4 The jurisprudence of legal autonomy in the seventeenth century

The development of private international law theory can be traced through Dutch scholars in the seventeenth century – Paul Voet, Johannes Voet, and Huber.[38] These scholars, using D'Argentré's philosophical approach, shifted the position of private international law and choice of law from the presumed or inferred intention of statutes to a broader contemplation of aligning the application of foreign law with the

[34] Nygh (n 28) 4.
[35] Mills (n 14) 47.
[36] Mills (n 14) 47.
[37] Nygh (n 28) 4.
[38] Mills (n 14) 48.

developing principle of territorial sovereignty.[39] Huber, who is deemed to have developed the theory most comprehensively, captured his view in three maxims:

> 1. The laws of each state have force within the limits of that state and bind all subjects in it, but not beyond.
>
> 2. All persons within the limits of a state, whether they live there permanently or temporarily, are considered to be subjects of the state.
>
> 3. On the basis of comity, sovereigns will recognise that rights acquired within the limits of states and retain their force everywhere insofar as they do not prejudice the powers or privileges of such states or their subjects.[40]

Huber provided a compelling and influential version of this theory based on his principles. He argued for the territoriality of legislative authority, stating that the laws of a sovereign should apply within its territory[41] as expressly captured in the first two maxims.[42] Huber warned that the forum state should act by way of comity to recognise the rights of foreigners within the remit of the laws of the forum state.[43] Thus, in the third maxim Huber attempts to justify (why) the need for the forum state to apply the law of another sovereign, but not (when) at what point it should be applied.[44] It has been argued that Huber's third maxim is problematic as the concept of comity does not provide concrete guidance as to the circumstances in which the forum will or will not apply the law of another state.[45]

---

[39] Lorenzen (1919) *EYLS* 378.
[40] Lorenzen (n 39) 378.
[41] Nygh (n 28) 5.
[42] Symeonides *Choice of Law* 50.
[43] Mills (n 14) 48.
[44] Symeonides (n 42) 50.
[45] Symeonides (n 42) 50.

As a result of Huber's position in law, a distinction was drawn between applying foreign law and recognising rights acquired under that law.[46] Huber's argument concerning private international law was based on the territorial independence of states, with comity serving as an ambiguous explanation for the recognition between states of one another's regional sovereignty. Huber makes no allowance for the principle of party autonomy. This is because he strongly believed that contracts should be governed by the law of the place of contracting[47] – as one might expect under a doctrine of territorially acquired rights.[48] Regarding this view, it has been suggested that Huber subtly moves towards party autonomy, at least in appearance, by subscribing to the belief that the intention of the parties is determinative of the law applicable to their contract based on the fact that the agreement should be governed by the law of place the parties had in mind.[49]

Arguably, Huber's support for party autonomy depends on the principles of freedom of contract in that he viewed party autonomy as a natural extension of freedom of contract and that parties were capable of creating a vested right under a foreign legal order.[50] Thus, in a more practical sense, Huber's approach to party autonomy may be a sign that the law of the place of contracting as the law applicable to the contract was increasingly arbitrary in the conduct of international trade – although this argument might equally support the selection of the law of the place of performance.[51] In the final analysis, Huber had no intention of doing more than acknowledging the

[46] Symeonides (n 42) 50.
[47] Lorenzen (n 39) 379.
[48] Mills (n 14) 49.
[49] Mills (n 14) 49.
[50] Mills (n 14) 49.
[51] Mills (n 14) 49.

role of the law in the area of performance as a law that the parties would or should have had in mind – an approach not unlike Dumoulin's view on this matter.[52]

Huber offers as authority a citation taken from the *Digest* stating that "every person is considered to have concluded a contract in the place where he had bound himself to pay".[53] This suggests that his apparent support for party autonomy is more debatable than is generally considered.[54] It has been recorded that Huber's approach to private international law had a direct effect on the advancement of private international law in England and the USA. His impact was felt in eighteenth-century courts through the pronouncements of Scottish civil-trained lawyers such as Lord Mansfield. In the case of *Robinson v Bland*,[55] Lord Mansfield recognised the significance of choice of law when he stated that the general rule established *ex comitate et jure gentium* is that the place of contracting is to be considered in expounding and enforcing a contract in the event of a dispute.[56]

In *Robinson*[57] Lord Mansfield – citing Huber as his principal authority – also held that the disputed contract, concluded in France but to be performed in England, was governed by English law because the parties had the laws of England in mind.[58] Subsequently, the place of performance selected by the court was that which the parties intended. It is not clear whether that law was applied because it was the presumed intention of the parties – an expectation that a contrary choice of law

[52] Lorenzen (n 39) 379.
[53] Watson *The Digest of Justinian* (trans 44.7.21) 158.
[54] Mills (n 14) 90.
[55] *Robinson v Bland* (1760) 96 ER 718 para 1078.
[56] Mills (n 14) 90.
[57] *Robinson v Bland* (1760) 96 ER paras 141-142.
[58] *Robinson v Bland* (1760) 96 ER paras 141-142.

agreement would defeat – or because parties in their position would generally expect that law to apply, as the law of the place of performance – an objective test that would not be defeated by a contrary choice of law agreement.[59]

2.5 The jurisprudence of legal autonomy in the nineteenth century

The principle of party autonomy was a point of debate amongst early nineteenth-century private international law scholars. An influential scholar, Joseph Story, a USA judge and academic, was influenced by Huber's approach.[60] Story's approach supported the territorial sovereignty of states. Generally, Story believed that the validity of a contract is determined by the law of the place of contracting.[61] He believed that states had exclusive sovereignty and jurisdiction over their territory. Hence, the laws of every state affect and bind all contracts made and performed in their territory.[62] Story can be seen to afford a central role to the law of the place of contracting, but he also acknowledged that the law of the place where the contract was performed can assume the same role.

Story argues that the objective basis for this principle is not that parties have implicitly subjected themselves to the law of the place of contracting, but rather that, "the law of the place of the contract acts upon it, independently of any volition of the parties,

[59] Mills (n 14) 51.
[60] Symeonides (n 42) 52.
[61] Lorenzen *Story's Commentaries on the Conflict of Laws–One Hundred Years After* 1934 *HLR* 22.
[62] Mills (n 14) 51.

by virtue of the general sovereignty possessed by every nation to regulate all persons, property, and transactions within its territory".[63]

He suggested that in a situation where two foreigners contract in an arbitrary place, the law that the parties intended may be applicable in preference to the law of the place of contracting.[64] In his suggestion, he appears to limit this possibility to the place of performance of the contract and, while doing so, he cites the *dictum* of Lord Mansfield in *Robison v Bland*[65] in support. In his commentary, Lord Mansfield stated that be it express or by tacit application, the performance of a contract is at the place of contracting.[66] He further noted that where the contract is to be performed in any other place, the general rule is that the contract is to be governed by the law of the place of performance concerning its nature, validity, obligation, and interpretation.[67]

It is suggested that under the influence of Huber, the foundation of choice of law for Story was again the doctrine of comity, whose focus on inter-state relations leaves relatively little space for the expressed wishes of the parties to affect the governing law.[68] A clear deduction can be made to the extent that the intention of the parties to a contract was given an indecisive role which arguably serves as justification for the rule concerning the law of the place of performance and not a situation where the principle of party autonomy serves as a rule in its own right.[69] Story himself clearly

[63] Story *Commentaries on the Conflict of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* s 273; also see Lorenzen (n 61) 22 and Mills (n 14) 51.
[64] Mills (n 14) 51.
[65] *Robinson v Bland* (1760) 96 ER paras 141-142.
[66] *Robinson v Bland* (1760) 96 ER paras 141-142.
[67] Story (n 63) s 233.
[68] Mills (n 14) 51.
[69] Story (n 63) s 233.

states that his approach adopts a "*lex loci contractus*" rule which reflects double standards. Thus, the "*lex loci contractus*" … may indicate the place, where the contract is made, or that where it is virtually made according to the parties' intent, that is, the place of performance".[70]

A similar approach was later endorsed by Von Savigny in his 1849 treatise, although some have argued that this position is not as straightforward as Story presents it. Von Savigny contends that,

> the local law for every legal relation is liable to be very extensively influenced by the free will of the persons interested, who may voluntarily subject themselves to the authority of a particular law, although this influence is not unlimited. This voluntary subjection is also efficacious regarding the competent forum for particular legal relations.[71]

He further asserts that voluntary subjection to domestic law manifests in various forms and degrees, some of which consist of the free choice of local law to regulate an issue where another law might have been preferred. An example is standard contracts in which freely-elected local law is regarded as part of the contract.[72]

A study of Von Savigny's work reveals his opposition to the autonomy principle. He argues that the word autonomy should be avoided as a voluntary subjection to domestic law or the law of domicile as a law governing a contract is in itself an expression of free will.[73] According to Von Savigny, it is a misconception to suggest that a party has the right to choose the law because it may choose its domicile.[74] In

[70] Mills (n 14) 51.
[71] Von Savigny *Private international law and the Retrospective Operation of Statutes A Treatise on the Conflict of Laws, and the Limits of their Operation in Respect of Place and Time* 134; also see Mills (n 14) 52.
[72] Von Savigny (n 71) 134.
[73] Von Savigny (n 71) 134.
[74] Von Savigny (n 71) 134.

determining the law applicable to a contract Von Savigny focuses on the law of the place of performance, defined expressly in the agreement or as a matter of presumption. This definition is based on the parties being presumed to have submitted themselves to this law.[75]

Arguably, Von Savigny is ambiguous in his approach. This notwithstanding, there is at least some evidence that he makes a subtle but decisive shift from the intention of the parties being used as a justification for a particular choice of law rule – that the law of the place of performance of the contract accords with their intention – to the parties' intention itself becoming foundational. This means that an expressed intention may override one that is merely a legal presumption.[76]

2.6 The jurisprudence of legal autonomy in the mid-nineteenth century

The debate around party autonomy continued in the mid-nineteenth century, especially in the English courts. A classic case in point is *Lloyd v Guibert* where the court stated that "it is necessary to consider by what general law the parties intended that the transaction be governed, or rather to what general law it is just to presume that they have submitted themselves in the matter".[77] The two questions that the courts had to address involved a subjective test and an objective test. In answering these questions, the court specifically focused on choosing between the law of the place of contracting and the law of the place of performance, and references to the parties' intention were, in the main, in support of one of these positions.

[75] Von Savigny (n 71) 222; also see Mills (n 14) 51.
[76] Mills (n 14) 52.
[77] *Lloyd v Guibert* (1865) 6 B & S 100 1146 para 130.

In 1880, Westlake cited *Robinson v Bland*[78] in support of the proposition that the governing law is the law of the place with the "most real connection" to the contract. This was generally the place of performance regardless of the parties' actual intention.[79] Westlake took cognisance of the fact that this position was coming under direct challenge.[80] In *Chamberlain v Napier*[81] the courts appear to have made room for an express choice of law. In this case, the court advocated that the parties may contract, and the deed shall be construed following a law other than the *lex loci contractus*, but such contract must be so expressed.[82] In a subsequent case the courts upheld the position of the parties' intention but with a caveat of considering the surrounding circumstances of the case to determine the true intention of the parties.[83]

The position of party autonomy found more fertile ground in the case of *In Re Missouri Steamship Company.*[84] In the Court of Appeal, Lord Halsbury expressed his support for Justice Chitty's approach of imputing an intention to the parties based on the circumstances of the case, but re-articulated the rule that the terms of the contract as decided by the parties can imply an intention of what the governing law of the contract should be.[85] The explanation rendered by Lord Halsbury supports the belief that the governing law of a contract can be determined by the parties making an informed choice of law incorporated in the terms of the contract.[86]

---

[78] *Robinson v Bland* (1760) 96 ER paras 141-142.
[79] Mills (n 14) 54.
[80] Mills (n 14) 54.
[81] *Chamberlain v Napier* 1880 15 CH D 614 628 para 1.
[82] *Chamberlain v Napier* 1880 15 CH D 614 628 para 1.
[83] *Chartered Mercantile Bank of India v Netherlands Co* 1883 10 QBD 521 529 para 1.
[84] *In Re Missouri Steamship Company* 1889 42 Ch D 321 330 para 3 331 para 4.
[85] *In Re Missouri Steamship Company* 1889 42 Ch D 321 330 para 3 331 para 4.
[86] Mills (n 14) 54-56.

While these judicial developments were taking place, there was theoretical support for the idea of vested rights inherited and debated by legal theorists such as Dicey in England and Beale in the United States.[87] For Dicey, foreign law was indirectly applied because an act in the foreign territory had created an obligation under that law which the local legal order should recognise.[88] Regardless of Dicey's endorsement of party autonomy, criticism has been levelled at his approach. Beale believed that Dicey's position was contrary to the sovereignty of states in that "parties cannot by their own will, change the law of the country in which they are"[89] – an apparent challenge that has proved stubbornly elusive in private international law theory.[90] The difficulty in understanding how parties might self-vest under a vested-rights approach through a choice of foreign law has been duly raised.[91]

2.7 The jurisprudence of legal autonomy in the twentieth century

The dawn of the twentieth century witnessed a period in which the intention of the parties in deciding the applicable law of a contract had developed in England from being one justification for a particular objective rule, to the very foundations of choice of law in a contract, such that the law selected would be determined by the parties express or implied choice or an imputed intention for and on behalf of the parties by

[87] Mills *The Identities of Private International Law – Lessons from the US and EU Revolutions* (2013) *DJCIL* 445.
[88] Mills (n 14) 57.
[89] Mills *The Identities of Private International Law – Lessons from the US and EU Revolutions* (n 87) 445.
[90] Mills *The Identities of Private International Law – Lessons from the US and EU Revolutions* (n 87) 445.
[91] Mills (n 14) 57.

the courts.[92] In the leading English case of *Vita Food Products Inc v Unus Shipping Co Ltd*[93] it was held that

> where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed is *bona fide* and legal and provided there is no reason for avoiding the choice on the ground of public policy.[94]

The use of the principle of party autonomy coincided with economic globalisation. The increased assertion of the independence of cross-border commercial activity and global markets from sovereign regulation comes as no surprise.[95] As it developed in the English common law, the principle of party autonomy developed in other legal systems. The development of the principle is a response by the courts and legislators to the needs of commercial parties increasingly engaged in cross-border commercial activity that might give rise to more than one territorial connection and so to more than one possible applicable law.[96]

A distinction has been drawn between party autonomy in private international law and party autonomy in contract law. Party autonomy in private international law concerns prior or higher-level questions, including which private law system applies to the parties' legal relations.[97] Party autonomy in contract law governs questions within a legal order, even for purely domestic contracts. It concerns what limits there are to

[92] Mills (n 14) 57; also see *R v International Trustee for the Protection of Bondholders AG* [1937] AC 500 529 para 2.
[93] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[94] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[95] Mills (n 14) 57.
[96] Mills (n 14) 57.
[97] Mills (n 14) 20.

the party's freedom to contract. Some authors have equally ascribed the development of party autonomy to the principle of freedom of contract which many states uphold.[98]

We turn now to the jurisprudence of freedom of contract and its relation to party autonomy in contracts of adhesion. The research considers autonomy in its general application to private international law and the right of choice based on freedom of contract. The scope of contractual party autonomy is determined by the applicable law on which the parties may decide (hence the view that in the context of choice of law party autonomy is part of determining that applicable law) and thus which rules of freedom of contract apply.[99] The parties may decide to override national law and select a foreign law to govern their contract.

3.0 Freedom of contract

Freedom of contract is an essential theory in the contract law of most legal systems globally; even states with a socialist market economy, China for example, recognise this fundamental principle.[100] The traditional assertion of freedom of contract is found in the case of *Printing & Numerical Registering Co v Sampson.*[101] In this case, the court was of the view that public policy requires that men of full age and understanding have the ultimate liberty of contracting. Such privilege will be held sacred and enforced by courts of justice.[102]

[98] Mills (n 14) 20.
[99] Mills (n 14) 20.
[100] Atamer and Pichonnaz 2020 *GSCL* 36.
[101] *Printing & Numerical Registering Co v Sampson* 19 LR-EQ 462, 465 (MR 1875) 465 para 1.
[102] *Printing & Numerical Registering Co v Sampson* 19 LR-EQ 462, 465 (MR 1875) 465 para 1.

3.1 Public policy interference with freedom of contract

The mid-nineteenth century saw the recognition of and judicial favour for public policy, which served as a means by which to interfere in abhorrent contracts. The idea of recognising the interference of public policy is convincing evidence of doubt as to how far contractual freedom should be sanctified.[103] Perhaps "one feels a persistent doubt . . . as to the wisdom of any interference in one's contractual bargains"[104] based on the fact that businessmen cannot avoid these standardised contracts, and most of them have become increasingly dependent on them due to the profound changes in international commerce.[105]

The proliferation of contracts of adhesion with the standard clauses is common to all industrialised countries.[106] Ninety-nine per cent of all commercial transactions are now performed under some standardised agreement.[107] However, standard-form agreements are too quickly and too readily abused by the insertion of adhesion clauses limiting the non-stipulating party's rights.[108] There is a need to assess whether the opinion that "the dominant party rules" revealed in adhesion contracts to ensure maximisation of industrialisation and profits, is sufficient reason to neglect the weaker parties' right to the contractual benefits of negotiation. Research must explore the extent to which international contracts deal with private international law in light of

[103] Wilson 1965 *ICLQ* 175.
[104] Wilson (n 103) 175.
[105] Wilson (n 103) 175.
[106] Berg 1979 *BIICL* 560.
[107] Berg (n 106) 560.
[108] Berg (n 106) 560.

the relations between persons and address the plausibility of accepting "the dominant party rules" in adhesion contracts, especially in matters of choice of law.

An assessment of the introduction of public policy – interference with an abhorrent contract – is necessary to determine whether the principles protect individual contractual rights while maintaining the sanctity of contract. Research into the jurisprudence of contract law merely exposes the truism that the principle of freedom of contract is not absolute, thereby restricting a party's autonomy in the contract.

3.2 Mandatory rules and freedom of contract

As the basis of the principle of autonomy, the principle of freedom of contract influences the jurisprudence of contracts of adhesion. The principle of freedom of contract deprives parties with less bargaining power of some benefits accruing to contracting parties. There is the need for adhesion contracts to serve as a measure for contracting and a check on parties with stronger bargaining powers to ensure equity (the need to provide some leverage due to unequal rights of the parties in negotiation) between contracting parties. Where the autonomy in question concerns choice of law, a contradiction emerges. Debatably, central to private international law is the autonomy granted to parties to decide the terms and conditions of their contract; but it is limited by mandatory rules.

The tendency to grant the contracting parties virtually unrestricted freedom to choose a law applicable to their transaction has increased the importance of mandatory rules in cross-border contracts in two ways. On the one hand, they are used as a means by which to restrict the autonomy of the party; on the other hand, weaker parties rely on

mandatory rules to protect them – specifically in contracts of adhesion. It is, therefore, necessary to consider the genesis of choice of law and how this affects contracts of adhesion in private international law.

4. Choice of law and its effects on contracts of adhesion in private international law

Substantive private law preserves the parties' freedom as a fundamental doctrine in contract law. The repercussions of this doctrine are extended to private international law where autonomy is generally recognised and accepted.[109] Recent eras have witnessed a significant development of the principle of party autonomy in private international law from one jurisdiction to the other and from the national to the international level.[110] The principle of party autonomy has gained recognition in the areas of jurisdiction, recognition and enforcement of foreign judgments, and choice of law. In choice of law, it has been accepted not only for contractual matters but also for tortious obligations and even in a number of areas in family law.[111]

Every individual who enters into a cross-border contract – be it for the purchase or sale of products or services, for employment, or for insurance – is challenged by the puzzling question of determining the governing law of the contract, in the main because these transactions generally involve contracts of adhesion.[112] The twentieth century has seen an escalation in complexity as advanced methods of transportation and communication have resulted in an increasing number of cross-border

[109] Tu 2019 *JPIL* 234.
[110] Tu (n 109) 234.
[111] Tu (n 109) 234.
[112] Levin (1957) *GLJ* 260.

contracts.[113] At the same time, the choice of law question has become more difficult in the face of more robust and varied contractual ties involving the laws of two or more jurisdictions.[114] This aspect of the research concentrates on the concept of choice of law in private international law, the idea of the proper law of contract, and the role of these two concepts in contracts of adhesion.

4.1 Choice of law

Choice of law involves the determination of the applicable law for resolving a dispute involving foreign elements.[115] The discipline involves identifying the system of law that the parties might reasonably have expected to apply to their contract.[116] Choice of law rules are concerned with identifying a system of law or a body of rules or principles that will govern the various aspects of a contract.[117] Take the case of two people in a cross-border contract – eg, X in California emails Y in England to make him an offer. Y receives the email and accepts the offer while holidaying in Germany. X receives the acceptance email in the USA. Is the contract made in the USA where X received the acceptance email, or in Germany where the offer was emailed? The law of which legal system will be the proper law of the contract?

In international commercial law the rules of choice of law apply to determine which country's law serves as the proper law of the contract. In the example above the

---

[113] Levin (n 112) 260.
[114] Levin (n 112) 260.
[115] Forsyth *Private International Law, The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 76.
[116] Hartley *International Commercial Litigation: Text, Cases and Materials on Private International Law* 624.
[117] Maniruzzaman *Choice of Law in International Commercial Contracts-Some Fundamental Conflict of Law Issues* 142.

determination of the place of acceptance serves as a connecting factor that will aid in deciding the applicable law of the contract.[118] Although many legal systems have attempted to resolve this problem, it is suggested that the solutions proposed are artificial due to the lack of an obvious answer to this question.[119] This is because the place of entering into a contract may be a matter of chance. The parties may be in the same city for different reasons and agree to meet.[120] A typical example of countries attempting to solve this problem is articulated in the English rule that where the parties communicate by an instantaneous mode of communication (eg, mobile phone), the contract is concluded where the offeror receives the acceptance.[121] If not by an instantaneous mode of communication (eg, by post), the contract is concluded where the acceptance letter is mailed.[122] The case of *Entores v Miles Far Eastern Corporations* established the English law position.[123]

This research Inquires into an important question concerning choice of law rules – what is the predominant method applied in identifying the applicable law in a consumer contract of adhesion with foreign elements. Rome I addresses similar problems by suggesting the law applicable in some of these situations.[124] The theory of the proper law in a cross-border contract of adhesion is considered. The discussion now turns to the theory of the proper law of a contract in international commercial contracts.

---

[118] Forsyth (n 115) 7.
[119] Hartley (n 116) 625.
[120] Hartley (n 116) 625.
[121] Furmston *Cheshire, Fifoot and Furmston's Law of Contract* 25.
[122] Furmston (n 121) 25.
[123] *Entores v Miles Far Eastern Corporations* [1955] 2 QB 327 (CA) para 2.
[124] A 4 6 7 and 8 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

4.2 The theory of the proper law

In identifying a relevant law to govern a contract of adhesion it is essential to note that different legal traditions use different expressions for the same purpose. The expression "the proper law of the contract" is generally used in the English common law and other legal systems which follow the common law tradition.[125] In other jurisdictions, "governing law" or "applicable law" is commonly used. In various relevant international instruments – eg, Rome I – "applicable law" is used.[126] Prominent legal scholars have shared their views to contribute to finding an adequate definition of the proper law. The term "proper law of the contract" is a suitable and concise expression to illustrate the law regulating various aspects of a contract.[127] The proper law is the law a court applies in determining the obligations under the contract.[128]

Importantly, it is worth noting that matters affecting a contract may well be governed by more than one law. The inquiry into the proper law asks what law governs a particular question raised in the instant proceedings.[129] The fact that one aspect of a contract is to be governed by the law of one country does not necessarily mean that that law is to be the proper law of the contract as a whole.[130] The theory of party autonomy allows the parties to agree that different applicable laws should govern different contractual issues. An omission of choice leads to the consideration of the

[125] Maniruzzaman (n 117) 124.
[126] Maniruzzaman (n 117) 124. Note that the research will use these phrases interchangeably, but they bear the same meaning.
[127] Fawcett, Carruthers and North *Cheshire and North Private International Law* 447-448.
[128] Fawcett, Carruthers and North (n 127) 448.
[129] Fawcett, Carruthers and North (n 127) 448.
[130] Fawcett, Carruthers and North (n 127) 448.

surrounding circumstances affording some peculiarity of a particular matter and may require different questions to be subject to different laws.[131]

The importance of the theory of freedom of contract in international commercial law and its role in identifying the proper law – a term coined by Westlake[132] – cannot be over emphasised. The previous position of the law for determining the proper law of a contract was to choose the law of the place where the contract was made (*lex loci contractus*).[133] As cross-border relationships became the order of the day, it became increasingly difficult to apply the *lex loci contractus* and the proper law of a contract determined by the place where the contract was made was the obvious option. An alternative to the problem was to apply the law of the place where the contract was performed (*lex loci solutionis*).[134] The reason for this alternative was that it provided a more significant connection to the contract, but it also opened the possibility of performance in different countries or states.[135]

The common law approach to identifying the applicable law developed in the nineteenth century when the English judges introduced the proper law[136] – a system of law by reference to which the contract was made, the law chosen by the parties, or that with which the transaction had its closest and most real connection.[137] The proper law was the system of law that generally applied to contracts and governed the freedom of contract aspect of a contract. If the parties agreed on the proper law

[131] Fawcett Carruthers and North (n 127) 625.
[132] Dicey, Morris and Collins *Dicey, Morris & Collins on The Conflict of Laws* 202.
[133] Hartley (n 116) 624.
[134] Hartley (n 116) 625.
[135] Hartley (n 116) 625.
[136] *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* [1938] AC 224 240 paras 1 and 2.
[137] Morris and Kisch *The Conflict of Laws* 353.

and incorporated a clause in the contract to this effect, the chosen law would apply as the proper law of the contract.[138]

Some authors who support the English approach have classified the position as the subjective theory of the proper law. Others have opposed this stance. An example is the argument that the law governing a contract is not that intended by the parties but that with which the contract has the most real and substantial connection to the transaction.[139] This position is regarded as the objective theory of the proper law. It is important to note that there need not be any connection with the country of the chosen law. As stated by the Privy Council,[140] the parties have always been entirely free in their choice.

The kernel of the challenge concerning the proper law as established by the English courts is revealed by the answers to two questions. First, is it sound law to allow the parties to decide, by choosing a particular legal system, whether or not they wish to be subject to a rule of *jus cogens* which may appear *prima facie* to apply to their contract?[141] If the answer to the first question is in the affirmative, is it sound law to allow parties to choose any legal system for their contract however remote the connection and however capricious the choice may be?[142] From these questions, it is clear that an absolute declaration that the proper law of the contract is the law the parties intended to apply, is inadequate.

[138] Hartley (n 116) 625.
[139] Fawcett, Carruthers and North (n 127) 397.
[140] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[141] Mann 1950 *TILQ* 3.
[142] Mann (n 141) 3.

Determining the governing law is more problematic in the case of contracts than in almost any other topic in private international law.[143] Based on the type of contract involved, a cross-border contract may have a diversity of connecting factors, such as the place of performance, domicile of the parties, nationality, or the place where the business of the parties is situated, the situation of the subject-matter, or the nationality of the vessel in case of a charter-party, amongst others.[144] In such an instance, which connections dominate in determining the proper law of the contract? An example of a solution to this problem is found in the revolution the choice of law in the EU and the USA.

Historically, prior to the EU's Rome I, English jurists put measures in place to establish the proper law of a contract involving multiple connecting factors. The source of this theory is to be found in the conformity of the Victorian judges to the Benthamite dogma of *laissez-faire*. The first theory considers the parties, and the second theory aims to decide where the contract is localised.[145] There is a suggestion that in identifying or establishing the proper law, consideration must be given to the law the parties intended to govern the contract, or the law to which it is assumed the parties subjected themselves in the matter.[146] This position is ambiguous. Does the parties' intention mean they directed their minds to the matter and reached an agreed conclusion? Suppose the second opinion applies (presumed intention) – does it signify the common intention that the parties would have held had they considered the

[143] Fawcett, Carruthers and North (n 127) 448.
[144] Fawcett, Carruthers and North (n 127) 448.
[145] Graveson 1951 *UMLR* 635-637.
[146] *Lloyd v Guibert* (1856) LR 1 QB 115 para 120-121.

matter, or does it merely mean the intention which, as reasonable persons, they ought to have formed having considered all the relevant factors?

A more favourable explanation lies in the idea of the localisation of the contract. Localisation of the contract concerns the fact that the proper law is the country's law in which the contract may be regarded as being localised. The process of localisation occurs by classification of the elements that emerge from the formation of the contract and the terms and conditions outlined in the contract.[147] From this process, a specific country will emerge as the country having the most significant elements based on categorisation. The country whose elements are most closely classified in the contract will be the natural seat and the law by which it is governed.[148] The difference between the two tenets lies in the objectivity and the subjectivity of the determination of the intention of the parties.[149] In the event of deliberation on a choice of law, the court will apply the law chosen by the parties.[150]

In terms of the localisation theory, failure to make an express choice mandates the courts to establish the parties' actual intention.[151] In doing so, the court imputes the intention of the parties based on the circumstances of the case and applies the law they should have selected as reasonable persons.[152] To the extent that the parties had the free will to decide the terms of their contract – eg, the place where the contract was made or the place of performance – the court will deduce an intention from their contractual terms that the proper law of the contract will be the law of the state in

[147] Fawcett, Carruthers and North (n 127) 450.
[148] Fawcett, Carruthers and North (n 127) 450.
[149] Fawcett, Carruthers and North (n 127) 450.
[150] Morris and Kisch (n 137) 353.
[151] Fawcett, Carruthers and North (n 127) 450.
[152] Fawcett, Carruthers and North (n 127) 450.

which the chosen factors show the contract to be localised.[153] Regardless of the seemingly unanswered questions about the English position, its concept that the proper law of the contract is what the parties intended it to be has been accepted by many jurisdictions.

In civil law the dominant and exemplified instruments on the law applicable to adhesion contracts are the Rome Convention and Rome I which will be extensively discussed in the next chapter.

4.3 Express choice

As earlier stated, an express choice of law mandates the court to uphold the parties' choice.[154] It has been recognised since 1796 that at the point of entering into the contract, the parties may expressly choose the law by which it is to be governed.[155] There are two sides to the coin when it comes to express choice of law. First, based on the principle of convenience, freedom of choice exercised by the parties produces certainty where otherwise everything might be uncertain. It puts the proper law beyond a doubt and thus saves the cost and delay of litigation. Second, this freedom of choice may be unattractive if applied capriciously. To solve this problem, there is the need to ascribe to the view held by Lord Atkin. In a judicial decision, Lord Atkin asserted that "intention will be ascertained by the intention expressed in the contract if any, which will be conclusive".[156]

[153] Fawcett, Carruthers and North (n 127) 450.
[154] Forsyth (n 115) 327.
[155] *Gienar v Meyer* (1796) 2 Hy BI para 603.
[156] *R v International Trustee* [1937] AC 500, 529, [1937] 2 All ER 164 para 166.

The autonomy afforded parties to choose the applicable law is not absolute. Some have argued that it is the first requirement, the choice being legal and the parties acting *bona fide*, that operates as a mere specific bar to the ultimate choice of the parties by providing that they must exercise their discretion and do so for a legal purpose.[157] In *Vita Food,*[158] Lord Wright indicated that the parties' choice must be "*bona fide* and legal," and there should be "no reason for avoiding the choice on the ground of public policy". This position is confirmation of the fact that the autonomy granted to parties in cross-border contracts is limited. It is trite that no court, and under no circumstance in private international law will a court, give effect to a foreign legal rule that does not conform to the forum's public policy.[159]

This express choice granted to the parties is not free from ambiguity. This limitation presupposes that the choice by the parties must always conform to the country's policies. If this is so, is it plausible to adduce that such a choice is a *bona fide* expression of their intention? The contention as to whether parties are free to choose the proper law or are limited in their choice to ensure that such a choice falls within the remit of the law of the forum granting them autonomy, is worth debating. An early opinion on the matter accepts the parties' choice, although the choice bears no connection with the country of dominant elements when categorising the contract.[160] In a dissenting opinion, Lord Denning refuted the subjective opinion of the proper law as suggested by Lord Wright.[161] He stated he did not believe that parties were free

[157] Fawcett, Carruthers and North (n 127) 453.
[158] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[159] Fawcett, Carruthers and North (n 127) 453.
[160] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[161] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.

to specify the law to govern the validity of their contract. The parties' intention was but one of the factors to be considered.[162]

A further limitation affecting the subjective choice of the proper law stems from the meaningfulness or otherwise of their choice. Where the choice contemplated by the parties is rendered meaningless, it will not be accepted as the law governing the contract.[163] As regards the limitations on the choice of proper law, parties to the contract cannot choose a "floating" proper law to govern the contract. Thus, the proper law must exist and be identifiable when the contract is made.[164] The law chosen by the parties is not applied as the law of the dispute when the law of the forum overrides the express choice of law or its effect,[165] and here there are two categories.

The first category consists of some legislative provisions that necessitate the court to ignore the parties' actual choice of foreign law.[166] A classic example is section 11 of the Australian Carriage of Goods by Sea Act. Section 11 provides that a bill of lading relating to the carriage of goods from a place in Australia to a place outside Australia is to be governed by the law in force in the state or territory of shipment. This completely nullifies any actual agreement as to the proper law.[167] The second category of overriding rules does not directly affect the party's choice of law. Rather, the court is obliged to apply substantive provisions of a relevant legal instrument regardless of whether the law designated by the parties would demand a different result.[168] Thus,

---

[162] *Boissevain v Weil* [1949] 1 KB 482 para 491.
[163] Fawcett, Carruthers and North (n 127) 455. Also See discussions on the case *Campagnie D'Armement Maritime SA v Compagnie Tunisienne de Navigation* SA [1971] AC 572 para 609.
[164] Fawcett, Carruthers and North (n 127) 455.
[165] Morris and Kisch (n 137) 446.
[166] Mortensen and Keyes *Private International Law in Australia* 446.
[167] Mortensen and Keyes (n 166) 446.
[168] Mortensen and Keyes (n 166) 446.

the courts will prioritise the effect of the legal instrument over the effects of the applicable law selected by the parties.[169]

There is the need to distinguish between the express choice of a proper law from the incorporation in the contract of specific domestic provisions of foreign law. There are two different options open to the parties. First, the parties may select a given law as a whole to govern the contract within the limits already discussed. Also, the parties can create a contract that is valid according to the law to which it naturally belongs and incorporate the relevant domestic rules of some other legal system, which thereupon become the terms of the contract.[170] This incorporation may be effected either by a verbatim transcription of the relevant provisions or by a general statement that the rights and liabilities shall be subject to that law in certain respects.[171] The latter is merely a short-hand method of expressing the agreed term.

Aside from the right accorded parties expressly to select the proper law of the contract, a court may infer the proper law from the terms of the contract. The following paragraph addresses how to approach the implied proper law of the contract where there has been no express choice.

4.4 Implied choice

The absence of an express choice compels the court to establish whether there is an actual but unexpressed choice of law. An inference of the proper law does not involve the implication of the term but rather the construction of the contract to determine

[169] *Golden Acres Ltd v Queensland Estates Pty Ltd* [1936] AC 277 para 291.
[170] Fawcett, Carruthers and North (n 127) 456.
[171] Fawcett, Carruthers and North (n 127) 456.

whether the court correctly may imply that the parties expected their contract to be governed by reference to a particular system of law.[172] In the case of *Oceanic Sun Line Special Shipping Co Inc v Fay*,[173] the court considered an exclusive forum clause as an indicator of the parties' intention. Thus, the parties' agreement that litigation was to be exclusively conducted in the court of a specific place is a strong indication that they intend the law of that place to be the proper law.

Often a contract is drafted in a language more sensibly understood by reference to the law of a particular country than to some other law, making it possible to infer that the parties intended the law of that country to be the applicable law.[174] A judicial decision has also suggested that the parties' agreement to arbitrate in a particular place is a weighty indication that they intended the law of that place to be the proper law.[175] In another decision, Lord Wilberforce stated that an arbitration clause is no more than one indication which may give way to other indications.[176] Noteworthy is that no single factor is sufficient to determine the proper law where there is no express choice. The court considers these connecting factors cumulatively. The courts may use connecting factors to determine the proper law of the contract where there is no express or implied choice. This position introduces the English courts' objective choice of law approach to which party autonomy does not apply.[177] Consequently, this research considers the objective proper law.

---

[172] Mortensen and Keyes (n 166) 447.
[173] *Oceanic Sun Line Special Shipping Co Inc v Fay* (1988) 165 CLR 197 paras 224-225.
[174] *Amin Rasheed Shipping Corp v Kuwait Insurance Co* [1984] AC 50 paras 64-67.
[175] *Akai Pty Ltd v the People's Insurance Co Ltd* (1996) 188 CLR 418 paras 436-437.
[176] *Akai Pty Ltd v the People's Insurance Co Ltd* (1996) 188 CLR 418 paras 436-437.
[177] *Mount Albert Borough Council v Australasian Temperance and General Assurance Society* [1938]
AC 224 para 240.

4.5 Objective proper law

A court uses the objective proper law test if the parties to a contract have no common intention as to the proper law or if they did have one, they failed to leave conclusive evidence of that intention in terms of the contract. In such situations, the courts generally look to some objective factors in the contract to establish the proper law.[178] The idea expressed in the older cases was that the court would impute an intention to the parties as to the proper law of the contract.[179] The *Assunzione* case[180] is a good illustration; the decision establishes that in the absence of an express or implied proper law, the courts look to the legal system with which the contract has its closest and most real connection.

In determining this closest and most real connection, the courts consider the terms of the contract and the surrounding circumstances when it was formed. This involves more than merely counting the number of contacts and their circumstances within the relevant legal jurisdictions; the significance of these contacts must also be evaluated.[181]

An issue of interest is the realisation that most of the contractual disputes which are settled by the courts involving choice of law are contracts of adhesion, especially those concluded via the internet.[182] In most cases, however, the courts have failed to address this issue in the context of contracts of adhesion. Thus, the courts fail to

[178] Mortensen and Keyes (n 166) 448.
[179] *Assunzione* [1954] P 150 (CA) para 175.
[180] *Assunzione* [1954] P 150 (CA) para 175.
[181] Mortensen and Keyes (n 166) 449.
[182] Zhang 2008 *ALR* 3.

address whether a party's failure to take part in the negotiation of choice of law in an international transaction where contracts of adhesion are used, constitutes a valid choice of law. In *Vita Food*[183] the

> goods were shipped in Newfoundland under bills of lading which did not contain the statement required by s.3, but which provided for exemption from liability for damage due to the negligence of the shipowners' servants and contained a clause that the contracts shall be governed by English law.

The presence of an exclusion clause is evidence of contracts of adhesion because it deprives a party of the right to negotiate. But it would appear that the courts always ignore whether there was proper negotiation between the parties about the terms of the contract. There appears to be a unanimous acceptance that to the extent that the non-negotiating party does not contest the terms of a contract of adhesion, there is a valid acceptance of the offer. There is a need to consider whether this leads to an infringement of the non-negotiating party's right to contract for lack of alternative means. In *Compagnie d'Armement Maritime SA*[184] the counsel for the appellants suggested instances where the terms of a contract of adhesion used in commercial dealings can be negotiated. This suggestion is quite exceptional as most of the contracts of adhesion used in commerce conform to internationally recognised rules accepted in the specific trade involved.

Some relief may be drawn from the wisdom of Lord Diplock[185] in this matter when he acknowledged the two forms of adhesion contract. The first type refers to the terms upon which common commercial transactions are concluded – eg, bills of lading. This

---

[183] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 278.
[184] *Compagnie Tunisienne de Navigation SA Compagine d'Armement Maritime SA* (1971) AC 572, 575 para F.
[185] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 1316 paras E and F.

type has been established over the years by negotiation between representatives of the commercial interests involved. It has been broadly adopted because of its history and usefulness in facilitating trade. He indicated that these contracts affect the parties to the contract and all persons involved in such commercial activities and may raise a strong presumption that their terms are fair and reasonable.[186] The second type of adhesion contract identified by Lord Diplock is one that has not been the subject of negotiation between the parties involved or approved by any organisation representing the interests of the weaker party. He stated that this form of contract has been dictated by the party whose bargaining power, either exercised alone or in conjunction with others providing similar goods or services, enables him to say: "If you want these goods or services at all, these are the only terms on which they are obtainable. Take it or leave it."[187]

Interestingly, in most adhesion contract cases discussed,[188] the courts largely disregard party involvement – and significantly that of weaker parties – in negotiating consumer contracts of adhesion. The approach by the courts to negotiation is based on the notion that parties contract on standard terms that have been established by negotiation by representatives of their commercial interests and have been generally approved because practice has shown that they expedite the conduct of trade.[189] Unfairness in adhesion contracts warrants the courts' application of the unconscionability principle to establish the level of unfairness involved on a case-by-

[186] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 1316 paras E and F.
[187] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 3 All ER 616 1316 paras E and F.
[188] *Compagnie Tunisienne de Navigation SA Compagine d'Armement Maritime SA* (1971) AC 572, 585 paras B-F.
[189] *Compagnie Tunisienne de Navigation SA Compagine d'Armement Maritime SA* (1971) AC 572, 585 paras B-F.

case basis.[190] The consideration of choice of law in cross-border contracts of adhesion relates to the perception of parties with the right to decide on the proper law, which stems, in turn, from the principle of party autonomy. Therefore, the study considers the jurisprudence of adhesion contracts to uncover the need for this type of contract and how the courts have debated issues involving negotiation in contracts of adhesion.

5. Contracts of adhesion: Definition, brief history, and use

The growing use of contracts of adhesion presents more significant concerns than commonly realised, and it is an area of law to which legal practitioners have paid only passing attention.[191] Sales has argued that the term should include every contract, whether under seal or contained in one or more documents of the parties drafted in a specific form which allows little or no variation of the terms. Enquiring into a working definition of a contract of adhesion or its variants will assist in our understanding of the concept.[192]

Contracts of adhesion are pre-printed contracts containing standard conditions applicable to a different contract of the exact same nature concluded by other parties.[193] They are preferable to individually drafted contracts in that they are intended to be comprehensive and avoid most of the pitfalls surrounding contractual relations in specific industries, eg, the building industry.[194] A distinct feature that cuts across the proposed definitions considered above is the fact that this type of contract or any of its variations do not allow a party the right to vary the contract terms to the

[190] *A & M Produce Co v FMC Corp* 1982 135 Cal App 3d 473 para 479.
[191] Sales 1953 *MLR* 319.
[192] Sales (n 191) 319.
[193] Sales (n 191) 319.
[194] *Blackwell Science Dictionary* 3rd ed.

extent that these contracts are, before being agreed to, drafted by the dominant party. Considering the origin of contracts of adhesion will provide a better understanding of the type of contract it is and facilitate insight into how it is used.

Possibly, contracts of adhesion were first used by an *American Law Review* author in 1919.[195] An article later traced the phrase:

> *contract d'adhésion* . . . to describe those so-called contracts in which one predominant unilateral will dictates its law to an undetermined multitude . . . which, as the Romans said, resemble[s] a law much more than a meeting of the minds. In France, the need for the distinct treatment of such contracts was recognised by the legislature as early as 1757.

The term gained popularity in its various forms, with "boilerplate" a common term used in the English common law jurisdictions in the 1850s. In the old days, newspapers were produced by hot metal typesetting. Newspaper text was imposed on the paper using bulky plates with the text already cut out.[196] By the late nineteenth century these were commonly referred to as "boilerplates" due to their similarity to the metal plates used to build boilers. In contract law, the term "boilerplate clauses" refers to the parts of a contract considered standard. They are generally located towards the end of the contract after the rights and responsibilities of the parties have been addressed. An example of such a clause can be found in *Parker* where the railway company included the clause: "The Company will not be responsible for any package exceeding the value of £10."[197]

In contract law, a contemporary definition of contracts of adhesion includes contracts where one-party consents because there is no other rational option. This always

[195] Preston and Mccann 2012 *OLR* 131.
[196] Preston and Mccann (n 195) 131.
[197] *Parker v South Eastern Railway* (1877) 2 CPD 416.

coincides with power disparities.[198] Parties may sign, seal, and swear in front of witnesses their consent to specific contract terms due to express or implied duress, however subtle.[199] However, some authors have argued that being compelled to accept a contract because of unfortunate circumstances beyond a party's control does not make a contract adhesive.[200] Such compulsion does not automatically signify a lack of extensive negotiation between the parties before consenting to the final terms, or less than a complete understanding of the meaning of the terms, or inadequate evidence of express consent.[201] Even if unpleasant, such a choice could be made freely and with full knowledge. [202] This view suggests that such a contract will amount to a contract under duress and does not fall within the discussion of contracts of adhesion.[203]

Contracts of adhesion developed as part of the modern contract theory which emerged in the early nineteenth century during times of economic and political revolution.[204] This period witnessed large numbers of goods and services produced in response to the demand for large profits based on efficiency. The theory of free will to contract was effective to the extent that the parties negotiated the terms and conditions personally. This position proved untenable in certain business areas – especially in the following centuries – due to how contracts were drafted to respond directly to the economic realities and changes. Manufacturers sought a uniform way of contracting

[198] Preston and Mccann (n 195) 142.
[199] Preston and Mccann (n 195) 142.
[200] Preston and Mccann (n 195) 143.
[201] Preston and Mccann (n 195) 143.
[202] Preston and Mccann (n 195) 143.
[203] Preston and Mccann (n 195) 143.
[204] Gluck 1979 *ICLQ* 72.

with consumers on a large scale rather than entering into individual contracts.[205] It was clear that manufacturers and owners of large enterprises had neither the time nor the resources to enter into individually negotiated contracts.

This problem led to the repeated use of printed, mass-produced, contracts.[206] Contracts of adhesion were born to complement the mass-production and use of goods and services.[207] Although not necessarily evidence of the two parties' contracting, this one-sided nature of the contract – primarily representing the drafting party's wishes – was used in areas such as insurance and finance.[208] Various court cases have shown that a buyer or a consumer signing an adhesion agreement does not indicate complete comprehension of the terms and conditions before signing. A case in point is *Unico v Owen* [209] where Francis J stated that the ordinary purchaser of consumer goods more often than not does not read the fine print and if she did, it is unlikely that she would understand the significance of the legal jargon which is, in most cases, not explained to her.[210]

Previously, contracts of adhesion were treated harshly just as were contracts entered into by free will. Thus, where a party assented to a contract, it was deemed that she understood the terms and conditions of the contract whether or not this understanding was complete. Applying this strict contract theory to contracts of adhesion culminated in injustices meted out to weaker parties who signed these contracts. A classic case

[205] Kessler 1943 *CLR* 629.
[206] Kessler (n 205) 629.
[207] Kessler (n 205) 629.
[208] Gluck (n 204) 73.
[209] *Unico v Owen* (1967) 50 NJ 101, 232 A (2d) 405 para 111.
[210] *Unico v Owen* (1967) 50 NJ 101, 232 A (2d) 405 para 111.

that illustrates this is *L'Estrange v F Graucob Ltd*.[211] In deciding against the plaintiff, Scrutton LJ reiterated that signing a contract in the absence of fraud and misrepresentation is binding on the parties whether or not the contract was read and understood.

A commentator strongly criticised[212] the decision in *L'Estrange v F Graucob Ltd*.[213] The court found that the clause was printed in small print and on brown paper, which must have made the small print even more difficult to read. The general layout of the form also appears to have been confusing, with the exemption clause being in a part of the document where it escaped notice. Based on the points above, the commentator argues that there was sufficient reason for the court to find that the plaintiff had not consented.[214]

The courts were compelled to depart from their previous views on what constituted consent in contracts, especially in situations involving contracts of adhesion. This acknowledged that assenting to a contract does not mean the parties were *ad idem* on all the terms at the time of contracting.[215] The new position adopted by the courts was based on the recognition of unfairness and injustice, especially to weaker parties who do not negotiate these contracts but merely have the option to assent or decline.[216] In the case of *Neuchatel Asphalt Co Ltd v Barnett,*[217] Lord Denning affirmed

[211] *L'Estrange v F Graucob* Ltd [1934] 2 KB 394 paras 406-407.
[212] Spencer 1973 *CLJ* 115.
[213] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 paras 406-407.
[214] Spencer (n 212) 115.
[215] *Smith v Hughes* [1871] LR 6 QB 594 607.
[216] *Neuchatel Asphalt Co Ltd v Barnett* [1957] 1 All ER 362 para 365.
[217] *Neuchatel Asphalt Co Ltd v Barnett* [1957] 1 All ER 362 para 365.

the new position of the courts when he stated that "we do not allow printed terms to be made a trap for the unwary".

The judicial system responded by creating devices by which inequitable clauses could be avoided to solve the problem of injustice in contracts of adhesion. For instance, the court may rule that the exclusion clause was never incorporated into the contract.[218] The court may give a strict interpretation to an exemption clause and find that an exemption of warranties will not cover conditions.[219] Further, the court may decide that a later express warranty has modified the written terms[220] or that the written contract did not supersede an earlier express warranty.[221] The most famous of these tools is the rule of construction known as "fundamental breach".[222] Under this rule, an exemption clause can only assist a party when carrying out the essence of her contract. [223]*Karsales (Harrow) Ltd v Wallis* illustrates this principle.[224] On appeal, the court held that the plaintiffs could not rely on the exception clause as under the hire-purchase agreement the delivery of the car in such condition "… was a breach of a fundamental term going to the root of the contract; and accordingly, the claim for unpaid hiring charges failed".[225] Undoubtedly, the fundamental breach doctrine was established to deal with the difficulties created by contracts of adhesion. But the concept is generally applied in a monolithic fashion, as a rule of law, to all exemption clauses without regard to the fact that a standard-form contract may not be in issue.[226]

---

[218] *Harling v Eddy* [1951] 2 KB 739 CA paras 742-743.
[219] *Wallis v Pratt* [1911] AC 394 para 395.
[220] *Couchman v Hill* [1947] KB 554 para 558.
[221] *Webster v Higgin* [1948] 12 All ER 127 para 465.
[222] Gluck (n 204) 76.
[223] *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 para 868.
[224] *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 para 868.
[225] *Karsales (Harrow) Ltd v Wallis* [1956] 2 All ER 866 para 937.
[226] Gluck (n 204) 76.

In effect, just as the courts in their "hands-off" approach discussed earlier, treated contracts of adhesion as ordinary contracts, they have come full circle with the fundamental breach and applied a standard-form analysis to traditional contracts.[227]

The efficiency of the fundamental breach doctrine has been questioned. It has been contended that even if the fundamental breach doctrine were strictly applied to contracts of adhesion as a rule of construction, it would be unsatisfactory because the courts assume that an exclusion clause can be understood to reflect the intention of the parties when the doctrine is used in a dispute.[228] Thus, if the exclusion clause is unambiguous, the parties must have intended it to apply. On the other hand, if the clause does not meet these criteria, the courts infer that the parties could not have intended the clause to apply when a fundamental breach has occurred.[229]

Thus, even though a party to a contract of adhesion may not be aware of the existence of the exception clause, courts can construe these unread clauses and interpret contractual intention in their light. The contradiction stems from the fact that although a fundamental breach was explicitly developed for contracts of adhesion, the doctrine is rooted in the traditional contractual transaction.[230] It has been contended that the courts were incapable of formulating a comprehensive analysis that they could bring to bear on contracts of adhesion. This is because the courts failed to re-classify contracts of adhesion with reference to their uniqueness and continued analysing them in terms of the traditional contract.[231] The outcome is that where an exclusion clause

[227] Gluck (n 204) 76.
[228] Gluck (n 204) 76.
[229] Gluck (n 204) 76.
[230] Gluck (n 204) 77.
[231] Gluck (n 204) 77.

is seen as oppressive, the courts can only address the problem with laws and not by applying logical legal reasoning.

The introduction of "covert tools" to resolve problems regarding contracts of adhesion creates the problem of uncertainty. Parties to a contract of adhesion are uncertain whether their contract will be upheld under the application of traditional contract theory or whether the courts will perceive certain injustices and, on an *ex post facto* basis, construct a non-existent intent.[232] An attempt by the courts to address the matter of unfairness has caused more harm than good through the uncertainty it engenders.

Another issue regarding contracts of adhesion is unequal bargaining power. In recent cases the courts have attempted to develop a way of dealing with contracts of adhesion under the "inequality of bargaining power". This principle creates a situation where the courts seek to negate the terms and conditions upon the realisation that a party has used her superior bargaining power to elicit unconscionable terms from the weaker party.[233]

In his quest to trace the development of adhesion contracts, Kessler points out that contracts of adhesion are generally used by huge companies and enterprises that fully exploit the resulting benefits. He argues that the companies' monopolistic positions allow them to adopt a take-it-or-leave-it attitude which cannot be avoided as there is no other option available. Thus, most of these companies have offered similar terms putting the weaker party in a situation where there is very little to choose from.[234] The

[232] Gluck (n 204) 77.
[233] *Schroeder Music Publishing Co Ltd v Macaulay* [1974] 1 WLR 308 1316 para C.
[234] Kessler (205) 630.

courts have partially adopted Kessler's thesis by concentrating on the process involved in drafting the standard terms in adhesion contracts[235] and neglecting the inequality of bargaining power and its effect on weaker parties. The courts therefore allow for standard form contacts provided they have not been drafted to trap the weaker party.[236] It has been argued that this move by the courts has distorted the fundamental problems raised by contracts of adhesion which is the right of the parties to negotiate the terms of a contract.[237]

Kessler points out the inequality of bargaining power in "monopolistic or *quasi*-monopolistic"[238] situations. Other legal institutions,[239] especially the courts, have concentrated on the fact that contracts of adhesion have damaged the bargaining process involved in contractual activities. Kessler believes that the absence of bargaining between contracting parties and the lack of real alternatives in the marketplace have resulted in the loss of freedom to enter into a contract.[240] But little attention has been given to the importance of the context in which Kessler's idea was formed. His notion of inequality in contracts of adhesion is based on the fact that the offeror takes advantage of the offeree on the basis of the take-it-or-leave-it approach.[241] This scenario explains that negotiation is an essential component of a freely concluded contract. The powerful offerors of contracts of adhesion use their strength to exclude bargaining.

---

[235] *Neuchatel Asphalt Co Ltd v Barnett* [1957] 1 All ER 362 para 365.
[236] *Neuchatel Asphalt Co Ltd v Barnett* [1957] 1 All ER 362 para 365.
[237] Gluck (n 204) 79.
[238] Kessler (n 205) 630.
[239] Kessler (n 205) 630.
[240] Kessler (n 205) 630.
[241] Kessler (n 205) 630.

While the bargaining process is undoubtedly one *indicium* of free entry into a contract, it is not a *sine qua non* for a freely concluded contract.[242] The accurate indication of free entry into a contract of adhesion is the offeree's opportunity to make an informed decision from alternative options.[243] There is the possibility of a person freely contracting an adhesion contract already drafted. This is possible because the offeree is allowed to read and understand the terms of the contract and compare them to forms of adhesion contracts, hence the availability of a variety from which to choose. Some opportunity can be provided for the weaker party to contest nominal terms of the contract before she assents to it.

A significant way in which weaker parties are protected in private international law, especially in situations where contracts of adhesion are used, is through mandatory rules. More importantly, a weaker party may not be able to contest some contractual terms in adhesion contracts drafted per internationally accepted rules such as the Incoterms, precisely drafted to improve cross-border trade through shipping. Regardless of these pitfalls, contracts of adhesion are widely used in international commercial transactions to facilitate trade and commerce and ensure efficiency. The following paragraph considers the jurisprudence behind mandatory rules to protect weaker parties in private international law.

[242] Gluck (n 204) 79.
[243] Gluck (n 204) 79.

6. The use of mandatory rules to protect weaker parties in contracts of adhesion

The significant role of mandatory rules in protecting weaker parties cannot be over-emphasised. These rules protect weaker parties in two ways: by establishing objective rules; and by applying mandatory rules. The first is establishing an objective rule favouring the weaker party and restricting party autonomy. The second is applying mandatory rules to protect weaker parties. [244] It is important to note that a party's right to choice of law does not prejudice the use of the rules of the law of the country that cannot be derogated from.[245] Subsequent paragraphs will briefly mention some examples of mandatory rules as this topic will be discussed extensively in the chapters presenting the comparative analysis.

The application of mandatory rules, in most cases, commences by ensuring the freedom of parties who enter into international commercial contracts. A typical example of mandatory rules used to protect weaker parties is found in the UNIDROIT Principles of International Commercial Contracts.[246] Article 1.4, captured as "mandatory rule", provides that: "Nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable per the relevant rules of private international law."[247]

The EU has enacted various mandatory rules concerning contracts which are applicable irrespective of the law chosen by the parties.[248] An example is Article 9 of

[244] Bochove 2014 *ELR* 147-156.
[245] Dicey, Morris and Collins (n 132) 1589.
[246] A 1 of the UNIDROIT Principles of International Commercial Contracts (2016).
[247] A 1.4 of the UNIDROIT Principles of International Commercial Contracts (2016).
[248] Article 9 of Rome I (n 117).

Rome I.[249] In such an instance, an obligation is conferred on the courts of the member states to apply national laws implementing these mandatory provisions. Such an obligation may exist in respect of mandatory rules enacted by the forum state and mandatory rules enacted by the other member states in implementing a directive.[250] In *Ingmar GB Ltd v Eaton Leonard Technologies Inc,*[251] the European Court of Justice addressed this question.

The CJEU held that Article 17 of Directive 86/653/EEC[252] requires member states to put measures in place to provide reparation to the commercial agent after the termination of the contract. The court observed that the Article allows the member state to choose between indemnification and compensation for damage. Articles 17 and 18 of Directive 86/653/EEC further prescribe a precise framework within which the member state may exercise its discretion as to the choice of methods for calculating the indemnity or compensation to be granted. The CJEU further stated that the mandatory nature of these articles is confirmed by the fact that Article 19 of the Directive states that the parties may not derogate from them to the disadvantage of the commercial agent before the contract expires.

The second view on applying mandatory rules to protect weaker parties is more complex. It involves a quest to develop a more vigorous position which allows courts, in certain circumstances, to apply both the mandatory laws of the forum and the

[249] Article 9 of Rome I (n 117).
[250] Verhagen 2002 *ICLQ* 136.
[251] *Ingmar GB Ltd v Eaton Leonard Technologies Inc* Case C-381/98, [2000] ECR I-9305 para 21.
[252] A 17 of the Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self-employed commercial agents (1986).

mandatory laws of other countries connected with the transaction in question.[253] Two views support this position. The first postulates that vesting courts with broad authority to apply foreign law acknowledges their capability to address the imbalances in the bargaining process.[254] Thus, the position supports the process of a judicial function that had, in some systems, gained ground in the local context, recognising its extension to cross-border transactions.[255]

The second position deals with recognising the authority of courts to apply foreign law that justifies judicial contribution in international governance processes to support other nations' essential governance and policy goals.[256] This concept was frequently articulated in the deliberations on the adoption of the Rome Convention which addressed the specific needs of the European Community.[257] A typical example is the application of Article 9 of the Rome 1 Regulation. It was not clear whether Article 9 of Rome I referred only to overriding mandatory provisions of the *lex fori* or *the lex loci solutionis* or included any mandatory provision of a third country.[258] Thus, does the wording of Article 9 prohibit applying or giving effect to overriding mandatory provisions of countries other than the forum or the country of performance?[259] And if so, can overriding mandatory provisions of a third country at least be taken into account in some other way?[260]

[253] Bochove (n 244) 148.
[254] Buxbaum 2008 *ARIA* 23.
[255] Buxbaum (n 254) 23.
[256] Buxbaum (n 254) 23.
[257] Buxbaum (n 254) 23.
[258] Kronenberg 2018 *IPICLUC* 874.
[259] Kronenberg (n 258) 874.
[260] Kronenberg (n 258) 874.

The European Court was granted the opportunity to address these problems in *Republik Griechenland v Grigorios Nikiforidis.*[261] One of the preliminary issues the court had to address was whether Article 9(3) of Rome I must be interpreted as precluding overriding mandatory provisions other than those of the state of the forum or the state where the obligations arising out of the contract have to be or have been performed from being taken into consideration, directly or indirectly, by the court under the national law applicable to the contract. The court held that:

> Article 9 of the Rome I must therefore be interpreted as precluding the court of the forum from applying, as legal rules, overriding mandatory provisions other than those of the state of the forum or of the state where the obligations arising out of the contract have to be or have been performed.[262]

From the discussion above it is clear that the reasoning behind the court's decision is simple. Rome I did not unify the substantive legal orders of member states but only the conflict of laws . It has been suggested that the EU neither intended unification of substantive law rules, nor would a unification of such an extent be possible since the EU's legislative power does not stretch to modifications of the member states' national legal orders and because such changes could also raise problems concerning fundamental rights.[263] Where mandatory rules apply to consumer contracts of adhesion, the EU has promulgated some provisions in Rome I to protect weaker parties. These are discussed in detail in Chapter 3.

In private international law it is trite that a court is mandated to determine whether its own country's law applies to the contract in question and, as a mouthpiece of the

[261] *Republik Griechenland v Grigorios Nikiforidis* Case C-315/15, CJEU, 18 October 2016 para 50.
[262] *Republik Griechenland v Grigorios Nikiforidis* Case C-315/15, CJEU, 18 October 2016 para 50.
[263] Kronenberg (n 258) 874.

enacting state, applies that law based on its legal mandate to do so. This mandate is evident in cases (with foreign elements) between a foreign *lex contractus* and a *lex fori* protecting an essential public policy.[264] The dilemma supports the unobjectionable view that the principle of party autonomy applied in an international contract may yield to specific laws of a forum and the doctrine of mandatory rules is applied to the extent that it simply reflects and explicates this reality.[265]

Thus, mandatory rules are applied in conflict of laws matters either to restrict the extent to which a party may act autonomously, or to ensure the protection of weaker parties in cross-border contracts. The comparative research explores whether mandatory rules in private international law achieve the purpose for which most instruments promulgate them. Therefore, the research will consider exploitation in contracts of adhesion.

7. Exploitation in contracts of adhesion (consumer contracts)

The term contracts of adhesion has been defined on the basis of certain characteristics inherent to the contract.[266] In most cases, the terms of the contract are presented by a dominant party on a take-it-or-leave-it basis to a weaker party whose contribution consists of a mere "adherence" to the terms and conditions provided by the dominant party.[267] This notion of contracting under the issue of domination and adherence has provoked the question, from within the corpus of contract law itself, of the enforceability of contracts of adhesion due to their inherently exploitative nature.[268]

[264] Buxbaum (n 254) 22.
[265] Buxbaum (n 254) 22.
[266] Rakoff 1982 *HLR* 1174.
[267] Ehrenzweig 1953 *CLR* 1075.
[268] Atiyah I979 *OUP* 731.

This arises as, in the main, contract law depends on the voluntary assumption of obligations and so cannot be applied without further ado to contracts of adhesion.[269]

One significant observation on contracts of adhesion – and consumer contracts in particular – is that most consumers do not read the terms and conditions of these contracts before signing them. This is because contracts of adhesion are potentially harmful to the consumer but dominate the commercial sector.[270] Consumers usually consent to unfair and often unfavourable terms in adhesion contracts of which they are unaware and which generally lead to exploitation by the dominant party.[271] Studies have shown that the problem of consumer contracts is multi-faceted.[272] Some of these research findings point out that commercial firms impose unfair and inefficient burdens on consumers by taking advantage of their lack of expertise, cognitive biases, difficulty in processing data, unfounded trust, unawareness of relevant legal rules, and various other vulnerabilities.[273] For these reasons, consumers are open to unlimited opportunities for business exploitation.[274] Certain authors have sought the root cause of exploitation in the consumer contract.

7.1 The root cause

The root cause of the average consumer being deprived of inclusion and influence over the specific content of most of the terms included in a consumer adhesion

[269] Rakoff (n 266) 1180.
[270] Adar and Becher 2020 *BCLR* 2407.
[271] Atiyah (n 268) 731.
[272] Adar and Becher (n 270) 2425.
[273] Stolle and Slain 1997 *BEHAV SCI & L* 83 where the author discusses the unfavourable effect exculpatory terms have on consumers.
[274] Adar and Becher (n 270) 2407.

contract is unequal bargaining power.[275] The effect is that consumers lack sufficient incentive to invest the necessary effort in critically reviewing these terms, which are in any case non-negotiable.[276] It has been argued that the consumer's supposed negligence is more acute when it comes to non-salient terms.[277] This view suggests a means by which dominant parties use such contracts to exploit consumers who do not pay particular attention to the minutiae of the contract.[278] One also encounters industrial firms which copy one another's consumer adhesion contracts and serve these up to all consumers.[279] It is further claimed that the similarities encountered in various consumer contracts leave consumers with little incentive to familiarise themselves with the content of the contracts they conclude.[280] The disadvantage here is that variations in these standard terms and conditions are seldom made to suit the specific nature of a consumer's contract.[281] In addition, consumers often fail to read their contacts with the necessary care simply because the terms are often unreadable.[282] The study also revealed that consumers suffer from various cognitive biases which affect their purchasing patterns and contracting behaviour, making them less likely to appreciate the risks inherent in consumer contracts.[283]

Experimental studies have revealed that fine print influences consumers' moral calculus leading them to assume that they are justly and lawfully bound by standardised guidelines regardless of whether these are unconscionable or

[275] Gillette 2004 *WLR* 680.
[276] Gillette (n 275) 680.
[277] Korobkin 2003 *UCLR* 1238-39.
[278] Clayton 2004 WLR 682.
[279] Adar and Becher (n 270) 2414.
[280] Adar and Becher (n 270) 2414.
[281] Furth-Matzkin and Sommers 2020 *SLR* 541-542.
[282] Adar and Becher (n 270) 2414.
[283] Adar and Becher (n 270) 2414.

enforceable.[284] Aware of these vulnerabilities and given competitive pressure, firms are likely to include exploitative boilerplate terms in their contracts – terms which help firms to reduce costs and increase profits.[285] Against this backdrop, the research proceeds to discuss how consumers are exploited in contracts of adhesion.

7.2 Consumer exploitation in contracts of adhesion

The areas of law consisting of delict/tort or breach of contract do not exhibit a level of business exploitation similar to that found in contracts of adhesion – the danger of it being assumed to be legal on its face.[286] Both dominant parties and consumers operate on a *prima facie* assumption of legality, which explains the harm resulting from ignorance.[287] The injustice suffered by consumers is direct and immediate and affects all "victims" who go along with unconscionable or unfair terms.[288] This highly distinctive damage relies on the specific effect of the exploitative term on the consumer's welfare in a particular case.[289] Also, unconscionable terms in contracts of adhesion may exploit consumers by illegitimately restricting their access to justice.[290]

Verein für Konsumenteninformation v Amazon EU Sàrl[291] demonstrated the notion of an unfair choice of law term in a consumer contract. This term was unfair to the extent

[284] Wilkinson-Ryan 2014 *FSPL* 1745 where the author discusses consumers' tendency to blame themselves for not reading fine print even when the terms are biased and unfair.
[285] Shahar 2014 *MLR* 893 where the author addresses the fact that "firms offer a variety of consumer-friendly legal arrangements… But when they do so, they make sure not to hide such attractive perks in the fine print. …It is mostly the stuff that consumers might not like (if they took the time to understand it) that is quietly tucked into the fine print."
[286] Adar and Becher (n 270) 2421.
[287] Furth-Matzkin and Sommers (n 281) 541-542.
[288] Stolle and Slain (n 273) 91.
[289] Kaplow and Shavell "Fairness Versus Welfare" 2001 *HLR* 1103.
[290] Christopher 2001 *ULLR* 700-720.
[291] *Verein für Konsumenteninformation v Amazon EU Sàr* (28 July 2016) ECJ Case C-191/15, ECLI:EU:C:2016:612 para 31.

that it was contrary to the laws of Austria, which protect consumers. The facts were that the Amazon website for consumers in Austria provided standard terms which stated that Luxembourg law applied to its contracts with consumers. *Verein für Konsumenteninformation* (VKI), an Austrian consumer protection corporation, approached the Austrian courts to prohibit the use of the terms as they were contrary to legal prohibitions or accepted principles of morality. VKI commenced a class action against Amazon and demanded an injunction under Directive 2009/225 to exclude the use of certain of the general terms and conditions dictated by Amazon which VKI regarded as contrary to Austrian law.

The *Verein für Konsumenteninformation v Amazon EU Sàrl*[292] case demonstrates the problem of exploitation which a consumer faces in adhesion contracts. The chances are that most registered users of Amazon do not take the time to read these copious terms and conditions. The few who manage to read them may not even understand the import or effect of a legal term such as choice of law – which, in the main, fall within the remit of experts and students of private international law. A further form of exploitation is found in restrictions on consumers' ability to raise specific allegations during litigation, unfair arbitration clauses,[293]and indemnity clauses that make consumers liable for challenging such restrictions which generally take the form of class actions.[294] These forms of exploitation adversely affect both consumers and society.

[292] [292] *Verein für Konsumenteninformation v Amazon EU Sàr* (28 July 2016) ECJ Case C-191/15, ECLI:EU:C:2016:612 paras 29-31.
[293] Christopher (n 290) 700-720.
[294] *Lennar Homes of Cal Inc v Stephens* 181 Cal Rptr 3d 638 649.

Some of these effects include the disempowerment of consumers and weakening the bonds of solidarity.[295] The exploitation of consumers also undermines the sense of community and erodes social trust.[296] Where the judicial system is seen to endorse the actions of dominant parties in a consumer contract, this has a negative impact on consumers' access to justice and instils a sense of injustice and exploitation among consumers.[297] It has been argued that exploitative terms in consumer contracts of adhesion can reduce overall wellbeing, hinder social capital, undercut the development of the law, and pressure sellers to exploit consumers' vulnerabilities.[298] These are some of the effects that provide evidence that exploitation in consumer contracts harms the underlying principles of contract law. While this is so, some measures can be implemented to deal with exploitation in consumer contracts of adhesion.

One of the legal measures that can be implemented to deal with exploitation is the implementation of instruments to prevent exploitation in consumer contracts. Legislators can regulate the substantive content of the forms that firms draft and offer to their consumers.[299] This can be achieved by prohibiting specific types of unfavourable clauses or defining such terms as presumably unfair, unconscionable, or unenforceable. For example, all members of the EU are subject to the Directive of Unfair Contract Terms.[300] A crucial provision in the Directive is to ensure that efficient

[295] Adar and Becher (n 270) 2423.
[296] Adar and Becher (n 270) 2423.
[297] Adar and Becher (n 270) 2424
[298] Adar and Becher (n 270) 2424.
[299] Article 6 of Rome I.
[300] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993).

statutory and administrative measures exist under member states' domestic laws to prevent "the continued application of unfair terms in consumer contracts".[301]

The Directive conspicuously provides a broad definition for an unfair term.[302] It then specifies in a non-exhaustive list, seventeen terms that may be unfair towards consumers.[303] Some other countries have adopted similar actions. For example, the Australian Consumer Law[304] provides what an unfair term is[305] and a non-exhaustive list of fourteen types of terms that may be unfair.[306]

The discretionary power vested in the courts can also curb exploitation in consumer contracts. It has been suggested that the doctrine of unconscionability stands out as the most forthright in the role courts play in this regard and thus serves as a valuable tool for tackling exploitative adhesion contracts.[307] The flexibility of this legal concept permits courts to address a wide variety of vulnerabilities in various situations. [308] Thus, it depends entirely on the judicial system to keep firms in line and deter them from using exploitative terms in their contracts with consumers. Courts may introduce penalties as incentives to protect and encourage consumers.

---

[301] Preamble of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993).
[302] A 3(1) of the Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993) which provides: "A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer".
[303] Annex s 1 of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts (1993).
[304] The Australian Consumer Law (ACL) is set out in Schedule 2 to the Competition and Consumer Act (2010).
[305] S 25 The Australian Consumer Law (2010).
[306] S 25 The Australian Consumer Law (2010).
[307] Korobkin (n 277) 1238-1239.
[308] Korobkin (n 277) 1238-1239.

Another measure to ameliorate the problem of exploitation in consumer contracts is the adoption of third-party administrative agencies – eg, union parties involved in the production of similar goods and services regulated by law – to draft these contracts for and on behalf of both parties thereby ensuring that the interests of both parties are adequately represented in the consumer contract. It has been argued that firms draft adhesion contracts on a take-it-or-leave-it basis.[309] The perception is that individual consumers or the law in general grants the seller implied permission to design the contract for both parties.[310] Such autonomous powers seemingly granted to sellers and firms can easily corrupt, and firms have a profit incentive to advance their interests at the expense of consumers.[311] When drafters of adhesion consumer contracts have regulated incentives to abuse their power and ignore the interests of consumers, this surely will lead to exploitation, and particular scrutiny is warranted.[312] The initiative of having third-party involvement in drafting polices can assist in resolving the issue of exploitation as third party organisations will ensure neutrality and fairness to both parties.[313] A general example is the Incoterm rules issued by the International Chamber of Commerce to regulate international sales between sellers and buyers.[314]

---

[309] Radin *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* 9.
[310] Radin (n 309) 9.
[311] Slawson 1971 *HLR* 531- 532.
[312] Slawson (n 311) 531-532.
[313] A typical example is the "Regulation Z" enacted under the Truth in Lending Act 15 USC ch 41 § 1601 of the USA. Regulation Z requires, inter alia, disclosure of "the circumstances under which a finance charge may be imposed". There is also The Federal Trade Commission (FTC) Used Motor Vehicle Trade Regulation Rule of the USA that requires the use of a Buyer's Guide Form that states and encourages consumers to record agreements resulting from oral negotiations with car dealers in writing. The provision also mandates car dealers to provide conspicuous and clear warnings to customers with whom they are negotiating a sale.
[314] International Chamber of Commerce *"Incoterms 2020"* International Rules for the Interpretation of Trade Terms.

8. Conclusion

This chapter has considered the jurisprudence of party autonomy in private international law and the principle of freedom of contract. The development of party autonomy and how this modern-day theory came to be accepted, especially in the discipline of private international law, was considered. Arguments were advanced on behalf of the reasoning behind the principle of freedom of contract and how the theory informs the principle of party autonomy. The research sought to inquire whether parties to a contract of adhesion, based on party autonomy and the common law concept of freedom of contract, may choose the law applicable to their contract.

At common law, parties' free will to contract cannot be overstated as the underlying principle of contractual activities.[315] The civil law approach has always been skeptical of the advantage of defending freedom of contract strictly without looking at specific circumstances that might deprive such a principle of its proper purpose.[316] Based on this view, freedom of contract can be realised if both parties can exercise it by allowing terms they know and accept.[317] The discussion on freedom of contract is related to the theory of *laissez-faire* economics, which was the influence of the philosophical root of Adam Smith's argument that society functions best when freely determined social contracts govern human behaviour.[318] Although adhesion contracts are a form of contract, they suggest a contrary view concerning the parties' free will. The burden of drafting the terms and conditions of the contract lies on the dominant party while the

[315] D'Agostino *Contracts of Adhesion Between Law and Economics Rethinking the Unconscionability Doctrine* 3.
[316] D'Agostino (n 315) 4.
[317] D'Agostino (n 315) 4.
[318] Viner 1927 *JPE* 200-201.

consumer assents to the terms and conditions of the contract on a take-it-or-leave it basis.[319]

The jurisprudential discussion of the choice of law rules in private international law considered in the study exposes the fact that party autonomy in private international law allows the parties to decide on the specific law that will govern their contract, be it expressly or by implication.[320] Failure to decide on an applicable law expressly or impliedly obliges the courts to impute an intention by considering the peculiarities of the case to which the principle of party autonomy does not apply. The courts may also achieve this through the closest and most real connection test [321] In considering a brief history of contracts of adhesion and how this type of contract was developed, it emerged that choice of law rules in contracts of adhesion suggest a situation where the determination of the applicable law depends on the choice of the dominant party to which the consumer consents.[322]

Parties who have consented by signing these contracts are bound by their content.[323] Arguably, such literal enforcement does not allow consumers to address their contract under the legal justification that they have a "duty to read" and are presumed to have read and understood what they have signed.[324] In reality, this notion has resulted in the exploitation of consumers in adhesion contracts. An inquiry into how consumers can be protected from such exploitation introduced the concept of mandatory laws in two forms – by establishing an objective rule which favours the weaker party; and by

[319] D'Agostino (n 315) 5.
[320] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[321] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[322] D'Agostino (n 315) 2.
[323] D'Agostino (n 315) 4.
[324] D'Agostino (n 315) 4.

restricting party autonomy in general.[325] This concept aims to develop a more vigorous position that allows courts, in some circumstances, to apply both the mandatory laws of the forum and the mandatory laws of other countries connected with the transaction in question.[326]

This chapter further discussed the exploitative nature of contracts of adhesion and the effect these forms of exploitation have on consumer contracts. The study focused on adhesion contracts and how they infringe weaker parties' rights to an agreement. It was revealed that weaker parties in adhesion contracts are subject to unfair and unconscionable terms.[327] The study suggests measures that may alleviate the problem of exploitation in consumer contracts. These measures include the need to adopt third-party organisations regulated by law to draft adhesion contracts for and on behalf of both parties to ensure equal representation of the interests of both parties in a consumer contract.

This suggestion defeats the purpose of freedom of contract, which is reasonable. But the meaning of an adhesion contract in its peculiarity defeats the whole purpose of the principles of freedom of contract and party autonomy. This is due to the commercial environment in which adhesion contracts are used and because these are in high demand in twenty-first century commercial activities.[328] Third-party organisational intervention in drafting these standard terms is a possible solution to curb the exploitation of weaker parties in adhesion contracts.

[325] Bochove (n 244) 148.
[326] Bochove (n 244) 148.
[327] Bochove (n 244) 148.
[328] Rakoff (n 266) 1180.

Where choice of law rules are involved, third-party institutions regulated by law – eg, global organisations providing similar goods and services – can be consulted in the formulation of rules based on the principles governing choice of law rules in private international law which favour dominant parties by ensuring business efficacy and the protection of weaker parties. An example is seen in *Compagnie D'armement Maritime SA*, where the parties entered into a contract based on the tanker voyage charter party standard form drafted by the Association of Ship Brokers and Agents.[329] A general example is also the Incoterm rules drafted by the International Chamber of Commerce to regulate terms of trade in the sale of goods.[330] In the next chapter the focus shifts to the EU's position on the unification of choice of law rules in consumer adhesion contracts.

[329] *Compagnie Tunisienne de Navigation SA Compagine d'Armement Maritime SA* (1971) AC 572, 585 paras B-F.
[330] International Chamber of Commerce *"Incoterms 2020"* International Rules for the Interpretation of Trade Terms.

Chapter three: Choice of law rules in consumer adhesion contracts: An assessment of the European Union position

1 Introduction

Issues of private international law dominate domestic laws as private international law consists of, amongst others, rules and regulations promulgated by states to deal with matters of jurisdiction, applicable law, and recognition and enforcement of foreign judgments.[1] Europe has taken a keen interest in private international law matters since the 1957 Treaty on the European Economic Community.[2] This assertion is evident in the 1997 Amsterdam Treaty,[3] which popularised the broader concept of judicial cooperation and brought the three core issues of private international law within the scope of the European Community.[4] In principle, private international law concerns itself with the cross-border aspects of all questions of private law.

In the European conflict of laws context, the most remarkable evolution of private international law in the past two decades has been its swift and intense Europeanisation.[5] It suffices to say that private international law in the EU is, to a large extent, European private international law because the evolution has been tailored to suit the European situation.[6] Europeanisation of private international law is evident in its impact on non-discrimination, fundamental rights, and especially the mutual recognition of member state laws and decided cases.[7] EU private international

[1] Deskoski and Dokovski 2019 *IPLR* 1.
[2] Consolidated Version of The Treaty Establishing the European Community (97/C 340 /03).
[3] Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts (97/C 340/01).
[4] Deskoski and Dokovski (n 1) 1.
[5] Deskoski and Dokovski (n 1) 1.
[6] Deskoski and Dokovski (n 1) 1.
[7] Meeuen 2007 *EJML* (2007) 287.

law considers a harmonised approach to three main questions: jurisdiction; applicable law; and recognition and enforcement of foreign judgments.[8] It is therefore necessary to consider a distinction of Unification and harmonisation as it focuses on the applicable law in contractual obligations, with specific reference to consumer contracts.

Due to the common misuse of the terms "unification" and "harmonisation" regarding private international law, it is necessary to distinguish between the two concepts. Unification aims to attain a complete unity in substance, whereas harmonisation circumvents complete uniformity[9] and is, in the main, concerned with approximating the essential tenets of national laws.[10] Unification, for instance, introduces a new law to replace the national laws that existed before the promulgation of the new law. The harmonisation of rules, on the other hand, is in essence an approximation.[11] It maintains the differences in the national laws not expressly governed by the law derived from the harmonisation process.[12] In terms of harmonisation national laws simply move closer but are not indistinguishable.[13]

Harmonisation aims at effecting a semblance of specific laws by removing key variations and establishing universal conditions or criteria for application.[14] Unification also focuses on replacing or fusing two or more legal systems and replacing them with a single system;[15] however, harmonisation aims to coordinate diverse legal traditions

[8] Deskoski and Dokovski (n 1) 1.
[9] Andenas and Andersen *Theory and Practice of Harmonisation* 309.
[10] Honnold *Clive M Schmitthoff's Select Essays on International Trade* 109.
[11] Andenas and Andersen (n 9) 309.
[12] Honnold (n 10) 109.
[13] Gharavi *The International Effectiveness of the Annulment of an Arbitral Award* 170.
[14] Fontaine *ULR* 2023 51.
[15] Allott 1968 *AJCL* 53.

by excluding extensive differences and establishing minimum conditions or rules.[16] While unification also considers replacing various systems of law with a specific law or legal tradition with few modifications,[17] harmonisation involves a total evolution including the comparison of the similarities and differences in the various legal systems. The process of harmonisation therefore involves identifying the limits in international unifications and private cross-border transactions and provides a model law but does not amount to absolute unification.[18]

The distinction between these two terms is revealed by their typical application in cross-border relationships.[19] As regards application, unification, which leads to uniform substantive law instruments, prescribes its scope of application. The uniform rules apply automatically in fulfilment of this requirement.[20] Where harmonisation is involved, most of these instruments do not initially apply directly to cross-border relationships but rather serve as a model law.[21] A typical example is the American Restatement which, in the main, addresses national legal issues by providing solutions based on comparative research. The American Restatement may apply to a case if the national or state law selected fails to offer a solution. Some of these laws also apply to cross-border relationships although this is not the purpose of their promulgation.[22]

This distinction is necessary because the two concepts influence the development of choice of law rules in consumer adhesion contracts in the jurisdictions selected for the

[16] Zaphiriou 1990 *AJCL* 71.
[17] Zaphiriou (n 16) 71.
[18] Rosett 1992 *AJCL* 687.
[19] Boele-Woelki *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* 273-461.
[20] Boele-Woelki (n 19) 440.
[21] Boele-Woelki (n 19) 443.
[22] Boele-Woelki (n 19) 444.

comparative research into a theoretical framework for choice of law rules in consumer contracts in the Ghanaian legal system. The theoretical framework is a proposed guide which Ghana should consider in drafting a law on consumer protection which includes choice of law rules.

The EU has measures to regulate international consumer contracts, specifically choice of law rules to protect weaker parties.[23] This is necessary and in accordance with the principle of party autonomy. As applied in other forms of contract, autonomy is not absolute in situations involving consumer and international consumer contracts.[24] The presumption is that parties entering into a consumer contract should enjoy equal bargaining power in deciding the terms and conditions of their agreement.[25] This presumption is rebuttable due to unavoidable natural, legal, social, or economic factors that distort the *status quo* in legal contractual relationships and results in abnormal bargaining power of one party over the other.[26]

These intolerable situations have led to the adoption of corrective measures to protect weaker parties with minimal information at their disposal which places them at a distinct disadvantage during contract negotiation.[27] In international consumer relations the consumer is more vulnerable and the position of the other contracting party is stronger. It is trite that conducting commercial activities in international markets demands a more significant measure of planning and preparation. Identifying the proper law of an international consumer contract presents a situation where the

[23] De Sousa Gonçalves 2015 *MUJT* 5.
[24] De Sousa Gonçalves (n 23) 5.
[25] De Sousa Gonçalves (n 23) 5.
[26] De Sousa Gonçalves (n 23) 6.
[27] De Sousa Gonçalves (n 23) 6.

consumer faces significant challenges in determining the law that governs the contract, and access to the content of foreign law.[28] The weaker party's position in a consumer contract was recognised and illustrated in the EC case *Johann Gruber v Bay Wa AG*.[29]

The regulation of international consumer contracts by the EU is related to the importance of consumer protection as established in Article 169 of the Treaty on the Functioning of the European Union[30] as well as the healthy functioning of the internal market. This legal instrument has mandated the EU to promulgate numerous EU instruments that have shaped the substantive law of the member states and the EU at large as regards consumer protection. These instruments include Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011,[31] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019,[32] and Directive (EU) 2019/2161 of The European Parliament and of the Council of 27 November 2019.[33]

1.1 Focus of the chapter

[28] De Sousa Gonçalves (n 23) 6.
[29] *Johann Gruber v Bay Wa AG* Case C-464/01, 20.01.2005, ECR 2005 I-00439 para 34.
[30] A 169 of the Treaty on the Functioning of the European Union.
[31] Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC (2011) and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (2011).
[32] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services (2019).
[33] Directive (EU) 2019/2161 of The European Parliament and of the Council of 27 November 2019 on amending Council Directive 93/13/EEC (2019) and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and of the Council as regards the better enforcement and modernisation of Union consumer protection rules (2005).

This chapter contributes to the current literature on the EU's position on consumer contracts of adhesion. The focus is on an examination of the EU choice of law rules for consumer contracts of adhesion and the role these rules play in consumer contracts within the EU. Rome I addresses choice of law rules for consumer contracts in the EU. The study reviews and analyses these provisions to establish whether Rome I has impacted positively or negatively on consumer contractual activity within the region. The research also considers other EU Directives read together with Rome I. A focal point is how the European courts have applied Rome I to resolve disputes arising from consumer contracts.

The chapter evaluates whether the EU laws on consumer contracts of adhesion afford protection to the rights of weaker parties. Denmark, the only EU member country to have opted out of Rome I, is also considered. The chapter concludes by identifying the strengths and weaknesses of the measures put in place by the EU.

2 Rome I on consumer contracts of adhesion

Rome I was promulgated in line with the provisions of the Treaty establishing the European Community, specifically Article 61(c) and the second indent of Article 67(5).[34] Article 65(b) of the Treaty establishing the European Community further provides that

> …measures in the field of judicial cooperation in civil matters having cross-border implications, to be taken following Article 67 and in so far as necessary for the proper functioning of the internal market, shall include (b) promoting

[34] Articles 61 and 67 (respectively) on the European Union Consolidated Versions of The Treaty on European Union and of The Treaty Establishing the European Community (2021).

> the compatibility of the rules applicable in the Member States concerning the conflict of laws and jurisdiction.[35]

The preamble to Rome I – Recital 11 specifically – provides that the parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict rules in matters of contractual obligations.[36]

This is supported in the *Interfrigo* case[37] in which the European Court emphasised that what are now uniform rules in the Regulation "enshrine–the principle that priority is given to the parties' intentions, to whom Article 3 of the [Regulation] grants freedom of choice as to the law applicable".[38] This freedom of choice does not necessarily apply when the contract involves a dominant party and a weaker party, especially in electronic consumer commerce. This was the subject of a document from the European Commission issued as a Green Paper.[39] The preamble to Rome I stipulates that where a contract is concluded with a party regarded as weaker, protection should include choice of law rules which indicate a higher level of protection than that ensured by rules of a general nature.[40]

In line with Recital 11, Article 3 of Rome I ensures freedom of choice for the parties.[41] Aside from this acceptance by Rome I, the possibility of choosing the *lex causae* for international contracts is a widely recognised principle of conflict regulation in

[35] A 65 on the European Union Consolidated Versions of The Treaty on European Union and of The Treaty Establishing the European Community (2021).
[36] R 11 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (2008).
[37] *Interfrigo SC (ICF) v Balkende Oosthuizen BC* Case C-133/08 [2009] ECR I-9687 para 24.
[38] Lord Collins *et al* (eds) *Dicey, Morris & Collins on The Conflict of Laws* 1798.
[39] Preamble to the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernization COM (2002) 654 final. Also see Twigg-Flesner (2007) *ERCL* 198-212 for a discussion of the Green Paper.
[40] Łuczak 2013 *WRIAE* 129.
[41] A 3(1) of Rome I (n 36).

domestic contract law, European community law, and international legal instruments.[42] Article 3 ensures that the parties are free to determine the law applicable to their contract by agreement.[43] Rome I further provides that parties may exercise their choice either by express or tacit agreement.[44] The only restriction applicable here is that, at least in proceedings before state courts, the law chosen must be "law" in a technical sense and not merely general principles or any other set of non-binding rules.[45] In principle, the Rome I applies the closest-connection approach.[46] Rome I, first of all, lists specific contracts for which it directly specifies the applicable law.[47] Article 4 of Rome I, on the other hand, provides for the applicable law in the absence of choice.[48]

2.1 Consumer contracts under Rome I

Rome I seeks to protect weaker parties to a contract by modifying the reach of party autonomy and the determination of the applicable law in the absence of choice. In terms of Recital 23 of the Regulation, weaker parties "should be protected by conflict rules that are more favourable to their interests than the general rules".[49] In this research, emphasis is placed on consumer contracts as set out in Article 6 of Rome I. Article 6 of Rome I adapts the rule in the Rome Convention regarding international consumer contracts, taking into account the requirements of consumer protection in

[42] Trávníčková 2002 *PFMUČR* 2.
[43] A 3 of Rome I (n 36).
[44] A 3 of Rome I (n 36).
[45] A 3 of Rome I (n 36).
[46] A 3 of Rome I (n 36); also see Behr 2011 *JLC* 246.
[47] A 4 of Rome I (n 36); also see Behr (n 46) 246.
[48] A 4 of Rome I (n 36).
[49] R 23 of Rome I (n 36).

an international contracts for weaker parties.[50] Article 6 determines the types of international contracts this provision applies to and establishes mechanisms to protect the consumer.[51]

The provisions in Article 6 clearly state that it applies to contracts concluded between a consumer and a professional.[52] It has been reasoned that the notion of the person who contracts with the consumer is optimised based on the jurisprudence of the CJEU and is now designated as a "person acting in the exercise of their business or professional activities (professional)".[53] The article gives a proper definition of the concept of who a consumer is.[54] Unlike Article 5 of the Rome Convention which failed explicitly to identify whether the consumer is a natural person or a legal person,[55] Article 6(1) resolves this problem by indicating that a consumer is a natural person.[56] This solution clarifies that the rule for the protection of the consumer under Rome I applies only to a contract between an individual and a professional.[57]

According to the CJEU, the concept of the consumer should be construed strictly, and what identifies a consumer in a contract is not the subjective situation of the person but the nature and the aim of the contract.[58] As a result, only contracts concluded to

---

[50] De Sousa Gonçalves (n 23) 9.
[51] De Sousa Gonçalves (n 23) 9.
[52] A 6 of Rome I (n 36).
[53] European Commission (2005) Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I). COM (650 final) 6.
[54] A 6 of Rome I (n 36).
[55] A 5 of Rome Convention on the law applicable to contractual obligations (1980).
[56] A 6 of Rome I (n 36). Also see the definition of a consumer by the EU court in CJEU 20 January 2005 Case C-464/01 *Gruber v Bay Wa* [2005] ECR 1-439 para 31; CJEU 11 July 2002 Case C-95/00 *Rudolf Gabriel v Schlank & Schick* [2002] ECR I-6367 para 37; CJEU 27 April 1999 Case C-99/96 *Mietz v Yachting Sneek* [1999] I-2277 para 26; CJEU 3 July 1997 Case C-269/95 *Benincasa v Dentalkit* [1997] ECR I-3767 para 12; and CJEU 19 January 1993 *Shearson Lehman Hutton v TVB* Case C-89/91 para 13.
[57] De Sousa Gonçalves (n 23) 9.
[58] ECJ *Francesco Benincasa v Dentalkit Srl* Case C-269/95 03.07.1997 ECR 1997 para I6.

satisfy an individual's own needs in terms of private consumption fall under the provisions intended to protect the consumer on the assumption that such persons are economically weak.[59] This presupposes that if the purpose of the contract is the trade or professional activity of the person, even a future activity, the protection of the provision does not apply.[60] Thus, only when a natural person acts outside her trade or profession can she be identified as a consumer and enjoy the corresponding protection.

Interestingly, Article 6 fails to provide how the criteria should be applied.[61] Nevertheless, guidance can be found in the CJEU's decision in *Benincasa v Dentalkit.*[62] In that case Benincasa, a non-professional, entered into a franchise contract with the company Dentalkit. Benincasa argued that he should be protected as a consumer because he was not yet carrying on a business when he concluded the contract. However, the CJEU held that a consumer should conclude a contract outside and independently of any trade or professional purpose, whether present or future.[63]

2.2 Party autonomy in consumer contracts in Rome I

The identification of party autonomy in Article 6 of Rome I entails that a judge first establishes whether the parties have appropriately selected the applicable law in accordance with the provisions of Rome I.[64] This is a clear indication that Article 6 guarantees, first, the provision in Article 3 which enshrines the very foundation of

[59] De Sousa Gonçalves (n 23) 9.
[60] De Sousa Gonçalves (n 23) 9.
[61] A 6 of Rome I (n 36). Also see Deskoski and Dokovski (n 8) 8.
[62] ECJ *Francesco Benincasa v Dentalkit Srl* Case C-269/95 03.07.1997 ECR para 18.
[63] ECJ *Francesco Benincasa v Dentalkit Srl* Case C-269/95 03.07.1997 ECR para 18.
[64] Article 6 of Rome I (n 36).

contract – freedom to contract. Thus, notwithstanding paragraph 1, Article 6(2) provides that the parties may choose the law applicable to a contract that fulfils the requirements of paragraph 1 per Article 3 of Rome I.[65] However, the parties' choice does not deprive the consumer of the protection offered her by provisions that cannot be derogated from by agreement under the law, which, in the absence of choice, would have been applicable under paragraph 1.[66]

Therefore, where the parties decide on the law applicable to their contract their choice does not deprive the consumer of any protection which would have accrued to her under the law that would apply in the absence of choice – in this case, the law of the consumer's habitual residence.[67] Where the courts cannot identify a choice by the parties, Article 6 provides that without prejudice to the Articles on the carriage of goods and insurance, consumer contracts are governed by the law of the consumer's habitual residence.[68]

The protective umbrella afforded consumers by Article 6 does not include all consumer contracts. Article 4(6) of Rome I expressly state the types of consumer contracts that do not fall under the protective umbrella of Article 6(1) and (2). These exceptions provided in Article 6(4) include:

> a) a contract for the supply of services where the services are to be supplied to the consumer exclusively in a country other than where he has his habitual residence.
> b) a contract of carriage other than a contract relating to package travel within the meaning of Council Directive 90/314/EEC of 13 June 1990 on package travel, package holidays, and package tours;

[65] A 3 read with A 6 of Rome I (n 36).
[66] A 6(2) of Rome I (n 36).
[67] A 6(2) of Rome I (n 36).
[68] A 6(1) of Rome I (n 36).

c) a contract relating to a right *in rem* in immovable property or a tenancy of immovable property other than a contract relating to the right to use immovable properties on a timeshare basis within the meaning of Directive 94/47/EC;
d) rights and obligations which constitute a financial instrument and rights and obligations constituting the terms and conditions governing the issuance or offer to the public and public take-over bids of transferable securities, and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute the provision of financial service; and
e) a contract concluded within a multi-party system falling within article 4 (1) (h) of Rome I.

Undoubtedly, the degree of party autonomy available under consumer contracts, combined with specific provisions concentrating on this form of contact, strike an appropriate balance between the consumer and business interests and protect the consumer as the weaker party.[69]

2.3 Protection under Article 6 of Rome I

Scholars have argued that Article 6 provides specific protection designed to protect only passive consumers whom traders target.[70] Rome I, therefore, sought to verify whether the protection of Article 6 applies in situations where the professional could have been reasonably ignorant of the private purpose of the contract because the consumer's conduct created the impression for the professional that the consumer was acting for business purposes.[71] The CJEU found that in such cases the provision's protection does not apply.[72]

[69] Deskoski and Dokovski (n 8) 8.
[70] Yuthayotin *Access to Justice in Transnational B2C E-Commerce A Multidimensional Analysis of Consumer Protection Mechanisms* 219.
[71] De Sousa Gonçalves (n 23) 10.
[72] *Johann Gruber v Bay Wa AG* (2005) Case C-464/01 ECR I-00439 para 53.

The CJEU stated that even if the contract's purpose is not the consumer's professional activity, because of the impression she created to the other party who was acting in good faith she is regarded as having renounced the protection afforded by those provisions.[73] An argument has been made in support of the position of the CJEU based on the ground that the conclusion of the contract is governed by the principle of good faith. Thus, if the supposed consumer gave the impression that she was acting within her profession, she cannot later rely on her capacity as a consumer to enjoy the protection afforded by Article 6.[74]

Moreover, having created the impression that the purpose of the contract was professional, the contract concluded would undoubtedly differ from one in which the party had identified as a consumer and would probably have been subject to more advantageous conditions. The supposed consumer cannot have her cake and eat it.[75] This interpretation is prudent in situations where most contracts are concluded *via* internet sites or other electronic means. These contracts are generally based on declarations by the contracting parties and the trust that must exist between them. Often these contracts are decided at a distance and the professional has no way of evaluating the purpose of the contract other than from the declarations of the other party.[76]

The seventh recital focuses on the substantive scope and provisions and indicates that they should be consistent with the Council Regulation (EC) No 44/ 2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in

[73] *Johann Gruber v Bay Wa AG* (2005) Case C-464/01 ECR I-00439 para 53.
[74] De Sousa Gonçalves (n 23) 10.
[75] De Sousa Gonçalves (n 23) 10.
[76] De Sousa Gonçalves (n 23) 10.

civil and commercial matters (Brussels I) which is now the Brussels Recast.[77] This stems from the Giuliano and Lagarde Report which indicates that the definition of consumer contracts in Rome I corresponds to Article 13 of the Brussels I (now Article 17 of Brussels Recast).[78] The Giuliano and Lagarde Report further states that where the receiver of goods, services, or credit acted primarily outside her trade or profession but the other party did not know this and, taking all the circumstances into account, should not reasonably have known it, the situation falls outside the scope of the protection afforded consumers. However, what if a person acts partly within and partly outside of her trade or profession? In that case she will be regarded as a consumer only if she acts primarily outside her trade or profession in the instance in question.[79]

It is important to note that on the issue of interpretation of Article 13 of the Brussels Convention the CJEU has indicated that[80] if the contract has a dual purpose, the protection afforded by the provision cannot be relied upon by the person who contracts partially aimed at her professional activity, except "if the link between the contract and the trade or profession of the person concerned was so slight as to be marginal and, therefore, had only a negligible role in the context of the supply in respect of which the contract was concluded, considered in its entirety".[81] In this

[77] Council Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters (Recast).
[78] A 5 of the Giuliano *Council Report on the Convention on the law applicable to contractual obligations* (Giuliano and Lagarde Report) OJ C282 31.10.80 (1980) in relation to Brussels Regulation. Also see A 17 of the Brussels Recast (n 77) on the definition of consumer contracts. See Łuczak (n 40) 123 on different definitions of "consumer" from other EU Directives.
[79] A 5(2) the Giuliano and Lagarde Report 1980 (n 78).
[80] *Johann Gruber v Bay Wa AG* (2005) Case C-464/01 ECR I-00439 39. Also see Article 13 (Replaced by A 15(1)) of the Council Regulation (EC) No 44/2001 of 22 December 2000 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (2000), and subsequently by A 17(1) of Brussels Recast (n 77).
[81] *Johann Gruber v Bay Wa AG* (2005) Case C-464/01 ECR I-00439 para 39.

analysis, the court must consider the nature, contents, and purpose of the contract and other objective circumstances existing at its conclusion.[82]

Recitals 23 to 32 provide a more elaborate explanation of the application of Article 6 of Rome I. Recital 23 provides that where contracts involve parties considered weaker, those parties should be protected by a conflict of laws rule that is more favourable to their interests than the general rules.[83] The framers of Rome I intended to protect weaker parties in special contracts in a situation where choice of law rules are involved. Recital 24 provides a fascinating argument on the issue of uniformity between the EU conflict of laws rules on choice of law, jurisdiction, and recognition and enforcement of judgments in consumer contracts. This Recital provides that the conflict of laws rules should make it possible to cut the cost of dispute settlement for what are commonly relatively small claims and take account of the development of distance-selling techniques.[84]

The provision does not expressly state what constitutes "relatively small claims". The provision would have ensured a more consistent application level had it stipulated an estimated amount. Some degree of discretionary power is conferred on the court to decide what constitutes "relatively small claims".

2.4 Consistency with Rome I and Brussels Recast

Recital 24 further indicates that consistency with Brussels Recast requires both that there be a reference to the concept of directed activity as a condition for applying the consumer protection rule and that the concept be interpreted harmoniously in Brussels

[82] De Sousa Gonçalves (n 23) 9.
[83] R 23 of Rome I (n 36).
[84] R 24 of Rome I (n 36).

Recast [85] and Rome I. Thus, where consumer contracts are involved, there is a need to consider the contractual activities provided by Rome I (that fall within the Article 6) in determining the type of consumer contract to which the protection rule applies. The provision imposes a duty on the court to ensure that where a dispute arises concerning consumer contracts, the solution offered by Article 6 must be considered not only in matters of choice of law but also in the determination of jurisdiction and issues of recognition and enforcement of judgments to ensure consistency in the three main areas of EU private international law.

Recital 24 moreover states that in the process of harmonious interpretation of Rome I and Brussels Recast, there is the need to bear in mind that a joint declaration by the Council and the Commission on Article 15 of Regulation (EC) No 44/2001 (now A 17 of Brussels Recast) states that "for Article 15(1)(c) to be applicable, it is not sufficient for an undertaking to target its activities at the Member State of the consumer's residence, or at the several Member States including that Member State; a contract must also be concluded within the framework of its activities". Article 15(1)(c)[86] of the Brussels Regulation provides that in matters relating to a contract concluded by the consumer for a purpose that can be regarded as falling outside her trade or profession, jurisdiction shall be determined by this section if in all other respects the contract has been concluded with a person who pursues commercial or professional activities in the member state of the consumer's domicile or, by any

[85] Now Brussels Recast (n 77).
[86] Now A 17(1)(c) of Brussels Recast (n 77).

means, directs such activities to that member state or to several states including that member state, and the contract falls within the scope of such activities.[87]

The Council emphasises an existing contract between the professional and the consumer. This emphasis is clear from the subsequent statement in Recital 24 which declares that:

> the mere fact that an internet site is accessible is not sufficient for Article 15 (now article 17) of Brussels Recast to be applicable. Accessibility to the internet site will not suffice as a condition precedent for applying Article 15 (now article 17) of Brussels Recast if the internet site solicits the conclusion of distance contracts and that a contract has been concluded at a distance, by whatever means. In this respect, the language or currency which a website uses do not constitute a relevant factor.

The current position of the law is captured in Article 17(1)(C) of Brussels Recast and is the same as in the previous Brussels Regulation.[88]

The harmonious interpretation of Rome I and Brussels Recast regarding the application of Article 15 (now A 17 of Brussels Recast) raises some interesting questions on what constitutes a "relevant consideration" as an element of a contract which is concluded through an internet site and warrants the application of Article 15 (now A 17 of Brussels Recast) read with Rome I. Suppose the language the website uses is not a relevant factor; how does a competent court decide whether the consumer understood the terms and conditions of the internet site contract before consenting to it? Will a competent court assume a basic understanding, void of the tenets of language, to impute an intention to the contracting parties? Rome I is not clear on these issues.

[87] A 17 (I) of Brussels Recast (n 77).
[88] A 17 (1)(c) of Brussels Recast (n 77).

It has been argued that Recital 24 achieves a high level of harmony between Rome I and Brussels Recast to the effect that Rome I and Brussels Recast take the same approach to the significance of dealings, especially when the contract between the parties was concluded via the internet.[89] As regards online consumer transactions, both Rome I and Brussels Recast use the verb "directed to" to make it clear that there is harmony of aim and interpretation between the instruments. All roads appear to lead to a common junction of agreement.[90]

An interesting argument concerning coherence within a single instrument is whether an insured person can assume the role of both a consumer and an insured under Rome I. If this is so, further questions arise concerning which protective rules within an instrument, be it the Brussels Regulation or Rome I, should be preferred in resolving a dispute.[91] In any given case it may happen that although in principle an active seeker of insurance cover can be regarded as a consumer, the consumer protective conflict of laws provision may be beyond her reach because of some element in the facts – eg, the consumer acting primarily in a business capacity.[92] If this happens, the question of which instrument takes precedence is answered. If not, although some claims have been made[93] that the provision on insurance contracts takes precedence over the provision on consumer contracts, a purposive interpretation of the instruments would lead to the conclusion that not only should weaker parties be protected by conflict rules that are more favourable to their interests than the

[89] Crawford and Carruthers 2014 *ICLQ* 20.
[90] Crawford and Carruthers (n 89) 20.
[91] Crawford and Carruthers (n 89) 20.
[92] *Gruber v BayWa AG* Case C-464/01 [2006] QB 204 para 54.
[93] Crawford and Carruthers (n 89) 20.

general rules,[94] but that, by extension, they should be entitled to the best protective options available.[95]

The Recitals equally provide that the consumer should be protected by such rules of the country of her habitual residence which cannot be derogated from by agreement, provided that the consumer contract has been concluded as a result of the professional pursuing her commercial or professional activities in that particular country. The same protection should be guaranteed if the professional, while not pursuing her commercial or professional activities in the country where the consumer has her habitual residence, directs her activities by any means to that country, or to several countries including that country, and the contract is concluded as a result of such activities.[96] A decision by the European Court of Justice which addresses uniformity between Rome I and Brussels Recast is discussed below.

2.5. Discussion of the CJEU's decision of 28 July 2016, Case C-191/15, *Verein für Konsumenteninformation v Amazon EU Sàrl*

A typical example of a result-oriented rule in a consumer adhesion contract is the promulgation of Articles 6 and 9 of Rome I.[97] The quest to reach result-oriented solutions for the protection of consumers began with the definition of who qualifies as a consumer.[98] To ensure uniformity in the litigation processes, the EU legal instruments on private international law – and specifically on consumer contracts –

[94] R 18 of Brussels Recast (n 77) and R 23 of Rome I (n 36).
[95] Crawford and Carruthers (n 89) 20.
[96] R 25 of Rome I (n 36).
[97] See discussion of the essence of A 6 and 9 to the protection of consumer's interest in Chapter 2.
[98] A 6 of Rome I (n 36).

require a uniform definition of who a consumer is in both choice of law and jurisdiction processes and the recognition and enforcement of judgments. A more recent case that addresses the issue of uniformity between the two instruments is the CJEU's decision of 28 July 2016[99] in which the court ruled that a standard choice of law clause favouring the law of the EU member state in which the seller or supplier is established, is unfair to the extent that it fails to stipulate that under EU law the consumer enjoys the equal protection of the mandatory provisions of law applicable in the consumer's home country.[100] On the facts of the case, the Amazon website for consumers in Austria provided standard terms which stated that Luxembourg law applied to its contracts with consumers. *Verein für Konsumenteninformation* (VKI), an Austrian consumer- protection corporation, asked the Austrian courts to prohibit the use of the terms in that they were contrary to legal prohibitions or accepted principles of morality. VKI commenced a class action against Amazon and sought an injunction within the remit of Directive 2009/225[101] to prohibit the use of some of the general terms and conditions provided by Amazon as VKI considered them to be contrary to Austrian law.[102]

Because the dispute before the CJEU concerned a choice of law clause, the court had to determine which conflict rule or rules applied in the case of class action against a trader who targeted consumers in their country of habitual residence, and in which an

[99] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 31.
[100] *Verein für Konsumenteninformation v Amazon EU Sàr (*2016) Case C-191/15 ECLI:EU:C:2016:612 para 31.
[101] Directive 2009/22 on injunctions for the protection of consumer interests [2009] OJ L 110/30.
[102] A 4 of the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals about the processing of personal data and on the free movement of such data.

injunction was sought to prevent the use of allegedly unfair terms due to the international nature of the case. The court of first instance and the court of appeal decided that this matter fell within the remit of Rome I but applied separate provisions in the legal instrument.[103] The court of first instance applied Article 6 of Rome I and reasoned that for this provision to apply, specific requirements must be met. Thus, the contract must first be between a seller or a service provider who acts during his trade or professional activity and a consumer who acts outside his trade or profession. Second, only the consumer addressed by the professional in her habitual residence will be protected.[104] The two parties, Amazon and VKI, recognised that the Austrian consumer was targeted by Amazon in Austria.

The court of first instance applied Article 6(2) of Rome I and observed that a choice of law is permitted to the extent that it does not rob the consumer of the protection under the mandatory rules of her habitual residence. This implies that Article 6(2) supports a limited choice of law.[105] Based on the application of Article 6(2), the court reasoned that choice of Luxembourg law could not set aside the mandatory rules of Austrian law and held that the choice of law clause was unenforceable and that the

[103] Rome I (n 36).
[104] This is generally regarded as a "passive consumer". The notion of a passive consumer in an electronic contract is illustrated in the cases mentioned here. Although most these cases concentrate on the Brussels I Regulation, they are relevant because the decisions cover the definition of a consumer in Rome I. These decisions include: *P Pammer v Reederei Karl Schlu¨ter GmbH & Co KG, Hotel Alpenhof GesmbH v O Heller* (2010) Joined Cases C-585/08 and C-144/09 ECLI:EU:C:2010:740; *A Maletic, M Maletic v Lastminute.com GmbH TUI O¨sterreich GmbH* (2013) Case C-478/12 ECLI:EU:C:2013:735; *D Mu¨hlleitner v A Yusufi, W Yusufi* (2012) Case C-190/11 ECLI:EU:C:2012:542; *L Emrek v Sabranovic* (2013) Case C-218/12 ECLI:EU:C:2013:666.
[105] Rutgers 2017 *NILR* 165.

contract was subject to Austrian law; hence Austrian law governed the validity of the conditions included in the general terms and conditions.[106]

The plaintiff and the defendant both appealed. On appeal, the court held that Article 10 of Rome I applies to the validity of a choice of law clause. The validity of a choice of law clause must be evaluated per the state law which would have been applicable under Rome I had the clause been valid. This evaluation would result in the application of Luxembourg law.[107] The Court of Appeal further stated that if the term was valid under Luxembourg law, the court of first instance, to which it referred the case, should compare Luxembourg and Austrian law. The law most favourable to the consumer must be applied.[108] VKI appealed against this decision to the Austrian Supreme Court (*Oberste Gerichtshof*), which referred preliminary questions to the CJEU. It asked whether the claim for an injunction by a consumer organisation should fall within Article 4 of Rome II's scope because of the absence of a contractual relationship between VKI and Amazon.

2.5.1. Discussion of contractual relationships between parties to the dispute and uniformity between the Rome I and Brussels Recast

On the issue of a contractual relationship between VKI and Amazon, the CJEU drew a distinction between the law applicable to the claim for an injunction within the meaning of Directive 2009/22[109] in prohibiting the use of unfair terms in general terms, and the law applicable to the unfairness of the conditions in issue.[110] It is important

[106] Rutgers (n 105) 165.
[107] Rutgers (n 105) 165.
[108] Rutgers (n 105) 165.
[109] Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on injunctions for the protection of consumers' interests (Codified version).
[110] Rutgers (n 105) 166.

to note that neither Rome I nor Rome II provides specific rules concerning a class action. Consequently, the court had to determine which regulation applied. The court held that these notions had to be construed autonomously. Further, Recital 7 of Rome I and Rome II provides that the interpretation of both regulations should be consistent with each other and with Brussels I.[111] The court held that a claim such as the dispute before the court was a matter relating to tort, delict, or quasi-tort within the context of Brussels I as it related to the distinction made by Brussels regime between matters relating to a contract[112] on the one hand, and matters relating to tort, delict, and quasi-delict on the other.[113]

The CJEU held that a claim such as the one before the court was a matter relating to tort, delict, or quasi-tort within the context of Brussels I.[114] Consequently, a consistent interpretation of Rome I, Rome II, and Brussels I required the claim to be classified as non-contractual, and Rome II determined the applicable law. The court disregarded the Austrian Supreme Court's (*Oberste Gerichtshof*) reference to Article 4 of Rome II and applied Article 6(1) of Rome II to establish unfair competition. The court argued that unfair terms in a contract by a seller who targeted consumers in a specific country fell within the scope of Article 6(1) of Rome II because they affected "the collective interests of consumers as a group".[115] They therefore also affected "the conditions of the competition on the market".[116] The CJEU specified that in the case of an injunction

[111] Regulation No 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2001] OJ L 12/1 (Brussels I).
[112] A 5(1) Brussels I (now A 7(1) Brussels Recast) (n 77).
[113] A 5(3) Brussels I (now A 7(2) Brussels Recast) (n 77), also see Rutgers (n 105) 166 -167.
[114] *Brogsitter v Fabrication de Montres Normandes EURL, K Fräßdorf* (2014) Case C-548/12 EU:C:2014:148.
[115] Rutgers (n 105) 167.
[116] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 42.

the country where the collective interests of the consumers are affected is the country of "habitual residence of the consumers to whom the undertaking directs its activities"[117] and whose interests are defended by the consumer organisation's activities. The CJEU further held that Article 6 of Rome II is a *lex specialis* of Article 4 of Rome II, which includes the general rule, but Article 4(3) of Rome II does not apply in this case. The explanation given by the courts was that Article 6(1) of Rome II includes a rule for situations where it is clear from all indications that the tort is manifestly more closely connected with another country than with the legal system of the country to which Article 4(1) of Rome II refers the tort.[118] If Article 4(3) is applicable, the rationale of Article 6(1) of Rome II would be undermined since it aims to protect the collective interests of consumers, while Article 4(3) of Rome II concerns "the personal connections" between the parties.[119]

Regarding the conflict rule governing the unfairness of terms in general conditions, the CJEU further observed that the unfairness of terms in general conditions is submitted to the conflict rules included in Rome I irrespective of whether they involve an individual or a collective action.[120] The court stated that if the provisions in Rome II govern the assessment of the term, different legal systems could apply in the case of collective and individual action. This position would, in turn, result in different levels of protection as Article 8 of the Directive on Unfair Terms provides for a minimum

[117] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 43.
[118] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 45.
[119] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 45.
[120] Rutgers (n 105) 167.

level of harmonisation and some member states have included more stringent rules in their national legal instruments to protect the consumer.[121]

An argument has been made against the CJEU's approach in applying both Rome I and Rome II to the issue of a collective action in that these two legal instruments will result in the same conclusion. The CJEU stated that both Article 6(1) of Rome II and Article 6(2) of Rome I applied in this case and both resulted in the application of Austrian law.[122] The court's reasoning in applying Article 6(2) of Rome I and Article 6(1) of Rome II was to certify the application of the same legal system in an individual and a collective action. A concern has been raised in understanding a situation in which Article 6(1) of Rome II and Article 6(2) of Rome I would lead to separate legal systems, notably that, as regards Article 6(1) of Rome II, the CJEU held that:

> …the country in which the collective interests of consumers are affected within the meaning of Article 6(1) Rome II is the country of residence of the consumers to whom the undertaking directs its activities and whose interests are defended by the relevant consumer protection association by means of that action.[123]

This contention is premised on the fact that the connecting factor in Article 6(1) of Rome II corresponds to that in Article 6(2) of Rome I and points to the country of the consumer's habitual residence which the trader targets.[124] On the other hand, the view of the CJEU is clear – the court did not apply both Rome I and Rome II. The CJEU emphatically stated that both Rome I and Rome II, as they apply to collective actions, should be interpreted to mean that:

---

[121] Rutgers (n 105) 167.
[122] Rutgers (n 105) 171.
[123] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 43.
[124] Rutgers (n 105) 171.

> without prejudice to Article 1(3) of each of those regulations, the law applicable to an action for an injunction within the meaning of Directive 2009/22 directed against the use of allegedly unfair contractual terms by an undertaking established in a Member State which concludes contracts in the course of electronic commerce with consumers resident in the other Member States, in particular in the State of the court seized, must be determined following Article 6(1) of the Rome II Regulation, whereas the law applicable to the assessment of a particular contractual term must always be determined under the Rome I, whether that assessment is made in an individual action or a collective action.[125]

To achieve a result-oriented outcome, the CJEU, as a referred court, sought to provide different options for the Austrian Supreme Court (*Oberste Gerichtshof)*. The CJEU allows room for the solutions proffered to be applied by the Austrian Supreme Court *(Oberste Gerichtshof)* based on the specific circumstance of the case.[126] The options arriving at the same conclusion do not connote an error on the part of the CJEU. The court only pointed out the possible rules, situations in which these rules must be applied, and the outcome of their application. It is imperative to note that the decision of the CJEU on collective actions was a purposive one to attain collective justice as Rome I and Rome II had no specific rule on collective actions. The CJEU rendered a purposive solution by observing that:

> The law applicable to an action for an injunction within the meaning of Directive 2009/22 must be determined under Article 6(1) of Rome II where what is alleged is a breach of a law aimed at protecting consumers' interests for the use of unfair terms in general terms and conditions, whereas the law applicable to the assessment of a particular contractual term must always be determined under Rome I, whether this is in an individual action or a collective action.[127]

Thus, a purposive interpretation was given to individual action to include collective action.

---

[125] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 60.
[126] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 79.
[127] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 58.

3 Overriding mandatory rules and public policy

Another means by which Rome I ensures the protection of consumers in contracts of adhesion is the application of mandatory rules. Rome I includes several potential vehicles for safeguarding these interests. These include Articles 3(3) and 3(4) which limit choice of law (party autonomy) for purely national and intra-EU situations to counteract an evasion of mandatory national or EU law, including substantive provisions based on the protective principle.[128] It has been identified that Rome I has two general correction mechanisms used to protect consumers – the public policy exception; and the doctrine of overriding mandatory rules.[129]

The mandate of the public policy exception is to negate foreign law which is manifestly incompatible with the fundamental principles of the forum.[130] On the other hand, Rome I superimpose certain overriding mandatory rules on the law applicable to the contract to protect an interest regarded as fundamental, generally by the forum state.[131] Of the two mechanisms, the doctrine of overriding mandatory rules appears to play a more prominent part in protecting weaker parties. However, it has been argued that the nature of its exact role needs further clarification.[132]

3.1 Overriding mandatory rules for consumer contracts under Rome I

[128] Bochove 2014 *ELR* 147.
[129] Bochove (n 128) 147.
[130] De Boer *Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community* 296.
[131] Bochove (n 128) 147.
[132] Bochove (n 128) 147.

Article 9 of Rome I [133] addresses overriding mandatory rules. Article 9(1) defines an overriding mandatory rule as:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.

This definition is similar to the definition given by the court in *Arblade.*[134] The Commission derived this definition from the CJEU's decision in a different context, namely the compatibility of national provisions in the construction sector with the freedom to provide services under Article 56 of the Treaty on the Functioning of the European Union (TFEU).[135]

Article 9 suggests that in a consumer contract there are some laws of a state that apply automatically to the contract regardless of the choice made by the parties involved. It is essential to note from the definition that overriding mandatory provisions are not simply mandatory provisions – unlike ordinary mandatory provisions, overriding mandatory provisions cannot be circumvented by a choice of law of another country in a consumer contract of adhesion. In other words, although these provisions belong to the domestic laws of the state involved, they are applied in cross-border transactions.[136] Where Article 9 of Rome I applies to consumer contracts,

---

[133] Formerly A 7 of the Rome Convention (n 55).
[134] *Arblade* [1999] Joined Cases C-396/96 and C-376/96 ECR Opinions I para I 8453. See Lord Collins *et al* (eds) (n 38)1829 para 34 "…. overriding requirements relating to the public interest and applicable to all persons and undertakings operating in the territory of the State where the service is provided, in so far as that interest is not safeguarded by the rules to which the provider of such a service is subject in the Member State where he is established." Also see European Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 Final 7; Green Paper COM (2002) 654 Final para 3.2.8.3.
[135] A 56 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) (2012).
[136] Bochove (n 128) 148.

the Regulation's position is that the mandatory rules of the forum are applicable irrespective of the provision promulgated in Article 6(2) of Rome I.

The definition in Article 9(1) fails to resolve all ambiguities in Article 7 of the Rome Convention. According to the Giuliano and Lagarde Report, Article 7 of the Rome Convention is based on the principle that national courts can under certain conditions give effect to mandatory provisions other than those applicable to the contract under the law chosen by the parties, or the law indicated by a connecting factor that has been recognised for several years both in legal writings and in practice in the member states and elsewhere.[137] The wording of Article 7(1) of the Rome Convention provides explicitly that in the application of the Convention, "effect may be given to the mandatory rules of the law of another country with which the situation has a close connection if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract".[138] The provision does not explicitly explain, nor is a criterion provided concerning the nature of the connection between the contract and a country other than that whose law is applicable.[139] A criterion for determining how the connecting factor is established is necessary.

3.2 Public interest under Article 9 of Rome I

Article 9(1) of Rome I provides that:

> Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any

[137] A 7 of the Giuliano and Lagarde Report (n 78).
[138] A 7 of Rome Convention (n 55).
[139] A 7 of the Giuliano and Lagarde Report (n 78).

> situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation.[140]

This wording creates a gap. A typical example is the word "crucial", the meaning of which Rome I fails to explain precisely. Neither does Rome I provide a criterion for determining the meaning of the term "crucial".[141] It has been argued that the European legislature appears to afford the courts a wide margin of interpretation.[142] Article 9 does not specifically clarify the kinds of public interest targeted by Rome I. As regards public interest, Article 9 mentions the state's political, social, or economic organisation. However, the inclusion of "such as" in the Article suggests that the list provided is not exhaustive.[143]

Furthermore, Article 9 (1) provides that the recognition of overriding mandatory rules should be considered crucial by a state for safeguarding its public interests. Whether rules that protect individual interests should be regarded as overriding mandatory provisions is worth considering.[144] Suggestions indicate that the legislative history of Rome I provides no clarity on this matter.[145] A scholar has argued that to qualify as an overriding mandatory provision a rule should at least partly pursue a state interest. The protection of this state interest should not simply be ancillary to the purpose of protection of individual interests.[146] Clearly, there is a need for a proper interpretation

---

[140] A 9 of Rome I (n 36).
[141] Bochove (n 128) 148.
[142] Bochove (n 128) 148.
[143] A 9 of Rome I (n 36).
[144] Bochove (n 128) 149.
[145] Bochove (n 128) 149 n 18. It should be noted that the Giuliano and Lagarde Report on the Rome Convention (OJ 1980 C 282/28) mentions rules on consumer protection as an example of overriding mandatory rules.
[146] Kuipers *EU Law and Private international law. The Interrelationship in Contractual Obligations* 145.

of Article 9 to resolve the controversies that have emerged in developing a criterion that will better explain what constitutes public interest. [147]

Further arguments around public interest relate to whether it includes the protection of weaker parties under the specific rules promulgated in Rome I to cater for the specific contract in which a party is deemed weak.[148] In such an instance, is it the provision of the specific rules (in this case, Article 6 of Rome I on consumer contracts) or the Regulation's mandatory rules (in this case, Article 9 of Rome I) that applies? Where consumer rules are concerned, it has been argued that the special rule for consumer contracts in Article 6 of Rome I is given precedence over Article 9.[149]

Other countries such as the UK (at the time the UK was part of the EU), have stated that provisions aimed at protecting individual interests, such as those of consumers, can be regarded as overriding mandatory rules.[150] It has been argued that although these provisions do not serve a specific public interest, a member state can nevertheless have an interest in applying them on public policy considerations since the abuse of weaker parties can be viewed as a threat to civil society.[151] Thus, the application of the rule itself is of public interest. Examples are found in section 27(2) of the English Unfair Contract Terms Act 26 of 1977.

The best Rome I does to resolve this problem is to confer a discretionary power on the court based on the statement that "…the concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be

[147] Bochove (n 128) 148.
[148] AA 6,7 and 8 of Rome I (n 36).
[149] A 6 of Rome I (n 36); also see *Bundesgerichtshof* (1997) Case VIII ZR 316/96.
[150] Kuipers (n 146) 145.
[151] Bochove (n 128) 150 n 24.

derogated from by agreement' and should be construed more restrictively".[152] But the question remains whether the special protection afforded weaker parties in Article 6 can be seen to override mandatory rules. The CJEU explicitly fails to address whether the application of a rule based on the protective principle can be regarded as crucial by a state for safeguarding its public interest in the sense of Article 7 of the Rome Convention and Article 9 of Rome I.[153] In the *Unamar* case[154] the CJEU draws no distinction between private and public interests but speaks of "an interest judged to be essential by the Member State concerned".[155]

One approach to the ranking of Article 6(2) and 9(2) of Rome I is that as the *lex specialis*, Article 6(2), must enjoy precedence, so leaving no room to invoke Article 9 for the application of provisions aimed at protecting the consumer.[156] The reasoning underlying this is that Rome I chose expressly not to grant special protection to mobile consumers to avoid the risk of an "unfair surprise" for the seller[157] and not overly to restrict party autonomy. However, it can be argued that rules that fall outside the scope of Article 6 of Rome I can still be enforced through the protection offered by Article 9.[158] Bochove has claimed that a mobile consumer who does not receive protection based on Article 6, should at least enjoy the protection offered by Article 9 if the state in question has a fundamental interest in the application of the protective

[152] R 37 of Rome I (n 36).
[153] Bochove (n 128) 150.
[154] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 46.
[155] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 50. Also see Bochove (n 128) 150 discussing *Unamar v Navigation Maritime Bulgare* where she argues that: "Since the request of the Belgian court for a preliminary ruling in this case did not address the question of whether rules based on the protective principle fall within the scope of Article 9 Rome I, one could argue that the CJEU was not given the opportunity to clarify this issue."
[156] Bochove (n 128) 152.
[157] Stone *EU Private international law* 352.
[158] Bochove (n 128) 152.

rule.[159] This position supports the view expressed in the Rome I Green Paper which states that the specific provision governing consumer contracts "does not interfere with the possible application of overriding mandatory rules".[160]

Article 9(2) provides that "nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the forum's law". This is problematic in that the use of "shall" makes it compulsory. This suggests that an overriding mandatory provision in the forum's law which has no substantial connection to the contract will apply. Where a forum with no real, substantial, or close connection to the contract assumes jurisdiction based on private international law rules such as the rules on submission, is it feasible to apply the overriding mandatory rules of that forum? Although Article 9(2) seeks to improve Article 7(2) of the Rome Convention, it can be argued that in this regard Article 9 fails to achieve its aim in light of its absolute application policy which allows for the application of a law which has no substantial connection to the contract. It has been argued that a genuine connection with the other country is essential and that a mere vague connection is insufficient.[161]

In order to explore the reasoning behind Article 9(2) of Rome I, the genesis of which can be traced back to Article 7(2) of the Rome Convention, the Giuliano and Lagarde Report explains Article 7(2) of the Rome Convention by stating that the origin of this paragraph is found in the concern of specific delegations to safeguard the rules of the law of the forum (eg, rules governing cartels, competition, and consumer protection

[159] Bochove (n 128) 152.
[160] Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a community instrument and its modernisation COM (2002) 654 final 34.
[161] A 7 of The Giuliano and Lagarde Report (n 78).

and specific rules on carriage) which are mandatory in the situation regardless of the law applicable to the contract. Thus, the paragraph merely deals with applying mandatory rules differently from Article 7(1) (now Article 9(1) of Rome I). The report fails expressly to explain the different ways in which the mandatory rules under Article 7(2)[162] apply under the Rome Convention (now Article 9(2) of Rome I). The Recital to Rome I equally fails to explain expressly the different ways in which the overriding mandatory rules under Article 9(2) are to be applied. At best, Recital 37 states that:

> Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively.

This allows the courts of member states discretionary powers in this regard which can lead to diversity of construction amongst member states in determining what constitutes "overriding mandatory provisions" under Article 9(2) of Rome I.

3.3 Other issues with Article 9 of Rome I

Other issues raised by Article 9 concern the interpretation of the phrase "by a country" in Article 9(3). The interpretation presents a dilemma as to whether the provision is only aimed at protecting national public interests, or whether a rule protecting a European public interest (eg, the free movement of goods and free and undistorted competition) qualifies as an overriding mandatory provision.[163] Thus one may ask:

[162] Now A 9(2) of Rome I (n 36).
[163] The Working Group on Rome I, the Max Planck Institute for Foreign Private and Private international law "Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome 1)" (2007) 71 Reb.

> Is there a distinct category of European values and interests apart from national ones? Or do the values and interests of each Member State necessarily coincide with those of the European Community? Does that mean that the exception can only be invoked against the law of non-Member States?[164]

An argument has been made in support of the rule protecting a European public interest. Thus, insofar as it would be possible to distinguish between "national" and "European" interests, the member states are, in any case, obliged to secure the interests of the European Union as if they were their own.[165]

Article 9(3) provides that in the application of the Convention:

> Effect may be given to the mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance to the contract unlawful.[166]

The use of the word "may" suggest that the judge has the discretion to either apply this provision or not. The discretion may override the application of the place of performance as substantial connection to the contract. The overriding mandatory provisions of the place of performance must be given effect to as an obligation.[167]

Article 9(3) adds that "regard shall be had to their nature and purpose, and the consequences of their application or nonapplication". Article 9(3) must be considered when deciding on the efficacy of the mandatory rules.[168] This controversial provision was based on a German theory introduced in the Hague Convention on the Law

---

[164] De Boer "Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community" in A Malatesta *et al* (eds) *The External Dimension of EC Private international law in Family and Succession Matters* 296.
[165] De Boer (n 164) 316; Bochove (n 128) 149.
[166] A 9(3) of Rome I (n 36).
[167] A 25(2) Croatian Private international law Act (1991) where an insightful solution has been adopted in Croatia in addition to the overriding mandatory rules of the *lex fori.* This Private International Law Act also allows for the application of the overriding mandatory provisions of the place of performance of an obligation following Article 9 (3) of Rome I (n 36).
[168] As in A 7(1) of the Rome Convention (n 78).

Applicable to Agency.[169] Its historical origin[170] in all likelihood stems from the German theory that foreign public laws (especially exchange control and import or export restrictions) should apply if the interests of the forum or those of a third country are not unduly violated.[171] The application of the mandatory provisions of any other country must be justified by both their nature and their purpose.[172]

In deciding whether to give effect to these mandatory rules, consideration must be given to the consequences of their application or non-application.[173] In explaining the application of Article 9(3) and the discretion afforded the courts of member states, the study resorted to the explanation given by the Giuliano and Lagarde Report for Article 7 of the Rome Convention. The Report argues that the judge must be allowed a discretion, particularly where the contradictory mandatory rules of two different countries both purport to apply simultaneously to the same situation and where a choice must be made between them.[174] Providing criteria to determine the consequences of the application or non-application of these mandatory rules would be helpful. This would alleviate the burden on judges and ensure uniformity in the application of these rules.

---

[169] A 16 of the Hague Convention on The Law Applicable to Agency (1978).
[170] Mann *Harmonisation of Private International Law by the EEC'* (1978) Institute of Advanced Legal Studies 31-32.
[171] Lord Collins *et al* (eds) (n 38) 1830.
[172] A 7 of The Giuliano and Lagarde Report (n 78). One delegation had suggested that this should be defined by saying that the nature and purpose of the provisions in question should be established according to internationally recognised criteria (eg, similar laws existing in other countries, or which serve a generally recognised interest). However, other experts pointed out that these international criteria did not exist and consequently that difficulties would be created for the court. Moreover, this formula would touch upon the delicate matter of the credit to be given to foreign legal systems. For these reasons the Group, while not disapproving of the idea, did not adopt this drafting proposal.
[173] A 7 of The Giuliano and Lagarde Report (n 78).
[174] A 7 of The Giuliano and Lagarde Report (n 78).

3.4 CJEU's limitation on overriding mandatory rules

It is essential to take note of the case *Unamar v Navigation Maritime Bulgare*[175] where the European Court set out specific limitations on overriding mandatory rules. Per the facts of this case, Unamar NV, a company incorporated in Belgium, and the Bulgarian company NMB concluded a commercial agency agreement. Unamar was to act as an agent for the operation of NMB's container shipping service. The contract contained a choice of law clause in favour of Bulgarian law and an arbitration clause in favour of the arbitration chamber of the Chamber of Commerce and Industry in Sofia (Bulgaria). The contract was renewed annually until NMB terminated it in 2008. Unamar brought proceedings before the Antwerp Commercial Court and sought compensation. NMB contested the court's jurisdiction based on the parties' arbitration clause in the contract. The Belgian court ruled that it was competent to hear the matter. It further found that regardless of the choice of Bulgarian law by the parties, Article 27 of the Belgian law on commercial agency contracts applied as an "overriding mandatory rule".

The Antwerp Court of Appeal declared that the arbitration clause was valid and that the Antwerp court had no jurisdiction in the matter. Moreover, it ruled that the provisions of Belgian law on commercial agency contracts did not qualify as overriding mandatory provisions. The Court of Appeal held that as Bulgaria had implemented the EU Agency Directive establishing minimum standards for the protection of agents, Unamar received sufficient protection under its choice of law even though Bulgarian law offered less protection than Belgian law. Unamar brought a further appeal, and

[175] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 25.

the Court of Cassation requested a preliminary hearing by the CJEU on the issue whether the Belgian provisions exceeding the scope and the level of protection of the Agency Directive could be applied as overriding mandatory provisions of the *lex fori* within the meaning of Article 7(2) of the Rome Convention – now Article 9 (2) of Rome I – even if the law applicable to the contract was the law of an EU member state in which the minimum protection provided by the Agency Directive had been implemented.

In response the CJEU shared its approach to the concept of overriding mandatory rules. The CJEU referenced the *Arblade* case[176] and Article 9(1) of Rome I although the Regulation was temporally not applicable to the dispute. With this, the CJEU imposed two restrictions on giving effect to overriding mandatory rules. The first was based on the provisions of the EU Treaty. According to the CJEU, the application of national rules shall not undermine the importance of EU law and its uniform application.[177] As regards the second restriction, the CJEU observed that the term "overriding mandatory provisions" should be interpreted strictly to secure the effect of the fundamental principle of freedom of contract. Here, the CJEU expressly considered the relationship between overriding mandatory provisions and party autonomy, the latter being the cornerstone of the Rome Convention and Rome I.[178] The CJEU refused, however, to draw conclusions.[179]

An inference that may be made from the *Unamar* judgment is that national legislatures and courts continue to enjoy a relatively wide margin of appreciation and can even

[176] *Arblade* [1999] Joined Cases C-396/96 and C-376/96 ECR Opinions para 1 8453.
[177] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 46.
[178] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 49.
[179] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 50.

classify a mandatory rule as overriding if that rule is based on a minimum harmonisation Directive but exceeds the protection required by the Directive.[180] The refusal of the CJEU to arrive at a radical conclusion, thereby conferring a discretion on legislators and the courts to classify a mandatory rule as overriding, does not achieve the aim of uniformity sought by the EU. The CJEU provided that "overriding mandatory provisions" should be interpreted strictly but failed expressly to define what will constitute a strict interpretation of these provisions, so confirming the discretion of the legislators and courts of member states.

Consequently, to ensure the protection of weaker parties in consumer contracts of adhesion specifically as regards choice of law, the EU promulgated Articles 3, 6, and 9 of Rome I (discussed above), which, to a large extent, ensure such protection by providing the right of choice of law.[181] In the absence of choice, the applicable law is the law of the consumer's habitual residence.[182]

3.5 Protection offered to consumers in contracts of adhesion under Rome I

In situations where pre-drafted consumer contracts of adhesion contain a choice of law clause and where the weaker party who does not participate in negotiations but consents to the contract, it suffices to argue that Rome I provides dual protection. The first is embedded in Article 6(2) and provides that the parties have a right to choose a governing law under Article 3. This choice may not deprive the consumer of the protection afforded her by provisions that cannot be derogated from by the

[180] Bochove (n 128) 149.
[181] A 3 of Rome I (n 36).
[182] A 6 of Rome I (n 36).

agreement under the law which, in the absence of choice, would have been applicable – the law of the consumer's habitual residence in terms of Article 6(1).[183]

Thus, where a consumer assents to a contract of adhesion which includes a clause on choice of law which represents a choice by the parties, the choice may not deprive the weaker party of protection afforded her under the laws of her habitual residence.[184] This mandatory protection results in a direct application of the substantive law governing protection without resorting to conflict rules of the forum.[185] Therefore, the chosen law will only displace default rules that would otherwise apply. A more obvious interpretation of this mandatory provision, which also reflects the majority opinion in the literature, is that a national court should apply the law that offers the highest level of protection to the consumer regardless of whether that is the chosen law or the law that applies under the objective conflict rules of the forum.[186]

The effect of accepting this interpretation is that the court will first have to identify the mandatory provisions that offer protection under the law of the consumer's habitual residence, and then compare these to the provisions of the chosen law to identify which offers the consumer better protection.[187] This approach to interpretation is more labour intensive than the "substantive choice of law" approach.[188] This notwithstanding, this interpretation provides the weaker party to the contract with the

[183] A 6(2) of Rome I (n 36).
[184] A 19 of Rome I (n 36).
[185] Bochove (n 128) 152.
[186] Bochove (n 128) 152.
[187] Bochove (n 128) 152.
[188] Bochove (n 128) 152.

highest level of protection.[189] Thus, while the this interpretation upholds the parties' right to choose the applicable law,[190] it also gives the stronger party an incentive not to include a choice of law clause in the contract.[191] As a result this approach manages to find a balance between party autonomy and the protection of the weaker party.[192]

The second protection offered in such an instance relates to the overriding mandatory rules of the forum under Article 9.[193] This provision suggests that where a forum assumes jurisdiction in a consumer contract dispute, to the extent that they protect the consumer, the overriding mandatory rules of the forum are a means of protection provided by Rome I. The *Unamar* case[194] illustrated this position. At trial level, the Belgian court ruled that it had jurisdiction to hear the matter and further that regardless of the choice of Bulgarian law by the parties, Article 27 of the Belgian law on commercial agency contracts applied as an overriding mandatory rule. If the Court of Appeal had agreed with the trial court, the Belgian law on commercial agency contracts would have applied as an overriding mandatory rule regardless of the parties' choice.

---

[189] Kuipers (n 146) 104 where Kuipers expresses his doubts as to whether this is in conformity with the rationale behind Article 6(2). He argues that the objective of this provision is to protect the consumer from the negative consequences of a choice of law but is not interested in raising the substantive level of consumer protection. An alternative option would be for the professional party to be given the opportunity to annul the choice of law and opt for applying the law of the consumer's habitual residence.

[190] Proposal for a Regulation of The European Parliament and The Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 7. Also see Lando and Nielsen "The Rome I Proposal" (2007) *JPIL* 39-40 where in the proposal for Rome I outrightly eliminated party autonomy for consumer contracts in ensuring efficiency international consumer contracts without affecting the substance of the professional's room for manoeuvre in drawing up his or her contracts. This proposed solution was, however, subject to heavy criticism and was therefore not included in the final Regulation.

[191] Bochove (n 128) 152.

[192] Bochove (n 128)152.

[193] A 9(2) of Rome I (n 36).

[194] *Unamar v Navigation Maritime Bulgare* (2013) Case C184/12 para 50.

The Belgian Supreme Court agreed with the trial court. It held that the Law on Commercial Agency Agreements satisfies the conditions set out in the CJEU and the mandatory provision of the Belgian law. The Supreme Court thus set aside the judgment of the Antwerp Court of Appeal.

3.7 Position of Denmark on consumer contracts of adhesion

The twentieth century, which marked significant development of private international law in various jurisdictions, also witnessed the development of Danish private international law. This development was evident in Denmark's ratification of the Hague Convention on the Law Applicable to International Sale of Goods 1955 and the Rome Convention in 1980, which essentially reaffirmed existing principles in Danish law such as party autonomy and the closest-connection test.[195] Rome I, although an EU Regulation, does not apply to Denmark.[196] Based on the Danish reservations to the EU Treaties,[197] most of the critical regulations on cross-border jurisdiction, choice of law, and the recognition and enforcement of judgments that the EU has adopted are not in force in Denmark.[198] Since Rome I does not bind Denmark, Denmark is the only EU member state where the Rome Convention, the predecessor to Rome I, remains

[195] Basedow, Rühl, Ferrari, *et al Encyclopaedia of Private International Law* "Denmark"2022-2036.
[196] R 46 of Rome I (n 36) which provides that in accordance with Articles 1 and 2 of the Protocol on the position of Denmark annexed to the Treaty on European Union and to the Treaty establishing the European Community, Denmark is not taking part in the adoption of this Regulation and is not bound by it or subject to its application.
[197] Protocol (No 19) on the Schengen Acquis Integrated into The Framework of The European Union Articles 1, 2 and 3 annexed in the Treaty on European Union. Consolidated Versions of The Treaty on European Union and The Treaty on The Functioning of The European Union (2012/C 326/01).
[198] Basedow, Rühl, Ferrari, *et al* (n 195) 2020-2036.

in force and is subject to development by Danish courts together with the case law of the CJEU on private international law.[199]

3.8 Summary

To a large extent, the EU has put in place measures to ensure the protection of consumers in international consumer contracts of adhesion. This is reflected in Articles 3, 6, and 9 of Rome I[200] which, although they may appear sufficient, are not in fact so (see the loopholes in Articles 6 and 9 discussed above). One meaningful action taken by the EU which is worth commending is to ensure uniformity between Rome I and Brussels Recast.[201] This is clear from the uniform definition of a consumer in Article 6(1) of Rome I and Article 17 of Brussels Recast.[202] Aside from the EU's initiative to protect weaker consumer parties in Rome I, other initiatives have been taken to ensure the protection of weaker parties.

4 Other EU Directives on consumer contracts of adhesion

Apart from Rome I which seeks to offer some solutions for the protection of consumers, the EU has other legal instruments and Directives with the same aim. Directives are EU laws that a country must first transpose into national law and then apply. They provide a level playing field for national legal systems by harmonising the laws of member states.[203] Directives require EU countries to achieve a specific result

[199] Basedow, Rühl, Ferrari *et al* (n 195) 2020-2036.
[200] A 3 and A 4 of Rome 1 (n 36).
[201] R 24 of Rome 1 (n 36).
[202] A 17 of Brussels Recast (n 77).
[203] Duina 1997 *IJSL* 155–179.

but leave them free to choose how to do so. EU countries must adopt measures to incorporate (transpose) the Directives into national law to realise the objectives set by the Directive. National authorities must communicate the measures they take in this regard to the European Commission.[204]

We turn now to how these Directives on consumer protection affect international consumer contracts in private international law. It is essential to point out that these EU Directives are not uniform laws or EU Regulations. Unlike EU Regulations which aim to unify laws in the region, the Directives are model laws which EU member states are encouraged to adopt and domesticate to ensure harmony in dealing with specific legal issues within the region. The need for these model laws lies in the fact that although members states of the EU, these states remain sovereign entities with the right to promulgate legal instruments governing different legal issues in their territories.[205] Member states are, consequently, not compelled to implement EU Directives but are encouraged to do so. This means that unless these laws have been incorporated in the national laws of the member states, they have only limited effect.[206]

4.1 Directive on unfair commercial practices

The most important of these Directives is the Directive on Unfair Commercial Practices.[207] This Directive aims to contribute to the proper functioning of the internal

[204] EU Website https://ec.europa.eu/info/law/law-making-process/types-eu-law_en accessed 12 May 2021.
[205] Twigg-Flesner 2011 *ERCL* 238.
[206] Twigg-Flesner (n 205) 238.
[207] Collins 2010 *MLR* 89.

market and to achieve a high level of consumer protection by approximating the laws, regulations, and administrative provisions of the member states on unfair commercial practices which harm consumers' economic interests.[208] This Directive deviates from the initial purpose of EU Directives which is to achieve a "minimum standard"[209] of unification and advocates for harmonisation[210].

A careful analysis of the Directive suggests the creation of harmonised rules to govern all marketing practices intended to induce consumers to purchase goods and services.[211] To ensure consumer protection, the Directive on Unfair Commercial Practices extends to misleading advertising, false claims about products and services, deceptive pricing, high-pressure sales techniques, and similar practices.[212] It illustrates an evolving confidence and a strategic approach shared by the Commission, the Council of Ministers, and the European Parliament.[213]

The Council of the EU's objective is to provide consumers and businesses with a single regulatory framework based on clearly defined legal concepts regulating all aspects of

[208] Boele-Woelki (n 19) 273-461.
[209] Kunnecke 2014 *ESJ* 426-437 where he argues that: "Minimum harmonisation has been used in the area of consumer protection in the past as a compromise because member states' legal instrument already existed or had recently been adopted and these member states were not yet prepared to accept a binding common standard of consumer rights protection. The minimum standard principle reduced the differences in national legal instrument by opposing a lower or zero protection, while allowing advanced member states to maintain their higher protection standards or to provide better protection measures in the harmonised areas. In this way, the average standard of consumer rights protection in the EU was raised. The Court of Justice of the EU also accepted the minimum harmonisation approach but set limits to its minimum protection clauses under aspects of the internal market and the proportionality criteria based on the decision in *Germany vs EP and Council*, C-376/98 [2000] ECR I-8419."
[210] Boele-Woelki (n 19) 273-461.
[211] Collins (n 207) 89.
[212] Collins (n 207) 89.
[213] Commission, EU Policy Strategy 2007-2013: Empowering Consumers, enhancing their Welfare, Effectively Protecting Them, Brussels 13.3.2007 COM (2007) 99 final.

unfair commercial practices.[214] The strategic approach shared by the Commission, the Council of Ministers, and the European Parliament is evident in the specific rules promulgated in the Directive to ensure harmonisation of the divergent national positions in member states. This significantly increases legal certainty for both consumers and businesses.[215] The result of the Directive is to eliminate the barriers stemming from the fragmentation of the rules on unfair commercial practices which harm consumer economic interests and enable a harmonised internal market to be realised in this area.[216] Annex I to the Directive identifies unfair commercial practices to provide greater legal certainty in all circumstances. It contains the complete list of all such practices[217] which are the only commercial practices that can be deemed unfair without a case-by-case assessment against the provisions of Articles 5 to 9. It further provides that the list may only be modified by revision of the Directive.[218]

For the stipulated objective of the Community to be achieved, the Directive on Unfair Commercial Practices provides that member states must have adopted and published the laws, regulations, and administrative provisions necessary to comply with the Directive by 12 June 2007.[219] The member states must have informed the Commission of their actions in this regard and do so in regard to subsequent amendments without delay. They should have applied those measures by 12 December 2007.[220] When

[214] R 12 of Directive 2005/29/EC of The European Parliament and of The Council of 11 May 2005 concerning unfair business-to-consumer commercial practices in the internal market and amending Council Directive 84/450/EEC, Directives 97/7/EC, 98/27/EC and 2002/65/EC of the European Parliament and of the Council and Regulation (EC) No 2006/2004 of the European Parliament and of the Council (Unfair Commercial Practices Directive).
[215] R 12 of Directive 2005/29/EC (n 214).
[216] R 12 of Directive 2005/29/EC (n 214).
[217] R 11 of Directive 2005/29/EC (n 214).
[218] R 17 of Directive 2005/29/EC (n 214).
[219] A 19 of Directive 2005/29/EC (n 214).
[220] A 19 of Directive 2005/29/EC (n 214).

adopting these measures, member states reference to the Directive must be included or such reference must appear on their official publication. It was up to the member states to decide the form which such reference should take.[221] Unlike the other Directives promulgated after this Directive, the Unfair Commercial Practices does not include a provision for the level of harmonisation.[222] Rather, it promulgates a provision on the transposition of the Directive into the national law of member states.

The absence of a provision which provides "maximum standards" raises the question whether the member states can maintain or introduce provisions in their national law which diverge from those laid down in the Directive. The question then arising is whether such an omission will hamper the Community's objective of harmonisation. However, the Directive does not hamper harmonisation but rather provides for a "maximum standard" for achieving harmonisation.[223] Perhaps it is for this reason that subsequent Directives on consumer protection expressly provide for this level of harmonisation.[224]

Whether the EU will succeed in its goal of establishing harmonised laws amid obstacles raised by the wide divergence in the national traditions of member states has been a debate engaged in by several legal scholars. The debate focuses, in the main, on the

[221] A 19 of Directive 2005/29/EC (n 214).
[222] See for example A 4 of Directive of The European Parliament and of The Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC (Text with EEA relevance), which provides that: "Member States shall not maintain or introduce, in their national law, provisions diverging from those laid down in this Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided for in this Directive".
[223] R 12 Directive 2005/29/EC (n 214) on the Objective of Attaining Harmonisation by the Community.
[224] Twigg-Flesner and Metcalfe 2009 *ERCL* 371-373.

point of convergence, even if the goal of achieving a harmonised law is impossible.[225] Implementing these Directives in the member states ensures that they are incorporated into the states' existing laws. It has been argued that it is not difficult to foresee that notwithstanding the harmonising efforts of the Directive, variations between national laws and practice will persist, and indeed that new divergence will arise due to the peculiarities surrounding the processes of interpretation.[226] Officials and judges will continue to construe the new laws in the light of national traditions and the context in which the European procedures are employed, thereby generating a new divergence arising from the differences in the national traditions of member states.[227] To resolve this problem the European Commission proposed the development of a "Common Frame of Reference" in addition to clarifying and consolidating the existing Directive on the Unfair Commercial Practices. This should provide common ideas, concepts, and guidance for courts when interpreting the legal instrument implementing Directives that affect private law.[228]

Two main reasons have ensured a sporadic harmonisation of consumer protection. As a result of the Directive on Unfair Commercial Practices setting only minimum

[225] Collins *The European Civil Code: The Way Forward* 125 where he argues that any proposal to enhance the powers of the European Union, to introduce new laws, and to eliminate the significance of national borders inevitably provokes questions about the appropriate balance between centralised uniformity and national diversity. How does the desire to preserve and enhance the artistic, literary, and intellectual diversity of European countries and regions fit with the ambition to evolve towards an ever-closer Union? Does the European Union serve to strengthen or damage the many cultures of the peoples of Europe?
[226] Collins (n 225) 91.
[227] Teubner 1998 *MLR* 12.
[228] Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law: An Action Plan, Brussels, 12.2.2003 COM (2003) 68 final; Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the acquis: The Way Forward, Brussels 11.10.2004 COM (2004) 651 final.

standards for securing harmonisation,[229] earlier Directives allowed the member states to retain their existing laws to the extent that the laws do not provide inferior consumer protection.[230] This flexibility allows considerable divergence between national laws. The second reason for this apparent success of consumer law is the narrow, sector-specific focus of many Directives, or their only partial regulation of a specific field. Earlier Directives were restricted to marketing techniques such as doorstep sales,[231] or to market sectors such as package holidays.[232]

With the two prominent positions that previously ensured the realisation of harmonisation, the Directive on Unfair Commercial Practices varies considerably from the earlier EU consumer law Directives in that the Unfair Consumer Practices Directive first provides comprehensive rules prohibiting unfair trading practices throughout Europe.[233] The second reason is that the Directive requires "full harmonisation"[234] of national laws in terms of its principles and rules as opposed to mere conformity to minimum standards.[235] It is suggested that the position taken by this Directive seeks to pre-empt national law in business practices aimed at encouraging consumers to purchase goods and services.[236]

---

[229] Weatherill *EU Consumer Law and Policy* 133-134.
[230] Collins (n 225) 92.
[231] Directive 85/577 to protect the consumer in respect of contracts negotiated away from business premises [1985] OJ L372/31.
[232] Directive 90/314 on package travel [1990] OJ L158/59.
[233] Collins (n 225) 93 where it is argued based on the Directive that such unfair practices may include misleading statements and advertising, aggressive selling techniques, prevarication and obstruction in the face of complaints, and, potentially, all the other tricks and devices used by dishonest traders to manipulate consumers' purchasing decisions. As well this broad coverage of all unfair commercial practices, the Directive differs from other legal instrument of the past 20 years.
[234] Discussion on harmonisation in Smits 2010 *ERPL* 5-14.
[235] Collins (n 225) 93.
[236] Collins (n 225) 93.

However, the pre-emption of national laws may not achieve harmonised laws throughout Europe. Although member states may implement the Directive by simply copying its provisions verbatim, issues of differences in language, traditions, philosophies, and practice will continue to fuel divergence in its interpretation and application.[237] Some member states also kicked against the Directive before its promulgation. Their arguments, although laudable, did not prevent the implementation of the Directive on Unfair Commercial Practices. Countries like Denmark and Sweden ultimately opposed the promulgation of the Directive in the fear that it would compel member states to lower their levels of protection in situations where national laws for the protection of consumers were higher than those provided in the Directive.[238]

Another reason for the opposition to harmonisation as stated in the Directive was the fear that the legal instrument would trap the EU in a particular model of regulation of marketing practices which would be difficult to reverse and would exclude further research into other marketing practices by member states.[239] This concern reflects the ongoing suspicion of the rigidity of codified laws, predominantly when their global operation effectively prevents rapid reform.[240] The Directive on Unfair Commercial Practices permits some time-limited preservation of national consumer laws ensuring better consumer protection, and measures put in place to implement previous EC

[237] Collins (n 225) 93.
[238] Collins (n 225) 94.
[239] Collins (n 225) 94.
[240] Wilhelmsson 2002 *ERPL* 77.

Directives. Even this permission to retain certain national laws may be challenged by the Commission as extreme.[241]

4.2 Directive on consumer rights

Another important Directive worth considering is Directive 2011/83/EU on Consumer Rights.[242] This Directive aims to contribute to the proper functioning of the internal market by approximating certain aspects of the laws and administrative provisions of member states regarding contracts concluded between consumers and traders.[243] The Directive is a single set of standard rules for the common aspects of distance and off-premises contracts, moving away from the minimum harmonisation approach in the former Directives while allowing member states to maintain or adopt national rules governing certain aspects.[244]

This Directive arose in response to Article 169(1) and Article 169(2)(a) of the Treaty on the Functioning of the European Union (TFEU), which provide that the Union must contribute to the realisation of a high level of consumer protection through the measures adopted pursuant to Article 114.[245] Thus, in terms of Article 26(2) of TFEU, the internal market comprises an area without internal frontiers in which the free movement of goods and services and freedom of establishment are ensured. The harmonisation of certain aspects of consumer distance and off-premises contracts is necessary to promote a real consumer internal market and to strike the correct balance

[241] A 3(5) of Directive 2005/29/EC (n 214).
[242] Directive 2011/83/EU (n 31). Also see the discussion of this Directive in Twigg-Flesner and Metcalfe (n 224) 371-373.
[243] A I of Directive 2011/83/EU (n 31).
[244] R 2 of Directive 2011/83/EU (n 31).
[245] R 3 of Directive 2011/83/EU (n 31).

between a high level of consumer protection and the competitiveness of enterprises while also ensuring respect for the principle of subsidiarity.

As regards application, Article 3 provides that the Directive shall apply to any contract concluded between a trader and a consumer under the conditions and to the extent set out in its provisions. Moreover, it shall apply to contracts for the supply of water, gas, electricity, or district heating – including by public providers – to the extent that these commodities are provided on a contractual basis.[246] Article 3(3) lists the types of consumer contracts to which the Directive does not apply.[247] Moreover, if any provision in the Directive conflicts with a provision in another EU law governing specific sectors, the provision of the other EU law prevails and shall apply.[248] This provision addresses the conflict between applying an EU law and a Directive, and provides clearly that the EU law enjoys precedence over the Directive.[249]

In ensuring harmonisation, the Directive on Consumer Rights provides that the member states shall not maintain or introduce in their national law, provisions diverging from those laid down in the Directive – including more or less stringent provisions to ensure a different level of consumer protection – unless otherwise provided for in the Directive.[250] Thus, the minimum harmonisation approach has been abandoned and the Directive on Consumer Rights is based on targeted harmonisation. Furthermore, Recital 5 and Article 4 of the Directive secure harmonised high levels of consumer protection and the better functioning of the business-to-consumer internal

[246] A 3 Directive 2011/83/EU (n 31).
[247] A 3 (3) Directive 2011/83/EU (n 31).
[248] A 3(2) Directive 2011/83/EU (n 31).
[249] Boele-Woelki (n 19) 273-461.
[250] A 4 Directive 2011/83/EU (n 31).

market.[251] Although reasonable, Article 4 suggests that where a member state has a stricter position on the protection of consumers who fall within the remit of the Directive, such laws must be repealed. This initiative ensures a high level of protection.[252] Recital 15 indicates that the Directive should not harmonise language requirements applicable to consumer contracts. Therefore, member states may maintain or introduce in their national law language requirements regarding contractual information and contractual terms.[253] The difference in language and its interpretation will result in divergence rather than the harmony sought.

Moreover, the Directive[254] provides that if the law applicable to a contract is the law of a member state, consumers may not waive the rights conferred on them by the national measures incorporating the Directive. Any contractual terms which directly or indirectly waive or restrict the rights resulting from the Directive are not binding on

[251] Bezáková 2013 *MUJLT* 181.
[252] Collins (n 225) 89. This situation was a similar position the UK had to face in implementing the Directive by the Consumer Protection from Unfair Trading Regulations 2008, which entered into force on 26 May 2008. To satisfy the requirement of full harmonisation, these UK Regulations necessarily enacted a major spring clean of the existing national consumer law. Schedule 4 to the Regulations refers to 40 primary legal instruments and 36 statutory instruments which needed to be repealed or revised. Repealed legal instruments include some cornerstones of domestic consumer protection law: the Trade Descriptions Act 1968 ss 1(1), 5-10, 13-15, the Consumer Protection Act 1987 ss 20-26 (misleading price indications), and the Control of Misleading Advertising Regulations 1988. The list of repeals also includes some quaint items, such as the Fraudulent Mediums Act 1951, a measure to catch persons who, with intent to deceive, pretend to be in touch with dead relatives by spiritualistic methods. The UK government reported that the repeals includeed all the most important laws governing the regulation of commercial practices, judged by reference to the fact that they accounted for over 95% of the prosecutions in the field. The content of the UK Regulations tracks closely the structure and words of the underlying Directive. The principal differences arise from the need to specify repeals of existing domestic legal instruments and to provide the details of the methods of enforcement.
[253] R 15 Directive 2011/83/EU (n 31) provides that: "This Directive should not harmonise language requirements applicable to consumer contracts. Therefore, Member States may maintain or introduce in their national law language requirements regarding contractual information and contractual terms."
[254] Directive 2011/83/EU (n 31).

the consumer.[255] In ensuring the protection of the weaker party, the provision uses the phrase "may not". This suggests a loose application of the provision, but this is not the case. An interpretation of the Directive suggests that even if the consumer waives her rights under this provision, she still enjoys its protection.[256] The position taken in Article 25 of the Directive suggests the application of a mandatory provision irrespective of the autonomy reflected by the parties in their contract.

On the issue of harmonisation it has been suggested that to avoid reducing the laws on consumer protection by the member states, the Directive does not practice full harmonisation but instead follows the principle of targeted harmonisation.[257] The Directive on Consumer Rights excludes from full harmonisation matters which concern additional pre-contractual information requirements for distance, off-premises, and other contracts, and leaves these to be expressly decided by the member states. It is also the prerogative of member states to decide the consequences of a breach of the pre-contractual information requirements – with the exception of extending the right of withdrawal.[258]

The implication is that the full harmonisation sought by the Directive does not cover all fields but allows space for the member states to adopt or maintain autonomous regulations for problems that are not addressed or covered by the Directive.[259] This approach is in perfect harmony with the shared competence of the EU and its member

[255] A 25 of Directive 2011/83/EU (n 31).
[256] R 58 of Directive 2011/83/EU (n 31).
[257] Discussions on targeted full harmonisation in Micklitz *The Targeted Full Harmonisation Approach: Looking Behind the Curtain* 47-86.
[258] Kunnecke (209) 431.
[259] Kunnecke (209) 431.

states in the area of consumer protection in terms of Article 4 II of TEU, the principles of sincere cooperation in Article 4 III TEU, and subsidiarity in Article 5 III TEU.[260]

The Directive assists consumers to make well-informed decisions on whether or not to purchase goods or services from a particular trader. To a large extent, the Directive ensures higher protection of consumers in distance selling and off-premises contracts, especially as regards their information and withdrawal rights.[261] Moreover, the Directive extends the cooling-off period and determines the rights and duties for both contracting parties[262] and ensures that the consumer can exercise her right of withdrawal.[263]

Regardless of these successes, the Directive is not without shortcomings. By leaving the outcomes of a breach of the pre-contractual information requirements – with the exception of extending the right of withdrawal – to the member states, the Directive fails to achieve its goal of harmonisation.[264] For instance, if a breach in providing the consumer with the required information leads to a claim for damages in one member state but has no legal consequences in another member state, the diversity in standards of consumer protection is widened rather than reduced.

4.3 Directive on certain aspects concerning contracts for the supply of digital content and digital services

[260] Kunnecke (209) 431.
[261] R 9 and 6 of Directive 2011/83/EU (n 31).
[262] A 6, 9 and 13 of Directive 2011/83/EU (n 31)
[263] R 37, A 6 and 9 of Directive 2011/83/EU (n 31); Geraint, Twigg-Flesner, and Wilhelmsson *Rethinking EU Consumer Law* 99-106.
[264] A 5(4) of Directive 2011/83/EU (n 31).

Another Directive which seeks to protect the interests and rights of the EU consumer is Directive (EU) 2019/770 [265] which is aimed at contributing to the proper functioning of the internal market while providing a high level of consumer protection by establishing common rules on specific requirements for contracts between traders and consumers for the supply of digital content or digital services.[266] In ensuring harmonisation of laws in the region, the Directive provides that member states shall not maintain or introduce provisions in their national law which deviate from those laid down in the Directive, including more or less stringent provisions to ensure a different level of consumer protection, unless otherwise provided in this Directive.[267]

Article 22 of the Directive addresses the mandatory nature of this provision. It provides that unless otherwise provided in this Directive, any contractual term which, to the detriment of the consumer, excludes the application of the national measures incorporating the Directive, derogates from them, or varies their effect before the failure to supply or the lack of conformity is brought to the trader's attention by the consumer, or before the modification of the digital content or digital service per Article 19 is brought to the consumer's attention by the trader, shall not be binding on the consumer. This Directive shall not prevent the trader from offering the consumer contractual arrangements more advantageous than the protection provided in this Directive.

4.4 Directive on contracts for the sale of goods

[265] Directive (EU) 2019/770 (n 32).
[266] A 1 of Directive (EU) 2019/770 (n 32).
[267] A 4 of Directive (EU) 2019/770 (n 32).

Directive (EU) 2019/771[268] which addresses contracts for the sale of goods, also provides some protection for consumers. This arises from the purpose of the Directive which is to contribute to the proper functioning of the internal market while providing for a high level of consumer protection by establishing common rules in respect of certain requirements regarding sales contracts concluded between sellers and consumers. This includes, in particular, rules on the conformity of goods with the contract, remedies in the event of a lack of such conformity, the modalities for the exercise of those remedies, and commercial guarantees.[269] This Directive applies to sales contracts between a consumer and a seller.[270] Contracts between a consumer and a seller for the supply of goods to be manufactured or produced shall also be deemed sales contracts for purposes of the Directive.[271]

The Directive also aims to achieve unification in the EU. In this regard it provides that the member states shall not maintain or introduce in their national law, provisions diverging from those in the Directive – including more or less stringent provisions to ensure a different level of consumer protection – unless the Directive provides otherwise.[272] As regards the protection of the consumer, Article 10 of the Directive addresses the seller's liability when the goods do not conform to what was agreed. The Directive provides that member states must take appropriate measures to ensure that information on the rights of consumers under the Directive and on the means of

[268] Directive (Eu) 2019/771 of The European Parliament and of The Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394 and Directive 2009/22/EC, and repealing Directive 1999/44/EC.
[269] A 1 of Directive (EU) 2019/771 (n 268).
[270] A 3 of Directive (EU) 2019/771 (n 268).
[271] A 3 of Directive (EU) 2019/771 (n 268).
[272] A 4 of Directive (EU) 2019/771 (n 268).

enforcing those rights are available to consumers.[273] The mandatory nature of the Directive also serves as a means of protecting weaker parties.

The Directive states that unless it provides otherwise, any contractual term which, to the detriment of the consumer, excludes the application of the national measures incorporating the Directive, derogates from them, or varies their effects before the failure to supply or the lack of conformity is brought to the trader's attention by the consumer, or before the modification of the digital content or digital service in terms of Article 19 is brought to the consumer's attention by the trader, shall not be binding on the consumer.[274] Moreover, the Directive does not prevent the trader from offering the consumer contractual arrangements which exceed the protection provided in the Directive.[275]

Apart from Rome I which in the case of consumer contracts protects consumers through choice of law rules, the discussions above show that EU Directives are also aimed at protecting consumers. It is essential to note that these Directives do not refer to choice of law rules applicable to disputes as dealt with in Rome I. This position implies that in settling a dispute which falls within the remit of these Directives, the court must resort to Rome I on choice of law rules applicable to consumers.[276]

The Directives discussed above provide a high level of protection for consumers in consumer contracts of adhesion. But this milestone by the EU is not without its shortcomings. In situations where a member state has a higher set of rules, the

[273] A 20 of Directive (EU) 2019/771 (n 268).
[274] A 22 of Directive (EU) 2019/771 (n 268).
[275] A 22 of Directive (EU) 2019/771 (n 268).
[276] R 6 of Rome I (n 36).

wording of these Directives suggests that to achieve the objective of unification, those laws must be repealed to make way for the incorporation of these Directives.[277] In situations where the national law offers better protection for the consumer than the uniform law, the implementation of the EU law will threaten the protection sought to be afforded to consumers. This initiative raises the spectre of rigid codes as predicted by certain member states, eg, the United Kingdom.[278]

5 Conclusion

The aim of the Council of the EU in promulgating provisions to protect consumers as weaker parties in Rome I is praiseworthy.[279] The problem which the EU seeks to solve appears to be Currie's "true conflict" – a problem which arises when the policies behind the laws of at least one sovereign member state are preferred over those based on the circumstances of a case which presents the possibility of more than one applicable law.[280] If this is indeed so, the EU parliament has by-and-large succeeded in implementing laws which offer solutions to these matters as Reynolds argues that this is a legislative mandate and not an obligation vesting in a court.[281]

The aim is to ensure the proper functioning of the internal market, thereby creating a need for uniform laws to improve the predictability of the outcome of litigation, provide certainty as to the law applicable and the free movement of judgments, for the choice

[277] Collins (n 207) 4-6 on UK repealing legislation.
[278] Collins (n 207) 4-6 on UK repealing legislation.
[279] See R 1 and R2 of Rome I (n 36) which provides that: "For the progressive establishment of such an area, the Community is to adopt measures relating to judicial cooperation in civil matters with a cross-border impact to the extent necessary for the proper functioning of the internal market. (2) According to Article 65, point (b) of the Treaty, these measures are to include those promoting the compatibility of the rules applicable in the Member States concerning the conflict of laws and of jurisdiction."
[280] Reynold 1997 *MLR* 1371.
[281] Reynolds (n 280) 1382.

of law rules in the member states to designate the same national law irrespective of the country of the court in which an action is brought.[282] The EU has sought to ensure a high level of protection for consumers, especially in choice of law. This is clear from its promulgation of Article 6 of Rome I which provides specific guidelines on choice of law in consumer adhesion contracts. In addition, Article 9, which applies mandatory rules, has been implemented. To ensure further protection for the consumer, other EU Directives (discussed above) have been promulgated and taken up in the national law of member states.

The EU initiatives, although laudable, may hold seeds of destruction. The quest to establish a single set of choice of law rules which applies to all member states with diverse social, cultural, ethical, and philosophical ideologies is perhaps an ambitious time bomb waiting to explode. This is clear from the unexpected exit of the UK from the EU. It is perhaps too idealistic to assume that a single set of rules on choice of law can ensure justice in the myriad and varied circumstances arising from cases emerging from consumer contractual disputes amongst the member states. There is the need to bear in mind that rules will not bind courts at the expense of justice.[283]

This implies that when justice requires, rules will be ignored.[284] It could be argued that these EU laws ensure the attainment of justice to the extent that they allow judges a discretion in certain instances.[285] This, however, also means that judges may side-step the unification sought by the EU. This position is validated by Rome I. Article 6 (3) provides that where the requirements in points (a) or (b) of paragraph 1 are not

[282] R 6 of Rome I (n 36).
[283] Reynolds (n 280) 1380.
[284] Reynolds (n 280) 1380.
[285] A 5(4) of Directive 2011/83/EU (n 17).

fulfilled, the law applicable to a contract between a consumer and a professional shall be determined in terms of Articles 3 and 4 of the Regulation. Article 4(3)[286] of Rome I opens the door to the close-connection test, which in the discretion of the presiding judge may override the rules set out in Rome I and specifically in Article 6.

The EU's goal of ensuring certainty and predictability in the internal market[287] stems from an illusion that bedevils students of conflict of laws – that somewhere there is a single set of choice of law rules capable of resolving real cases free of manipulation by result-oriented judges.[288] It has been argued that this myth has had an enormous and negative impact on contemporary thought on choice of law.[289] The impact it has had on the EU is positive, although not absolute. Regardless of the opposition raised to the promulgation of some of these EU laws,[290] the EU has succeeded in implementing them for consumer adhesion contracts. This success, although commendable, shoots itself in the foot as the introduction of the close-connection test under Article 4 of Rome I allows a judge room to apply laws which favour the public interest of a specific member state.

5.1 Recommendation on harmonisation

The issue of minimum and maximum harmonisation is another area demanding attention. The EU consistently uses the phrase "maximum harmonisation" which aims

[286] A 4(3) of Rome I (n 36) provides that: "Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."
[287] R 6 of Rome I (n 22).
[288] Reynolds (n 280) 1379.
[289] Reynolds (n 280) 1379.
[290] See discussions in Collins (n 207) 4-6 on UK repealing legislation.

to unify the EU's laws.[291] The move to unification has raised doubts amongst member states, especially on the issue of the sovereign right of member states to make their own laws.[292] To avoid these concerns, a proposed measure that the EU may adopt is "partial unification" which allows room for modification of EU laws to suit the social, ethical, political, and philosophical ideologies of each member state while upholding in the rules established at EU level. In doing so, where national laws on consumer adhesion contracts provide greater protection than that offered at EU level, the national laws prevail but do not infringe on the protection provided in the EU laws.

In situations where member states' national laws provide a lower protection than that in the EU laws, the latter are seen to provide harmonisation which laws of member states are obliged to meet. This represents a transposition of EU laws into the national laws of member states. The EU must further ensure that the laws implemented by member states, and which offer greater protection, inure to the benefit of consumers from other member states and are not detrimental to them. This approach nullifies the rigidity of implementing codes which may not be amended or modified. It also limits situations in which member states may withdraw from the EU leading to the collapse of the supranational organisation.

This chapter contributes to the current literature on the EU's position on consumer contracts of adhesion. The focus was on an examination of the EU choice of law rules on consumer contracts of adhesion and the role these rules play in consumer contracts. The study reviewed these provisions, as well as analysed these provisions to determine whether Rome I had impacted positively or otherwise on consumer

[291] Boele-Woelki (n 19) 273-461.
[292] Collins (n 225) 94.

contractual activities within the EU. The research considered other Directives of the EU read in tandem with Rome I. This chapter has explained the role of EU choice of law rules on contracts of adhesion. However, choice of law rules on consumer contracts is a debate in the USA and the next chapter focuses on the position of USA, with specific reference to the state of California.

Chapter four: Choice of law rules on consumer adhesion contracts – An analysis of the position in United States of America with specific reference to California

1 Introduction

A dilemma facing a federal or civil court is to determine whether a state law applies in inter-state and international cases.[1] This arises in both state and federal courts in the USA, particularly when considering cases where the laws of more than one state or jurisdiction are applicable based on the peculiarities of the case.[2] One proposal for resolving this problem is that rules applicable in domestic cases generally apply in international cases.[3] This claim must be carefully considered to ensure that federal common law does not replace state law save when federal interests are extraordinarily persuasive.[4] In support of this idea, Chow has suggested that "when the use of state law to decide the international choice of law issues may compromise significant federal interests, federal and state courts should apply a federal common law rule that pre-empts state law".[5]

A constitutional interpretation of the preceding proposition indicates that whenever the choice of state law by a court might obstruct the application of foreign relations powers accredited to the federal government, federal common law should replace state law.[6] Therefore, where a court is to decide the law applicable to a dispute, one may assume that the court first considers the law of the state which is best suited to

[1] Nafziger 1990 *PILR* 67.
[2] Nafziger (n 1) 67.
[3] Nafziger (n 1) 67.
[4] Nafziger (n 1) 67.
[5] Chow 1988 *ILR* 165.
[6] Chow (n 5) 169.

be applied based on the surrounding circumstances of each case, and only applies the federal laws when the application of the state law may compromise significant federal interests.

The determination of the applicable law in consumer adhesion contracts generally follows a pattern in terms of which the conflict of laws regime of a jurisdiction is, in the main, applied to a dispute based on the surrounding circumstances of the issue at hand and the terms of the contract. It is important to note that the USA does not have a federal contract law. Instead, the various states apply their individual contract law. This notwithstanding, there is the Uniform Commercial Code (UCC) although it is not binding on the states.[7] It is recommended to the states as a uniform state law to unify the USA's commercial contract laws.[8] While it is hoped that the Code will become the uniform law of all the states and territories, there is no certainty whether or when this unification will be achieved.[9] Section 1-301 of the UCC, which is substantively identical to former section 1-105, provides that in situations where a transaction bears a "reasonable relation" to the specified state and also to another state or nation, the parties may, as a rule, consent to the law of either the specified state or the other state or nation to govern their rights and duties under the transaction.[10]

1.1 Party autonomy in the USA

The principle of party autonomy has long not been accepted in the USA. The phrase "parties generally may consent that the law either of the specified state or the other

[7] Rheinstein 1951 *LCP* 114.
[8] Rheinstein (n 7) 114.
[9] Rheinstein (n 7) 114.
[10] S 1-301(a) of the Uniform Commercial Code USA 1952.

state or nation governs their rights and duties under the transaction" suggests an introduction of party autonomy. This is, however, not the view of most legal writers.[11] Amongst this opposition, the most vehement critic is Beale. Beale's disapproval of autonomy was realised in the Restatement (First) of Conflicts.[12] The position taken by Beale was in contrast to the conflict rules of other countries and did not reflect the decisions of US courts.[13] Beale's main objection was that if the parties were permitted to choose the applicable law, they would free themselves from the power of the law which would otherwise apply, and thus perform a legislative act.[14]

Beale argued that the extraordinary power of legal instruments in the hands of individuals was anomalous.[15] Cook refuted this; he identified that what constituted the applicable law in a conflict was determined by the acts of legislations in situations where an inaccurate assumption was made that a different law was otherwise applicable.[16] Cook argued that using a rule like "place of performance" was only proper when the parties had not chosen the applicable law. Therefore, a party stipulation was not a legal instrument since there never was a proper law of the contract to replace.[17] The ultimate result of Cook's efforts is that virtually no current writer argues that autonomy is entirely impossible. Rather, arguments on party autonomy in the USA are concentrated on the limitation to its application.[18]

[11] Yntema 1955 *AJCL* 341-358.
[12] Burton 1960 *AJCL* 463.
[13] Nussbaum 1942 *YLJ* 893-923.
[14] Burton (n 12) 463.
[15] Beale 1910 *HLR* 260 7-9.
[16] Cook 1932 *ILR* 423-432.
[17] Cook (n 16) 423-432.
[18] Cook (n 16) 423-432.

1.2 The Uniform Commercial Code on consumer contracts

The Uniform Commercial Code (UCC) provides that where the contract omits a valid choice of the substantive state law applicable to the terms of the contract, the substantive law of the jurisdiction that has an "appropriate relation" to the transaction governs the rights and duties.[19] Further, it is provided that if one of the following provisions captured in the UCC section 1-301(c)(1-7) specifies the applicable law, that provision governs and a contrary agreement is effective only to the extent permitted by the law.[20] This provision excludes consumer leases from the rules applied to choice of law as stated in the UCC. On consumer leases, the UCC provides that if the law chosen by the parties to a consumer lease is that of a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter, the chosen law is not enforceable.[21] The pertinent section of the UCC, section 1-301, does not contain a public policy limitation. While this may appear beneficial to the principle of party autonomy, the UCC is not void of restrictions.

The UCC restricts party autonomy through the limits of the *lex causae*.[22] Thus, the "law so specified" as applicable to the particular transaction in the absence of party choice by the *lex causae* describes the limitation on party autonomy under the UCC regime.[23] The commission of the UCC has attempted to revise the UCC, but this revision was withdrawn due to a lack of interest on the part of the states. It has been

[19] S 1-301(2) of the UCC (n 10).
[20] S 1-301(3) of the UCC (n 10).
[21] S 1-301(c)(2) read with s 2A-106 of the UCC (n 10).
[22] Symeonides 2014 *BJIL* 1133.
[23] Symeonides (n 22) 1133.

argued that the biggest problem surrounding revised Article 1 of the UCC is based on section 1-301 and its deference to parties' autonomy to choose the applicable law in non-consumer transactions.[24] While Article 1 of the previous UCC required the parties to choose the law of a jurisdiction that was reasonably connected to the contract,[25] the revised Article 1 requires no such link between the transaction and the chosen jurisdiction[26] unless one or more parties to the contract at issue is a consumer.[27]

This suggests that the revised Article 1 neglects the usual predisposition of states to permit parties to choose only the law of a jurisdiction that has a substantial relationship to the parties, the contract, or both,[28] and then only if the law selected does not conflict with some essential public policy of a state having a more substantial relationship to the conflict than the chosen state.[29] Academic debates on the UCC have led to the effect that section R1-301 is far broader, covers far more contracts, and by sheer force of the number of contracts involved, is less deferential to the ordinarily governing rule of other jurisdictions than any widely-known conflict of law rules anywhere.[30]

---

[24] Graves 2005 *SHLR* 60.
[25] S 1-105(1) of the UCC (n 10).
[26] S 1-301(c)(1) of the UCC (n 10) which allows parties to choose a state's law "whether or not the transaction bears a relation to the State designated".
[27] S 1-301(c)(1) of the UCC (n 10). Also see Rowley 2005 *UNLV* 5-6.
[28] Rowley (n 27) 5-6.
[29] S 1-301(c)(1) of the UCC (n 10).
[30] Woodward 2001 *SMULR* 740. Professor Woodward further states that: "The revised provision on choice of law in R1-301 of the UCC states a rule for any case subject to the Uniform Commercial Code, unless displaced by a specified provision elsewhere in the UCC. This means that all sales and leases of goods contracts will be covered, as will contracts in all the other areas covered by the Uniform Commercial Code. Thus, the provision will be available for a large percentage of the staggeringly large number of commercial contracts formed in our economy every day. There are no size or value limitations. Parties to every commercial contract from the sale to a carpenter of a screwdriver to the largescale business liquidation sale will be able to choose unrelated law to cover their transaction."

It is worth nothing that each state's adopted version of the UCC encompasses special provisions that dictate the law to apply to specified types of transaction, which essentially override any agreement by the contracting parties to select a different governing law.[31] For example, some of these specific provisions dictate the law governing perfection in performance and the priority of a security interest in the collateral.[32] In certain instances, the courts enforce the law of the state in which the debtor is located to give creditors in UCC Article 9-secured transactions certainty as to whether and where to file and where to look for existing filings.[33]

The existence of provisions on choice of law in the UCC does not fully resolve issues of conflict of laws.[34] The reason is that most of the states have adopted and enacted variant amendments to some sections of the UCC, and their courts act with little regard for the function of uniformity in a uniform act, which is apparent in the non-uniform interpretations to some sections of the UCC.[35] The research will concentrate on the variation of the UCC adopted in California.

1.3 Restatement (Second) on Conflict of Laws

Another legal regime which regulates choice of law in a consumer contract is the Restatement (Second) on Conflicts of Laws. This legal instrument is a revision of its predecessor – Restatement (First) – which made no provision for party autonomy in choice of law.[36] Unlike the Restatement (First), section 187 of the Restatement

[31] S R1-301(3) of the UCC (n 10).
[32] S R9-301(1) of the UCC (n 10).
[33] S 1-301, Official Comment No 4 of the UCC (n 10).
[34] Leflar 1981 *ALR* 87.
[35] Leflar (n 34) 87.
[36] Burton (n 12) 463.

(Second) governs choice of law and grants parties autonomy to include a choice of law clause in their contract indicating the choice of a particular state law to govern the contract.[37] To enforce the parties' intention regarding choice of law, a court considers whether the law of the selected state has a "substantial relationship to the parties or their transaction or if there are some other reasonable bases for the parties' choice of law".[38] This provision further ensures that the choice of state law by the parties must not be contrary to a fundamental policy of a state with a "materially greater interest than the chosen state in the determination of the particular issue".[39]

The position regarding choice of law can be seen in the 2005 decision in *Discover Bank v Superior Court* [40] where the courts explained California's position on choice of law. The court stated that:

> [I]f the trial court finds that the . . . claims fall within the scope of a choice of law clause, it must next evaluate the clause's enforceability pursuant to the analytical approach reflected in section 187, subdivision (2) of the Restatement (Second) of Conflict of Laws.[41]

In *Discover Bank* the court referred to the classic case *Nedlloyd Lines BV v Superior Court of San Mateo County (Seawinds Ltd)* in which California's choice of law provisions are summarised.[42] The matter before the court in this case involved a demurrer in which the plaintiff claimed that the shareholders' agreement required the application of the law of Hong Kong to Seawinds's agreement and not the law of

[37] S 187(1) of the American Law Institute Restatement (Second) of Conflict of Laws 1969.
[38] S 187(2)(a) of the Restatement (Second) (n 37).
[39] S 187(2)(b) of the Restatement (Second) (n 37).
[40] *Discover Bank v Superior Court* 36 Cal 4th 148 (Cal 2005) paras 173-174.
[41] *Discover Bank v Superior Court* 36 Cal 4th 148 (Cal 2005) para 173.
[42] *Nedlloyd Lines BV v Superior Court of San Mateo County (Seawinds Ltd)* (1992) 834 P 2d 1148 para 469.

California. In resolving the demurrer, the court stated that the process for California's Appeal Court to follow in determining choice of law is to either consider

> …whether the chosen state has a substantial relationship to the parties or their transaction, or whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the Court need not enforce the parties' choice of law.

If, however, either test is met, the court must then establish whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the court must enforce the parties' choice of law. However, if there is a fundamental conflict with California law, the court must then establish whether California has a "materially greater interest than the chosen state in the fortitude of the particular issue".[43] If California has a materially more significant interest, the choice of law will not be enforced.

In this case, the court further held that where a state has a materially more significant interest than the state of the chosen law, the courts are mandated to decline the enforcement of law contrary to the fundamental policy of the state with the materially more significant interest.[44] The court maintained that the choice by the parties applied on the basis of a substantial relationship to the contract. It further held that it could find no reason not to apply the parties' choice of law in Seawinds's cause of action for breach of fiduciary duty. As explained, Hong Kong, the chosen state, had a "substantial relationship to the parties" in that two of them were incorporated in Hong Kong.

[43] The court in this instance referred to s 187(2) of the Restatement (Second) (n 37).
[44] *Nedlloyd Lines BV v Superior Court of San Mateo County (Seawinds Ltd)* (1992) 834 P 2d 1148 para 469.

Moreover, their incorporation in that state afforded a reasonable basis on which to choose Hong Kong law.[45]

If parties fail to choose a law or their choice is unsuccessful under section 187(2), the Restatement (Second) stipulates that the rights and duties arising from the contract are to be resolved by the local law of the state which, as regards that issue, bears the most significant relation to the transaction and the parties under the principles stated in section 6.[46] Section 6 sets out numerous criteria to serve as the basis for the state's determination of which state has the "most significant relationship" to the contract.[47] To decide where to look for the applicable rule of law, section 188 lists the types of contacts to be regarded as giving rise to the choice factors below. These include:

> (a) the place of contracting,
> (b) the place of negotiation of the contract,
> (c) the place of performance,
> (d) the location of the subject matter of the contract, and
> (e) the domicile, residence, nationality, place of incorporation, and place of business of the parties.

A recent case supporting this position is *Ruiz v Affinity Logistics Corp*[48] where the court stated that California's choice of law framework is set out in Restatement § 187(2) and in the case of *Nedlloyd Lines BV v Superior Court*.[49] The court stated that: "California courts apply the parties' choice of law unless the analytical approach articulated in § 187(2) of the Restatement (Second) of Conflict of Laws (187(2))

[45] *Nedlloyd Lines BV v Superior Court of San Mateo County* (*Seawinds Ltd*) (1992) 834 P 2d 1148 para 469.
[46] S 188 of Restatement (Second) (n 37). Also see Weinberger 1976 *HLR* 608.
[47] S 6 of Restatement (Second) (n 37).
[48] *Ruiz v Affinity Logistics Corp* 667 F 3d 1318 (9th Cir 2012) para 1318.
[49] *Nedlloyd Lines BV v Superior Court of San Mateo County* (*Seawinds Ltd*) (1992) 3 Cal 4th 459, 11 Cal Rptr 2d 330, 834 P 2d 1148, 1152 (1992).

dictates a different result."[50] In *Ruiz* the court held that California had a materially greater interest than Georgia in the outcome of this case. To determine the extent of California's interest the court analysed the five types of contacts set out above.[51]

Thus, these types of contracts are to be evaluated in terms of their relative importance to the issue and the immediate circumstances of each case.[52] The intention with the promulgation of the Restatement (Second) was to make significant changes to the Restatement (First). The drafters of the Restatement (Second) intended to offer the parties the power to choose the law applicable to the terms of their contracts. In the Restatement (First) no such power was given to the parties.[53] The Restatement (Second) is more precise on the issue of party autonomy as it limits the contracting parties' freedom to choose the applicable law by providing that their choice will not apply if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice".[54]

Another innovation in the Restatement (Second) is that in the absence of an appropriate choice by the parties, the terms of the contract will not be decided entirely by the law of the place of contracting, but will be governed instead by the law of the place with the most substantial relation.[55] Also, whereas the Restatement (First) failed to draw a material distinction between different types of contracts, the Restatement (Second) recognises and addresses specific types of contracts to which, in the absence of a valid choice, specific state law may be applied. This choice will play an important

[50] *Ruiz v Affinity Logistics Corp* 667 F 3d 1318 (9th Cir 2012) para 1318.
[51] *Ruiz v Affinity Logistics Corp* 667 F 3d 1318 (9th Cir 2012) para 1324.
[52] Weinberger (n 46) 610.
[53] S 187(1) and (2) of the Restatement (Second) (n 37). Also see Weinberger (n 46) 610.
[54] S 187(2)(a) of the Restatement (Second) (n 37). Also see Leflar (n 34) 97.
[55] S 188 of the Restatement (Second) (n 37). Also see Weinberger (n 46) 610.

role in establishing the governing law of the contract.[56] It is important to note that the Restatement (Second) makes no distinction between matters of validity and performance.[57] However, it does distinguish details of performance which are governed by the law of the place of performance. Section 187 does not grant party autonomy unless the local law of the place where performance is to take place confirms the choice by the parties.[58]

Regardless of the apparent success of the Restatement (Second), legal scholars have indicated the need for a new Restatement in that the Restatement (Second) is not suited to settling choice of law issues arising from recent conflicts related to today's reality – eg, cyberspace conflicts, conflicts arising from same-sex relations, and covenant marriages, amongst others.[59] It has also been argued that the Restatement (Second) lacks rules on even more traditional conflicts that existed at the time of its drafting, regardless of their popularity. These include maritime conflicts, conflicts involving stolen works of art or cultural property, and conflicts arising from interstate arbitration.[60]

1.4 The Restatement (Third) on conflict of laws

Irrespective of these shortcomings and in the absence of a new Restatement (the Restatement (Third) is not yet available), this study will consider the Restatement

[56] S 188 of the Restatement (Second) (n 37). Also see Weinberger (n 46) 610.
[57] Weinberger (n 46) 610.
[58] S 206 and comment (d) of the Restatement (Second) (n 37).
[59] Symeonides 2009 *JPIL* 17-18.
[60] Symeonides (n 59) 18.

(Second) on choice of law as it has dealt with choice of law provisions on consumer contracts.[61]

1.5 Focus of the chapter

The focus of this chapter is to consider the position of the USA on choice of law in consumer adhesion contracts. The study concentrates on the State of California in that its economy is the largest of any US state and is exceeded only by a handful of industrialised countries.[62] Financiers in California have been ingenious in pursuing and utilising capital and many of the nation's largest banks and companies are located in the state.[63] In 1965 California superseded New York as the leading state exporting manufactured goods. With the development of Silicon Valley in the late 1970s, California became a world leader in the manufacture of computers and electronics.[64] Due to California's reputation in economic activity, most consumer contractual activities include a company from California.

Another reason for selecting the State of California is contingent on the fact that the judicial manifestations concerning choice of law provide a suitable ground for a concrete comparative analysis. California courts have frequently used the "substantial relationship" and "strong policy" tests without extensive reference to the Restatement

[61] The American Law Institute Restatement of the Law Third Conflict of Laws, Tentative Draft No 2 2021 submitted by the Council to the membership of The American Law Institute for consideration at the 2021 Annual Meeting on May 17-18 and June 7-8, 2021. The American Law Institute has approved Council Draft No 5 containing §§ 8.01 to 8.12 of Topic 1, General Choice of Law Rules, of Chapter 8 which deals with contracts. Specifically, Chapter Eight (8) Topic Two (2) addresses Specific Contract Issues under which choice of law rules on consumer contracts will be addressed in the future.

[62] International Bankers *The State of California's Economy* https://internationalbanker.com/finance/the-state-of-californias-economy/ accessed 13 August 2021.

[63] International Bankers *The State of California's Economy* (n 58).

[64] International Bankers *The State of California's Economy* (n 58).

(Second) of Conflict of Laws.[65] Those California courts which have cited the Restatement (Second) of Conflict of Laws have typically focused on section 187(2), as have the courts in other jurisdictions. The legal position in the State of California provides a formidable ground for concrete comparative analysis with Rome I in the EU. It is worth noting that while the EU has promulgated a uniform law which regulates choice of law in consumer contracts,[66] the USA directs the application of state law, whether it is the domestic laws of the state or the laws of the UCC domesticated to form part of the laws of the state.[67]

In situations where Rome I seeks to enforce the law chosen by the parties in a restrictive manner,[68] and in the absence of choice provides for special rules to govern consumer contracts,[69] the Restatement (Second) as it applies in California circumvents the choice by the parties[70] to apply specific California state law to consumer contracts based on the principles of "substantial relationship" and "state policy".

This position is illustrated in *Discover Bank v Superior Court*[71] where the court stated:

> California does not have any public policy against a choice of law provision, where it is otherwise appropriate … [and] …choice of law provisions are usually respected by California courts . . . an agreement designating a foreign law will not be given effect if it would violate a strong California public policy . . . or result in an evasion of . . . a statute of the forum protecting its citizens…An arm's length choice of law provision between commercial entities will not be enforced if it violates a fundamental California public policy and California has materially greater interests than the chosen state.[72]

---

[65] *Hall v Superior Court* 150 Cal App 3d para 414; also see generally *Ashland Chemical Co v Provence* 129 Cal App 3d; *Frame v Merrill Lynch, Pierce, Fenner & Smith Inc* Cal App 3d.
[66] Preamble read with R 1,2,3,4, 5 and 6, and 1 of Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[67] S 188(1) of the Restatement (Second) (n 37).
[68] Aa 3, 4 and 6(1) of Rome I (n 66).
[69] A 6 of Rome I (n 66).
[70] S 187(a) and (b) of the Restatement (Second) (n 37).
[71] *Discover Bank v Superior Court* 36 (2005) Cal 4th 148 para 158.
[72] *Discover Bank v Superior Court* 36 (2005) Cal 4th 148 para 158.

Consequently, the research focuses on the specific laws governing choice of law in consumer contracts applicable in California.

The study considers how the UCC and the Restatement (Second) address issues of choice of law in consumer adhesion contracts. The chapter also considers some challenges regarding the UCC and the Restatement (Second) as they apply in California.

2.0 Choice of law rules in California

The first step in addressing issues of consumer adhesion contracts is to consider the definition of an adhesion contract under California law. An "adhesion contract" is defined as a standardised contract imposed and drafted by a party with superior bargaining power, which relegates to the weaker party only the opportunity to adhere to the contract or to reject it.[73] In California, the classification of a contract as an adhesion contract begins with the judicial guidance provided by *Neal v State Farm Ins Cos.*[74]

In the *Neal* case, the California District Court of Appeal defined an "adhesion contract" as a standardised contract which is imposed and drafted by the party of superior bargaining strength and relegates to the subscribing party only the opportunity to adhere the contract or reject it.[75] A recent 2016 decision also defines "adhesion contracts" as contracts imposed upon a powerless party, usually a consumer, who has no real choice but to accede to their terms.[76] The court in the *Neal case* considered

[73] Sterkin 2004 *GGULR* 324.
[74] *Neal v State Farm Ins Cos* (1961) 10 Cal Rptr 781 (Cal Dist Ct App) para 693.
[75] *Neal v State Farm Ins Cos* (1961) 10 Cal Rptr 781 (Cal Dist Ct App) para 693.
[76] *Woodroof v Cunningham* (2016) 147 A 3d 777 (DC) para 789.

an interpretation of an agency agreement between the parties and determined that the contract at issue was an adhesion contract. It proceeded to address the inequities intrinsic in such contracts.[77] The court stated that adhesion contracts do not "issue from that freedom in bargaining and equality of bargaining which are the theoretical parents of the American law of contracts".[78]

The court further held that adhesion contracts warranted special consideration due to the wide-reaching effect that they have in our everyday lives.[79] As a result, the court examined the contract closely as to its adhesive nature and held that the way in which the instant contract had been prepared, drafted, and printed left no room for bargaining by the vulnerable party. The court observed that any ambiguities in the drafted terms had to be interpreted against the drafting party in the case of adhesion contracts.[80] The court's reasoning in the *Neal* case remains the accepted position in California in identifying contracts of adhesion.[81]

Another example is the classic case of *Graham v Scissor-Tail Inc*.[82] Here the court held that adhesion contracts are fully enforceable "unless certain other factors are present which, under established legal rules – legislative or judicial – operate to render it otherwise".[83] California courts consider two factors in determining the enforceability of adhesion contracts. These are: (1) whether the contract or provision falls within the

[77] *Neal v State Farm Ins* Cos (1961) 10 Cal Rptr 781 (Cal Dist Ct App) para 693.
[78] *Neal v State Farm Ins* Cos (1961) 10 Cal Rptr 781 (Cal Dist Ct App) para 693.
[79] *Neal v State Farm Ins* Cos (1961) 10 Cal Rptr 781 (Cal Dist Ct App) para 693. Also see Friedmann *Law and Social Change in Contemporary Britain* 45.
[80] *Neal v State Farm Ins* Cos (1961) 10 Cal Rptr 781 (Cal Dist Ct App) para 693.
[81] Sterkin (n 73) 29. Also see the decision of the court in *Graham v Scissor-Tail Inc* (1081) 623 P 2d para 167.
[82] *Graham v Scissor-Tail Inc* (1081) 623 P 2d para 167.
[83] *Graham v Scissor-Tail Inc* (1081) 623 P 2d para 167.

"reasonable expectations" of the consumer; and (2) whether the contract or provision is considered unconscionable.[84]

In a recent case the court stated that:

> [A] finding of procedural unconscionability does not mean that a contract will not be enforced, but rather that courts will scrutinise the substantive terms of the contract to ensure they are not manifestly unfair or one-sided. There are degrees of procedural unconscionability. At one end of the spectrum are contracts that have been freely negotiated by roughly equal parties, in which there is no procedural unconscionability.... Contracts of adhesion that involve surprise or other sharp practices lie on the other end of the spectrum. Ordinary contracts of adhesion, although they are indispensable facts of modern life that are generally enforced, contain a degree of procedural unconscionability even without any notable surprises, and bear within them the clear danger of oppression and overreaching.[85]

The courts have expressly elaborated on the issues of reasonable expectation and unconscionability.[86] California has established general rules to guide choice of law in contracts. Thus section 1646 of the California Civil Code, which establishes general rules on choice of law for contracts, states that a contract is to be construed according to the law and procedure of the place where it is to be performed, or, if it does not suggest a place of performance, according to the law and procedure of the place where it is made.[87]

2.1 The California Civil Code

The California Civil Code provides that:

> [N]notwithstanding section 1646, the parties to any contract relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars ($250 000), including a transaction otherwise covered by subdivision (a) of section 1301 of the Commercial Code, may agree

[84] *Graham v Scissor-Tail Inc* (1081) 623 P 2d para 167.
[85] *Baltazar v Forever 21 Inc* (2016) 62 Cal 4th 1237 para 1244.
[86] *Discover Bank v Superior Court* (2005) 36 Cal 4th 148 para 158.
[87] S 1646 of California Civil Code 2001.

> that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, undertaking, or transaction bears a reasonable relation to this state.[88]

The provision further states that the section does not apply to any contract, agreement, or undertaking: (a) for labour or personal services; (b) relating to any transaction primarily for personal, family, or household purposes; or (c) to the extent provided to the contrary in subdivision (c) of section 1301 of the Commercial Code. This provision does not apply to a consumer adhesion contract per section 1301 subsection (c) of the California Civil Commercial Code.

In California, the Uniform Commercial Code adopted and incorporated in the laws of California regulate choice of law in adhesion contracts. The California Commercial Code replicates section 1-301 of the UCC.[89] It is vital to note that the autonomy granted to parties operates in a limited sense in consumer contracts in California.[90] The provision presented to consumers indicates that if the law chosen by the parties to a consumer lease indicates a jurisdiction other than a jurisdiction in which the lessee resides at the time the lease agreement becomes enforceable or within 30 days thereafter, in which the goods are to be or in which the lease is executed by the lessee, the choice is not enforceable. Thus, even though the parties have the right to choose under the law of California,[91] their choice must, by law, be limited to the law of the place where the lessee resides.[92] This suggests that California's rules on choice of law with regard to consumer contracts favour the consumer.

[88] S 1646.5 of California Civil Code (n 87).
[89] S 1301 of California Commercial Code (n 87).
[90] S 1301(c)(7)(a) California Commercial Code (n 87).
[91] S 1301 California Commercial Code (n 87).
[92] S 1301 (c)(7)(a) read with s 10106 California Commercial Code (n 87).

More importantly, the court will refer to the UCC only if parties in their contract intended the provisions of the UCC to apply. This position is illustrated in *Kaul v Mentor Graphics Corp*[93] where the courts referred to the case of *Nedlloyd Lines BV v Superior Court*[94] and indicated that there may be an exception to the application of the Restatement approach. The court further stated that choice of law issues arising from contracts subject to the UCC are governed by section 1105(1) of the California Commercial Code which provides that, subject to specified exceptions, the parties may choose the law of a state having a reasonable relation to the transaction. This "reasonable relation" test is similar to the "substantial relationship" test in the Restatement.[95] The court held further that as neither party to the action had contended that California's Uniform Commercial Code section 1105 applied to their contract, there was no need to consider the difference between the Commercial Code and Restatement approaches.[96] The Restatement (Second) is another source in California on choice of law where consumer adhesion contracts are concerned.

2.2 The Restatement (Second) approach in California

The Restatement (Second) approach has been described as the "embodiment of the autonomy principle"[97] and has become the primary tool for most courts in interpreting contractual choice of law provisions.[98] Since its inception in 1971, the California courts have adopted the Restatement as the appropriate approach in cases interpreting

[93] *Kaul v Mentor Graphics Corp* Case No (2016) 16-cv-02496-BLF, 5 ND Cal Oct 26 para 5.
[94] *Nedlloyd Lines BV v Superior Court* (1992) 3 Cal 4th 459 para 468.
[95] *Nedlloyd Lines BV v Superior Court* (1992) 3 Cal 4th 459 para 468.
[96] *Nedlloyd Lines BV v Superior Court* (1992) 3 Cal 4th 459 para 468.
[97] Friedler 1989 *UKLR* 489.
[98] Friedler (n 97) 488-489.

choice of law by parties in consumer contracts.[99] Regardless of this mandate, the Restatement approach does not always uphold the expectations of the contracting parties.[100] In applying the Restatement (Second), the California courts apply the selected choice of law by the parties unless the chosen jurisdiction has no substantial relation to the contract[101] or will be contrary to the public policy of the state that has a materially more significant interest than the chosen state in the disputed issue and whose law would apply in the absence of a choice of law.[102]

In presenting a further explanation of the provision, comment (c) of section 187 provides that the intention of the parties to a contract will be upheld so long as extrinsic evidence attests to the fact that they incorporated a choice of law clause in their contract.[103] The comment further explains that based on extrinsic evidence on the issue of choice of law, the forum court will apply the provisions of the chosen law to enforce the parties' intention.[104] Understanding subsection (1) connotes that the parties' intention is paramount in interpreting choice of law provisions. However, this applies only if the parties could have resolved the conflict with an unambiguous provision in the contract directed to the issue.[105] The result is that section 187 appears to emphasise party autonomy, even in cases where there is no express contractual provision for choice of law.[106]

---

[99] *Frame v Merrill Lynch, Pierce, Fenner & Smith Inc* (1971) 20 Cal App 3d 668, 673, 97 Cal Rptr 811, 814 para 671.
[100] Kelson 1990 *LALR* 1350.
[101] S 187(b) Restatement (Second) (n 37).
[102] S 187(c) Restatement (Second) (n 37).
[103] S 187 comment (c) of the Restatement (Second) (n 37).
[104] S 187 comment (c) of the Restatement (Second) (n 37).
[105] S 187(1) comment (c) of the Restatement (Second) (n 37).
[106] Kelson (n 100) 1351.

A careful look at the provisions of subsection 187(2) reveals that the Restatement (Second) supports party autonomy through deference to contracting parties' expectations.[107] The provision indicates that even when parties could not have resolved a particular issue by a specific provision in their agreement, the law of the state chosen by the parties will still be decisive unless it has no substantial relation to the parties or it violates a fundamental policy of a state with a more significant interest than that chosen.[108] Consequently, in interpreting section 187, it has been proposed that the courts generally defer to the parties' choice, thereby advancing the fundamental goal of a contract to enforce the parties' agreement and adding certainty and predictability to their relationship.[109] It has been suggested that the section's limitations have been framed as exceptions, and this shows the inconsistencies in section 187 as the provision is no different from other choice of law rules that seek to restrict the principle of party autonomy.[110]

2.3 Restrictions on party autonomy under the Restatement (Second) in California

The restriction on party autonomy in the Restatement (Second), specifically section 187 comment (g) that:

> [A]pplication of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of s 188, would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue.[111]

[107] Kelson (n 100) 1352.
[108] S 187(1) and (2) of the Restatement (Second) (n 37); also see Kelson (n 100) 1352.
[109] Carpinello (1990) *MLR* 58.
[110] Kelson (n 100) 1352.
[111] S 187 comment (g) of the Restatement (Second) (n 37).

And further that:

> [T]he forum will apply its own legal principles in determining whether a given policy is a fundamental one within the meaning of the present rule and whether the other state has a materially greater interest than the state of the chosen law in the determination of the particular issue.[112]

It is interesting to note that, unfortunately, neither Reese (reporter of Restatement (Second)) nor the Restatement itself, affords any clear definition as to what might qualify as "fundamental policy of the state".[113] The comments to the Restatement advise that the policy "must, in any event, be a substantial one".[114] This discretion given to the states may lead to the abuse of the "state policy" rule so as to disregard a choice of law by the parties.

In verifying a choice of law provision, California courts consider whether a choice of law clause in an adhesion contract was drafted unilaterally by the dominant party who presents the clause on a take-it-or-leave-it basis.[115] The courts will also look to whether the negotiation of the choice of law clause took place without restraint and willingly between parties with the support of legal advice and representation.[116]

Also, the California court will consider whether the chosen state law is rational and bears a logical relation to one of the parties or the dispute.[117] When the parties fail to decide on a specific law to govern the contract or where there is no specific governing law provision, the court establishes the jurisdiction in terms of the most significant

---

[112] S 187 comment (g) of the Restatement (Second) (n 37).
[113] Carpinello (n 109) 62.
[114] S 187(2) comment (c) of the Restatement (Second) (n 37).
[115] *A & M Produce Co v FMC Corp* 135 Cal App 3d (Cal Ct App 1982) para 473.
[116] *A & M Produce Co v FMC Corp* 135 Cal App 3d (Cal Ct App 1982) para 473.
[117] *Nedlloyd Lines BV v Superior Court of San Mateo County (Seawinds Ltd)* (1992) 834 P 2d 1148 para 469.

relation to the dispute by considering the following factors:[118] place of contracting, place of negotiation of the contract, place of performance of the contract, location of the subject matter of the contract, domicile, nationality, residence, principal place of business, and home of incorporation of the parties.[119]

2.4 The comparative impairment approach in California

In determining the law applicable to a consumer contract, the California courts generally undertake a choice of law assessment which assists in determining the substantive law applicable to the issue at hand.[120] The California courts apply California law unless a party to the dispute invokes the application of the law of a foreign jurisdiction.[121] Thus, the onus lies on the party convinced that the law of a different jurisdiction applies to bring choice of law to the California courts' attention. In a dispute concerning choice of law, the courts will apply California law unless the foreign law conflicts with California law and both California and the foreign jurisdiction have significant interests in having their respective laws applied.[122] In the event of conflicting interests between two states, the court will assess the comparative impairment of each state's policies. From the assessment, the California court then applies the state's law whose policies would suffer most were the other state's law to be applied.[123] This position, although modified, is still relevant as the California courts

[118] *Nedlloyd Lines BV v Superior Court of San Mateo County (Seawinds Ltd)* (1992) 834 P 2d 1148 para 469.
[119] S 188 Restatement (Second) (n 37).
[120] *Chan v Society Expeditions* (1997) 123 F 3d 1287 9th Cir para 1297.
[121] *Hurtado v Superior Court* (1974) 11 Cal 3d 574 para 581.
[122] *Sommer v Graber* (1995) 40 Cal App 4th para 1455.
[123] *Discover Bank v Superior Court* (2005) 36 Cal 4th para 148.

use the impairment approach in a subtle manner as regards choice of law. This is explained further below.

The California approach to conflict of laws issues termed the "comparative impairment" approach is similar to and supports Currie's governmental interest analysis.[124] Both look to the policies primary to the laws of the participating states to decide whether those states have an interest in applying their laws to a specific issue.[125] This similarity notwithstanding, the significant difference between comparative impairment and governmental interest analysis manifests in how comparative impairment resolves the problem of true conflict.[126]

When two or more jurisdictions have legitimate interests in applying their laws, comparative impairment does not spontaneously apply the forum's law.[127] The comparative impairment approach instructs the forum to evaluate the interests of the competing states involved in the conflict and to verify which state's underlying policies would be most impaired if its law were not applied.[128] The comparative impairment approach then applies the law of that state.[129] It has been argued that the reasoning behind the comparative impairment approach is an attempt by the California court to best serve the needs of federalism by identifying the alternative which does the least damage to the states whose laws are competing for application.[130]

[124] Horowitz 1974 *UCLALR* 748-758.
[125] Kelson (n 100) 1346.
[126] Kelson (n 100) 1346.
[127] *Bernhard v Harrah's Club* (1976) 16 Cal 3d para 313.
[128] *Bernhard v Harrah's Club* (1976) 16 Cal 3d para 313.
[129] *Bernhard v Harrah's Club* (1976) 16 Cal 3d para 313.
[130] Kelson (n 100) 1346.

It is evident that when it comes to choice of law, California concentrates on the doctrine which clearly provides that choice of law issues involve determining which state's policy on a specific issue predominates when two or more states have a reasonable interest in their law governing such issues.[131] Thus, in California the focus of a choice of law issue is to harmonise and reconcile conflicting state interests within the federal system. This notion is supported by Freund's statement "to understand, harmonise, and weigh competing interests in multistate events",[132] and Chief Justice Traynor's reference to "the classic political problem of weighing, adjusting, and harmonising diverse community values."[133] Thus, California's choice of law rules aim to find the best way these states can coexist harmoniously within the Federation so that each state can pursue and fulfil its aims and purposes without hampering the corresponding aims and purposes of every other state or the Federation as a whole.[134]

Arguments have been made that fundamental elements of California's position on the Restatement (Second) are suppressed by the approach to choice of law as described by Cavers. He indicates that the court is mandated to seek a choice of law rule or a principle of preference which would either reflect relevant multistate policies or provide the basis for reasonable accommodation of the laws' conflicting purposes.[135] California's position on the Restatement can be fashioned from three opinions by Chief

[131] Horowitz (n 124) 719.
[132] Freund 1946 *HLR* 1210-1236.
[133] Traynor 1959 *TLR* 675.
[134] Rheinstein 1955 *UCLR* 811.
[135] Cavers *The Choice-of-Law Process* 64.

Justice Traynor in *People v One 1953 Ford Victoria,*[136] *Bernkrant v Fowler,*[137] and *Reich v Purcell*.[138]

Currently, California's position on choice of law is not necessarily derived from the revolution in the theoretical approach to choice of law; rather, it stems from the common law lawmaking undertaken by judges who sought to find solutions to choice of law issues over a more extended period.[139] These judge-made theories affect the application of the Restatement in promoting party autonomy, as judges in California circumvent and apply the laws of California to promote the policies of California as opposed to the law chosen by the parties based on substantial relationship and state policy as prescribed in the Restatement.[140] It can be argued that this approach is a subtle way of applying the impairment approach as it is aimed at promoting the policies of California. This position was illustrated in the *Discover Bank* case where the judge stated that:

> [I]f the trial court finds that the . . . claims fall within the scope of a choice of law clause, it must next evaluate the clause's enforceability pursuant to the analytical approach reflected in section 187, subdivision (2) of the Restatement (Second) of Conflict of Laws. Under that approach, the Court must first determine: '(1) whether the chosen state has a substantial relationship to the parties or their transaction, or (2) whether there is any other reasonable basis for the parties' choice of law. If neither of these tests is met, that is the end of the inquiry, and the Court need not enforce the parties' choice of law. If, however, either test is met, the Court must next determine whether the chosen state's law is contrary to a fundamental policy of California. If there is no such conflict, the Court shall enforce the parties' choice of law. If, however, there is a fundamental conflict with California law, the Court must then determine whether California has a 'materially greater interest than the chosen state in the determination of the particular issue. If California has a materially greater interest than the chosen state, the choice of law shall not be enforced, for the

[136] *People v One 1953 Ford Victoria* (1957) 48 Cal 2d 595, 311 P 2d para 480.
[137] *Bernkrant v Fowler* (1961) 55 Cal 2d 588, 360 P 2d 906, 12 Cal Rptr para 266.
[138] *Reich v Purcell* (1967) 67 Cal 2d 551, 432 P 2d 727, 63 Cal Rptr para 31.
[139] Horowitz (n 124) 720.
[140] S 187(2) Restatement (Second) (n 37).

> obvious reason that in such circumstance we will decline to enforce a law contrary to this state's fundamental policy.[141]

A reason for resolving conflicts between state policies is to reach a choice of law decision that will adequately expedite multistate transactions. In attempting to achieve this, California courts have used some multistate policy factors which aid in determining which law is applicable where there is a conflict. The first policy is based on the fact that national or federal interests in expediting private relationships across state lines is a sound and valuable principle in making the choice of law decision.[142] Some other multistate policy factors, connected to the assistance of multistate contacts, which appear in California's choice of law policy include: (1) the rule of validation – ie, selecting that state's law which validates the transaction; (2) party autonomy as to choice of law; (3) promotion of practicability, efficiency, and convenience; and (4) facilitation of what may become a multistate transaction.[143]

2.5 Other multistate policy factors in California's choice of law on consumer contracts

The phrase "rule of validation" has been used frequently in the context of choice of law, most notably by Ehrenzweig.[144] The "rule of validation" defines the analysis in several California cases involving cross-border commercial transactions in which two states had interests in having their policies prevail on the issue of the validity of the transaction – one state's law validating and the other invalidating the transaction. The court held that the state's policy which validated the transaction would prevail.[145] The

[141] *Discover Bank v Superior Court*, (2005) 36 Cal 4th 148 para 173-74.
[142] *Discover Bank v Superior Court* (2005) 36 Cal 4th 148 para 174. Also see *In re Archy* (1858) 9 Cal para 147.
[143] Horowitz (n 124) 759.
[144] Ehrenzweig 1961 *CLR* 252 -253.
[145] Horowitz (n 124) 760.

rule of validation is codified in the Restatement (Second) on choice of law, and provides that:

> In the absence of choice by the parties, the rule of validation is applied to decide choice of law based on the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.[146]

Another position considered by the California court in resolving multistate consumer choice of law disputes is the principle of party autonomy. It has been stated that cross-border consumer transactions in which potential conflict-of-laws issues are present are facilitated if the parties to the transaction have some autonomy to identify and resolve the problems.[147] This emerges in consumer decisions by the California courts, where the courts either accept or reject a choice of law by the parties to govern their contract. For instance, in the case of *PMP Access Fund Manager, LLC v Vertical Ventures Capital LLC* the court applied the place of performance test and decided that the law of California was applicable. The court was not convinced by PMP Access's alternative argument that the award of 20% post-judgment interest could not be attacked as a legal error in the arbitration award. The court further stated that once a judgment has been entered in California on a stipulated arbitration award, the award is enforceable as a judgment and the California constitutional and statutory limits on post-judgment interest apply.[148]

The discussion above reveals that the parties' autonomy to select the law governing their contract is not unfettered. The choice by the parties is examined in terms of the

[146] S 188 Restatement (Second) (n 37).
[147] Horowitz (n 124) 765.
[148] *PMP Access Fund Manager LLC v Vertical Ventures Capital LLC* (2011) No H032258 Cal Ct App para D.

traditional rules of contract,[149] the interests of the states involved in the conflict, and the principles of "substantial connection" and "state policy". This analysis by the court is aimed at ensuring and promoting practicability, efficiency, and convenience, another guideline that directs the California court in deciding choice of law in a consumer contract.[150]

It is clear from the debate above that only the state with a legitimate interest has the right to allow or disallow the parties' choice, and that state is the state whose law is applicable in the absence of choice.[151] It has been suggested that this is the state's law that the parties' choice would displace, and hence it is for that state to decide whether and to what extent to allow such a displacement.[152] Thus, private parties should not be permitted to evade the public policy of that state merely by choosing the law of another state; in short, the California position generally mandates the *lex causae* to limit the parties in their choice of law.[153]

Interestingly, California courts aim to promote practicability, efficiency, and convenience but shoot themselves in the foot in the process. The choice made by the parties is more often than not subject to the interests of the states involved in the conflict and not the intent of the contracting parties. The question then is should predictability in consumer choice of law aim to provide a foreseeable outcome for the state or the parties. To a large extent, where the interests of states are preferred to the interests of the parties, it may be seen to defeat the basic principle of contract –

[149] S 1646 of the California Civil Code (n 87).
[150] *Ohio ex rel Squire v Porter* (1942) 21 Cal 2d 45, 129 P 2d para 691; *Commonwealth Acceptance Corp v Jordan* (1926) 198 Cal 618, 246 P para 796.
[151] Symeonides (n 22) 1132.
[152] Symeonides (n 22) 1132.
[153] Symeonides (n 22) 1132.

to allow parties voluntarily to agree on a choice of law in their agreement. The extension compounds the problem of choice of law to include the interests of states in addition to the interests of the parties involved.[154] It is suggested that the interests of the states should not be the focal point in deciding a choice of law issue but rather serve as a guide for the choice made by the parties should it fall within the remit of a state's interests.[155]

Where consumer contracts are involved, the state is interested in protecting the weaker party. Where the interest of a state aims to ensure the protection of a weaker party, choice of law terms in a consumer contract of adhesion will be dismissed by the California courts if it does not conform to the policies of California state. This position then checks dominant parties and the choice of law clauses they include in their consumer adhesion contracts. Regardless of this notion, the state proceeds to ensure the protection of consumers in a consumer adhesion contract without making the state's interests the focal point of deciding choice of law issues in conflict of laws.

The court equally considers the need to facilitate multistate transactions in deciding on choice of law. Arguably, it is difficult in a summary phrase to describe this factor.[156] In a bid to offer an explanation, it has been argued that the choice of law decision, which is the consequence of the application of this policy, avoids a variation in the legal aspects of a contract and serves as an example for future contractual parties to follow, which in turn facilitates future multistate transactions.[157] This position is

[154] Reynolds 1997 *MLR* 1382.
[155] Reynolds (n 154) 1382.
[156] Horowitz (n 124) 772.
[157] Horowitz (n 124) 772-773.

illustrated in *People v One 1957 Ford Victoria*[158] where the court found that a Texas mortgagor's security interest in an automobile is not forfeited under California law when the automobile was sent, without the mortgagee's knowledge or permission, to California and used to transport narcotics.[159] However, California law provided for such forfeiture if the mortgagee did not, at the time of the financing transaction, enquire into the moral responsibility, character, and reputation of the mortgagor.

Justice Traynor stated that a person financing the sale of an automobile in Texas or using it exclusively in that state would look to Texas law to determine her rights and duties.[160] Such a person cannot reasonably be expected to familiarise herself and comply with the statutes of the 48 or more jurisdictions into which the automobile could be taken without her consent and in violation of express contractual prohibitions.[161] On this note, the court applied a multistate policy to prevent the consequence that the mortgagee must plan the transaction in compliance with the laws of all states in which the automobile might be operated. However, the mortgagee could have foreseen that the automobile might be taken to another state and used there in a manner that might give a reason for the application of a policy of that state which would be disadvantageous to the mortgagee.[162] Aside from these multistate policies, it has been argued that the principles of "substantive relationship" and "state policy" have been used to enforce the state interest of California as against the interest of the parties in choice of law.

---

[158] *People v One 1953 Ford Victoria* 48 Cal 2d para 595.
[159] Horowitz (n 124) 773.
[160] *People v One* 1953 Ford Victoria 48 Cal 2d para 595.
[161] *People v One 1953 Ford Victoria* 48 Cal 2d para 595.
[162] Horowitz (n 124) 773.

3 California's "substantive relationship" and "state policy"

3.1 Substantive relationship

The rules of "substantive relationship" and "state policy" play a significant role in deciding choice of law issues in California courts. In deciding contract choice of law provisions in California, it has been emphasised that the courts seek to determine whether the preferred state has a substantial relation to the parties or their contract, or whether there are any other reasonable grounds for the parties' choice of law.[163] Based on the principle of state interest, the court also consider whether applying the laws of another jurisdiction is contrary to a fundamental policy of California and whether California has a materially more significant interest in the resolution of the issue.[164]

In *Palomino v Facebook Inc*,[165] the court pointed out that California has a firm policy of supporting the enforcement of choice of law provisions. It was reasoned that in analysing the enforceability of a choice of law clause, the court must first determine "(1) whether the chosen state has a substantial relationship to the parties or their transaction; or (2) whether there is any other reasonable basis for the parties' choice of law".[166] In arriving at their decision, the court referred to *Washington Mut Bank FA v Superior Court*[167] where the court began by inquiring whether the elected state has

[163] *Nedlloyd Lines BV v Superior Court of San Mateo County (Seawinds Ltd)* (1992) 834 P 2d 1148 para 469.
[164] *Reich v Purcell* (1967) 67 Cal 2d 551 para 553.
[165] *Palomino v Facebook Inc* (2017) No 16-cv-4230-HSG (ND Cal) para 5.
[166] *Palomino v Facebook Inc* (2017) No 16-cv-4230-HSG (ND Cal) para 5.
[167] *Washington Mut Bank FA v Superior Court* (2001) 24 Cal 4th 906 para 916.

a significant relation to the parties or their contract and whether there is any other logical basis for the choice.[168] If the answer to these questions is in the affirmative, the burden of proof lies on the party requesting to avoid the application of the contractual choice to establish that both "the chosen law is contrary to a fundamental policy" of the alternative state and that the alternative state "has a materially greater interest in the determination of the particular issue". The plaintiffs in the *Palomino* case[169] were unsuccessful because they failed to argue that California's consumer protection law, which itself prohibits a wide array of fraudulent and deceptive practices and aims to achieve the same end, is contrary to New Jersey policy.[170]

Another focus point in applying the "substantial relationship" test is the Restatement (Second). In situations where the parties choose the law applicable to their contact as per section 187 of the Restatement (Second), the courts consider the prescription by the Restatement (Second) to determine whether the choice by the parties is valid. This approach can be seen in *Hoffman v Citibank*[171] where the California Supreme Court held that under California's choice of law analysis, a court must determine as a threshold matter "whether the chosen state has a substantial relationship to the parties or their transaction, or . . . whether there is any other reasonable basis for the parties' choice of law" as required under section 187 of the Restatement (Second).[172]

Per the facts of the *Hoffman* case, the plaintiff-appellant, Laura Hoffman, appealed the district court's order compelling arbitration in her class action suit against her

[168] *Washington Mut Bank FA v Superior Court* (2001) 24 Cal 4th 906 para 916.
[169] *Palomino v Facebook Inc* (2017) No 16-cv-4230-HSG (ND Cal 2016) para 5.
[170] *Palomino v Facebook Inc* (2017) No 16-cv-4230-HSG (ND Cal 2016) para 5.
[171] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1078.
[172] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1078.

credit card company, defendant-appellant Citibank (South Dakota) NA. The district court found that Hoffman was party to an arbitration agreement in which she had waived her right to proceed on a class basis. The district court applied South Dakota law, the law chosen in the credit card agreement, and enforced the class arbitration waiver and ordered Hoffman to proceed on a non-class basis. The issue on appeal was whether California law or South Dakota law should be used to determine the enforceability of the arbitration agreement.[173]

The Appeal Court held that when an agreement contains a choice of law provision, California courts apply the parties' choice of law unless the analytical approach articulated in § 187(2) of the Restatement (Second) of Conflict of Laws dictates a different result.[174] The California Supreme Court has held that under California's choice of law analysis, a court must determine as a threshold matter "whether the chosen state has a substantial relationship to the parties or their transaction, or . . . whether there is any other reasonable basis for the parties' choice of law".[175] The court further stated that if either of these tests is satisfied, the second inquiry is whether the chosen state's law is contrary to a fundamental policy of California. If such a conflict with California law is found, "the court must then determine whether California has a materially greater interest than the chosen state in the determination of the particular issue".[176]

In resolving the dispute, the Appeal Court ruled that the District Court had erred in not applying the laws of California because the dispute was brought by

[173] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1080.
[174] *Discover Bank v Superior Court* (2005) 36 Cal 4th 148 para 1117.
[175] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1082.
[176] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1082.

a California resident, on behalf of a California-only class, under a California statute, for an allegedly deceptive practice whose injury was felt in California. This constituted a substantial relation to the dispute.[177] Thus, the district court had erred in not applying the laws of California as articulated in Restatement § 187(2) and the *Nedlloyd* case,[178] and more specifically because it failed to address whether Citibank's class arbitration waiver, accompanied by a non-acceptance provision, was unconscionable under California law.[179]

From the discussion of section 187(2) of the Restatement (Second) above, it is clear that the first qualification to the right of the parties to choose the applicable law is the requirement of a "reasonable basis" for choosing that law. When the state of the selected law has some significant relationship to the parties or their contract, the parties have a reasonable basis for their choice.[180]

The following criteria relate to the fundamental policy of the forum state in the determination of the issue. It is essential to note that the forum applies its legal principles in determining whether a specific policy is fundamental within the meaning of the present rule, and whether the other state has a materially more significant interest than the state of the chosen law in the determination of the particular issue.[181] Moreover, the parties' power to choose the applicable law is subject to the least restriction in circumstances where the substantial contacts are so widely dispersed

[177] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1085.
[178] *Nedlloyd Lines BV v Superior Court* 1992 3 Cal 4th para 459.
[179] *Hoffman v Citibank* (2008) 546 F 3d 1078 9th Cir para 1085.
[180] S 187(a) of the Restatement (Second) (n 37).
[181] *Mencor Enterprises Inc v Hets Equities* Corp 1987 190 Cal App 3d Cal Ct App para 432.

that determining the state of the applicable law without regard to the parties' choice would cause real problems.[182]

One advantage that has been identified with the "substantial relationship" test is how it assists in ensuring that certain states internally deal with some effects of lax laws by regulating only those which have a substantial connection with the state. Regardless of this advantage and whether or not the contracting parties are subject to the law, the state will presumably be constrained by other affected residents.[183] The Restatement (Second) also suggests that the parties' right of choice is not absolute.[184] This research will further consider the criteria for the fundamental policy of the forum state in the determination of choice of law issues in California.

3.2 State policy

In issues of state or public policy, choice of law has been defined as that principle which allows a court to discard a cause of action based on the law of a different jurisdiction because the other jurisdiction's law is not only distinct but also offensive to generally recognised standards within the forum.[185] Thus, under the conventional approach to choice of law, the forum's territorially-oriented rule might refer to a law the enforcement of which would be contrary to the forum's public policy. In these circumstances, the forum will hear the matter and apply its laws to that specific aspect

[182] S 187 official comment (g) of the Restatement (Second) (n 37).
[183] O'Hara and Ribstein 1999 *UCLR* 1548.
[184] S 187(2)(a) of the Restatement (Second) (n 37). Also see O'Hara and Ribstein (n 183) 1549.
[185] Corr 1985 *WMLSSR* 649.

of the contract to which the application of a choice of law will be repugnant to the forum's policies.[186]

Those opposed to the public policy doctrine have argued that, in conflict of laws, the doctrine ought to have been a cautionary measure on which parties may rely in guiding them in considering their choice of law and not a means of preventing the application of their choice *ex post facto*.[187] The doctrine has been described as "a brute force type of argument".[188] It has also been stated that the danger of the traditional view of public policy is that its operation is likely to be chaotic and that, if exploited to avoid a result on the merits, the forum is more likely to reject implementation of a foreign law than if the forum faces the issue squarely and applies either forum law or foreign law to dispose of the case on the merits.[189]

These criticisms focus on the fact that these policies provide a standard to which rules on choice of law in consumer contracts must conform. When choice of law by parties does not conform to this standard, the court will disallow the enforcement of choice of law clauses in the contract on the basis of public policy. Thus, the courts are released from their obligation to refrain from arbitrary decision-making based on a judge's highly personalised notion of justice.[190] Regardless of these criticisms, the California courts frequently use the theory of public policy to deprive parties of the enforcement of their choice of law in consumer contracts as was seen in the *Discover* case[191] discussed above.

---

[186] Corr (n 185) 649.
[187] Lorenzen 1924 *YLJ* 736.
[188] Corr (n 185) 651.
[189] Corr (n 185) 651.
[190] Corr (n 185) 651.
[191] *Discover Bank v Superior Court* 36 Cal 4th 148 (2005) para 1117.

An analysis of the cases above indicates strong protection for consumers in adhesion contracts. Section 187(2)(b) of the Restatement (Second) provides that the state whose public policy may defeat the parties' choice of law is not the forum state *qua* forum, but rather the state whose law would, under section 188, govern the issue had the parties not made a reasonable choice – the *lex causae* (the objective proper law). In this regard, in exercising their choice of law dominant parties may find their choice excluded by the court should it prove contrary to public policy aimed at protecting the consumer.[192] Arguably, this form of protection is not adequate.

4 California's position on choice of law rules in consumer contracts of adhesion

The case of *Gamer v duPont Glore Forgan Inc*[193] is a classic example of the court dealing with choice of law issues in a consumer contract of adhesion. The issues before the court were whether the choice of law provision in paragraph 18 of the margin account was invalid as a matter of law because it was contained in a contract of adhesion; and, if not, whether it was invalid because: (a) there was an insufficient relationship with the state of New York between the parties to the contract and the subject matter of the contract; or (b) the application of the choice of law provision would do violence to the declared policy of California against usurious transactions; and finally, (c) whether Glore Forgan was entitled to the benefit of the choice of law provision if it was valid. Paragraph 18 stated that "the provisions of this agreement

[192] California's policies on protecting consumers include: The Unfair Competition Law (Business and Professions Code s 17200); The False Advertising Act (Business and Professions Code s 17500); and The Consumer Legal Remedies Act (Civil Code s 1750-1784).
[193] *Gamer v du Pont Glore Forgan Inc* 65 Cal App 3d (Cal Ct App 1976) para 280.

shall be construed according to, and the rights and liabilities of the parties hereto shall be governed by, the laws of the state of New York".

In resolving these issues, the court first defined the term "contract of adhesion" and indicated that it

> …refers to a standardised contract prepared entirely by one party to the transaction for the acceptance of the other; such a contract due to the disparity in bargaining power between the draftsman and the second party must be accepted or rejected by the second party on a take it or leave it basis without opportunity for bargaining and under such conditions that the adherer cannot obtain the desired product or service save by acquiescing in the form agreement.[194]

Regardless of this position, the court pointed out that such contracts are valid and enforced according to their terms unless they are ambiguous.[195] Any ambiguity or uncertainty is to be interpreted against the drafter of the contract.[196]

The court further stated that California does not have any public policy against choice of law provisions in a contract of adhesion. The court referred to the decision in *Windsor Mills Inc v Collins Aikman Corp*[197]and stated that "the parties may expressly agree on what law shall govern their contract. Although the form may be characterised as a contract of adhesion, the choice of law provision contained in such a contract is usually respected".[198] It further indicated that a choice of law provision is not invalid as a matter of law because it is contained in a contract of adhesion. Citing *Frame v Merrill Lynch, Pierce, Fenner Smith, Inc*[199] the court commented that, as a rule,

---

[194] *Lomanto v Bank of America* (1972) 22 Cal App 3d Cal Ct App para 663.
[195] *Schmidt v Pacific Mut Life Ins Co* (1969) 268 Cal App 2d Cal Ct App para 735.
[196] *Neal v State Farm Ins Cos* (1961) 188 Cal App 2d Cal Ct App para 690.
[197] *Windsor Mills Inc v Collins Aikman Corp* (1972) 25 Cal App 3d Cal Ct App para 987.
[198] *Windsor Mills Inc v Collins Aikman Corp* (1972) 25 Cal App 3d Cal Ct App para 987.
[199] *Frame v Merrill Lynch, Pierce, Fenner Smith, Inc* (1971) 20 Cal App 3d 668, 97 Cal Rptr 811 para 673.

contracting parties may by agreement specify what law is to govern their contract if "enforcement of the contract by a local court or by the foreign law does not result in an evasion of the settled public policy or a statute of the forum protecting its citizens". The court indicated that a choice of law in an adhesion contract will only be denied by the court if and only if the choice is contrary to a public policy in California. Thus, an agreement designating the applicable law will not apply if it violates a firm California public policy.[200]

The court in the *Gamer* case[201] reiterated that where both states involved in the dispute have an interest in the case, the court will consider the surrounding circumstance and the nature of the issue at hand to determine which of the states has a greater interest in the matter. In the *Gamer* case, the court rejected the plaintiff's claim that the declaration stated that the "customer agreement" was signed in California, all plaintiff's payments were made to offices in California, and all the plaintiff's orders, requests for loans of money, or extensions of credit were made through California offices, and that the law of California should consequently apply. The court found that those plaintiff statements did not create an issue of fact regarding the substantial relation to the contract and the state of New York. Furthermore, where there is no choice of law provision, if the general rule as to conflict of laws were to be applied, New York law would apply as to the validity of all stock sales and purchases made in New York.

The law of the place where the contract is to be performed – the *lex loci solutionis* – is to be applied in matters relating to performance. In considering the nature of the

[200] *People v Globe Rutgers Fire Ins Co* (1950) 96 Cal App 2d 571 para 575.
[201] *Gamer v du Pont Glore Forgan Inc* (1976) 65 Cal App 3d Cal Ct App para 280.

case, the court concluded that the residence of the parties to the litigation was not significant in determining what law is to be applied in stock and commodity transactions as these forms of contract are ordinarily governed by the law of the place where the order is executed, irrespective of where the order is given or where the parties reside. This again pointed to the law of New York.[202]

The court further indicated that in considering the surrounding circumstances of each case, a court may take judicial notice of the historical facts regarding the contract. The judicial precedence highlighted above reveals that a California court will not deny choice of law clauses in a consumer contract of adhesion. Instead, when it comes to enforcement, the court will consider whether the choice is unconscionable and whether a choice of law by the dominant party falls within the remit of the state's rules on choice of law.

This chapter concludes by addressing the strengths and weaknesses of the laws on choice of law applicable in California.

The signal decision in the *Gamer* case has been validated in a recent consumer case in which the court held that California has no strong public policy against a particular rate of interest in a contract of adhesion provided that rate is permitted by law for the specific loan. The court concluded that a New York choice of law provision was enforceable even though New York allows interest rates in excess of the rates permitted in California as there are no policies against including such terms in a contract.[203]

---

[202] *Brooks v People's Bank* (1920) 233 NY 87 [134 NE 846] para 543.
[203] *Schoemann v eWellness Healthcare Corp* (2017) Civil Action No 17-00123-BAJ-EWD, MD La para 8.

5 Conclusion

The ongoing debate has revealed that the state of California has adopted and incorporated the UCC as California's Commercial Code which applies only if the parties choose the UCC to apply to their contract. Section 1-301 of the UCC provides that, when a contract bears a reasonable relation to the state and another state or jurisdiction, the parties may agree that the law of either the state or of such other state shall apply to the terms and conditions of the contract.[204] This presupposes those transactions covered by this legal instrument must bear a "reasonable relation" to the chosen state. This is the only express requirement for permitting a contractual choice of law.[205] In this light, the "reasonable relation" test is not a sufficient reason to prohibit parties from choosing the law of another state. It has been argued that section 1-301 of the UCC fails to differentiate expressly between a contractual choice of law and incorporation by reference but appears to suggest that the application of the UCC is based on incorporation by reference.[206] This suggestion is drawn from official comments stating that the parties are free to replace the UCC's waivable rules by incorporating the law of a state with no reasonable relation to the contract by reference in their contract.[207]

Where party autonomy is concerned, section 1-301(c) lists several other sections of the UCC and provides that if any of those sections designate the state of the applicable law, that law governs and "a contrary agreement is effective only to the extent

[204] S 1-301 of the UCC (n 10); Symeonides 2007 *SIULJ* 520.
[205] Symeonides (n 204) 520.
[206] S 1-301 of the UCC (n 10); Symeonides (n 204) 520.
[207] S 1-301 comment 1, s 1-302 comment 2, and 1-302(a) of the UCC (n10).

permitted by the law so specified". This notion is interesting because the UCC section 1-301(c) does not impose a general public policy limitation on party autonomy.[208] It has been stated that because all states in the USA have adopted the UCC, this may suggest that such a limitation on party autonomy by the UCC is not necessary for American interstate conflicts.[209]

This assumption is undoubtedly false in the case of international conflicts because the public policies of these states differ, and the adoption and interpretation of the UCC in the states are likewise different.[210] The revised 2001 version of the UCC attempted to remedy the situation by imposing a "fundamental policy" limitation on the state whose law would govern in the absence of a valid choice of law agreement.[211] The state law was determined through the forum state's choice of law rules.[212] Where consumer contracts are concerned, the revised UCC indicated the chosen law could not deprive the consumer of the protection offered by non-waivable rules of her home state or a state in which she concluded the contract and took delivery of the goods.[213] It is unfortunate that by 2008 only the US Virgin Islands had adopted the proposed revision and that the UCC Commissioners withdrew the revision due to lack of interest.[214]

California also follows a combined approach in choice of law, which involves the application of both the Restatement (Second) and an interest analysis.[215] In applying

[208] S 1-301 (c) of the UCC (n 10); Symeonides (n 204) 521.
[209] *Mell v Goodbody & Co* (1973) 10 Ill App 3d 809, 295 NE 2d 97 para 100.
[210] *Mell v Goodbody & Co* (1973) 10 Ill App 3d 809, 295 NE 2d 97 para 100.
[211] S 1–301(f) of the UCC (n 10) (2001 Revision).
[212] S 1–301(d), (f) of the UCC (n 10) (2001 Revision).
[213] S 1–301(e)(2) of the UCC (n 10) (2001 Revision).
[214] Symeonides (n 204) 522.
[215] Symeonides (2007) *AJCL* 16.

this combined approach, the forum must find the applicable proper law on the basis of the surrounding circumstances of the case and in favour of the litigants and the states involved. With the governmental interest approach, the courts do not disregard a choice of the Restatement (Second) of Conflict of Laws.[216] Instead, the choice is examined as part of the analysis of the states' interests based on the nature of the contract and the relevant interest of the contract law under consideration.[217] It is important to note that the Restatement (Second) limits party autonomy by requiring a specified geographical connection with the state of the chosen law or a reasonable basis for the choice and a guarantee that the chosen law's application remains within the substantive limitations of the *lex causae*.[218]

The Restatement (Second) subscribes to the substantive limitations of the *lex causae,* which will apply in the absence of a valid choice by the parties, rather than those of the forum which has jurisdiction to try the matter.[219] Even if the public policy of the forum is applied, it is always the shield of limitations to be considered by reference to their contract to prevent the application of a repugnant foreign law – whether the choice originated with the parties or through the forum's choice of law rules.[220] This particular shield of limitation remains an option for judicial systems that resort to modern conflict of laws approaches. Judge Cardozo has warned that this class of limitations should only be considered in extraordinary instances where the applicable foreign law is repugnant to the sense of justice and fairness of the forum.[221]

[216] Symeonides (n 215) 18.
[217] Symeonides (n 215) 18.
[218] Symeonides (n 204) 517.
[219] Symeonides (n 204) 518.
[220] Symeonides (n 204) 518.
[221] Symeonides (n 204) 518.

Although the Restatement (Second) recognises the application of limitations fundamental to the public policy of the state of the *lex causae*, it fails to define what constitutes "fundamental" and only states that it must be substantial. The Restatement (Second) further states that to be "fundamental" within section 187, "a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of section 90".[222]

The Restatement (Second) includes a requirement for that the state of the *lex causae* must have a "materially greater interest than the chosen state" in applying its law to the issue. It, however, fails to elaborate on a "materially greater interest".[223] There is an assumption that once the *lex causae* has been established, that state automatically has a materially more significant interest in applying its law.[224] But what if the choice of law rules of the *lex fori* identify two states with a materially more significant interest in applying their law? The Restatement (Second) fails to address this problem. California applies the comparative impairment approach to the Restatement (Second) to resolve this problem.[225]

On the issue of describing "a fundamental policy of a state which has a materially greater interest", the Restatement (Second) gives examples of rules that embody such a policy. These include statutes that make specific contracts illegal, and statutes intended to protect one party from the oppressive use of superior bargaining power, such as statutes protecting insureds against insurers".[226]

[222] S 187 comment (g) of the Restatement (Second) (n 37).
[223] S 187 (c) of the Restatement (Second) (n 37).
[224] Symeonides (n 204) 518.
[225] Symeonides (n 215) 16.
[226] S 187 comment (g) of the Restatement (Second) (n 37).

Typical of the American legal culture, the Restatement (Second) prefers to take the position of under-regulation rather than over-regulation.[227] This is realised when the instrument provides only a single party-autonomy rule embodied in section 187 for all agreements, rather than several rules for different types of contract as it does for agreements that do not contain a choice of law clause.[228]

The failure of the Restatement (Second) to define some critical terms used in section 187, such as substantial relationship, reasonable basis, fundamental policy, and materially greater interest,[229] creates the impression that the instrument creates an appealing effect rather than legal certainty. This position is supported by Symeonides's view that the lack of definitiveness is a deliberate policy choice by the Restatement's drafters which reflects a low degree of confidence in their ability to provide reasonable *a priori* solutions for diverse situations, and a high degree of confidence in the court's ability to do so on a case-by-case basis.[230]

The American legal culture of under-regulation defeats the purpose of achieving harmonisation in choice of law rules where consumer contracts are concerned. The idea of under-regulation leaves room for manipulation based on the discretion afforded the courts. At this point, the judicial precedence developed is not dependent on the potency of choice of law regulations, but rather on the jurisprudential position of the state's policy and the ideologies of judges. This leads to a humdrum approach to ensuring uniformity and predictability, which creates unease between the parties where consumer contractual disputes are concerned. The state of California should

[227] Symeonides (n 215) 520.
[228] S 189-207 of the Restatement (Second) (n 37).
[229] S 167 of the Restatement (Second) (n 37).
[230] Symeonides (n 215) 520.

provide more specific and suitable choice of law rules that afford better consumer protection in consumer contracts of adhesion.

This chapter addressed how the UCC and the Restatement (Second) address issues of choice of law in consumer adhesion contracts by examining some of the challenges raised by the UCC and the Restatement (Second) as they apply in California.

Choice of law rules on consumer contracts have a wider purchase which extends to China and it is to this reason that we now turn to evaluate the choice of law rules in a consumer adhesion contract.

Chapter five: Choice of law rules on consumer adhesion contracts: An assessment of the rules in China.

1 Introduction

In Chinese law the principle of party autonomy, partially in consumer adhesion contracts, was first acknowledged in 1985 in China's Foreign Economic Contract Law.[1] This recognition was perhaps the first step in adopting party autonomy as a principle in China. The principle was later codified in the Law on the Application of Laws to Foreign-related Civil Relationships (2010 Conflicts Statute), a new statute governing China's private international law promulgated by the Standing Committee of the National People's Congress (NPCSC) on 28 October 2010.[2] The statute, which took effect on 1 April 2011, sets out aspects of party autonomy in the first chapter as one of the General Provisions.[3]

A brief history of Chinese private international law reveals that the period after 1949 witnessed a situation in which there was little or no rule on choice of law regulating commercial matters. In that era, this position was widely attributed to the non-application of foreign law in the People's Courts.[4] When Chinese courts faced a dispute involving foreign elements they resorted to principles regulating foreign-related civil or commercial relations which appeared only in consular treaties between China and

[1] Jieying *Party Autonomy in Contractual Choice of Law in China* 1.
[2] Jieying (n 1) 2.
[3] A 1 of the Law of The People's Republic of China on The Laws Applicable to Foreign-Related Civil Relations (2010 Conflicts Statute) which provides that: "This law is formulated with a view to specifying the laws applicable to foreign-related civil relations, resolving foreign-related civil disputes fairly and safeguarding the legitimate rights and interests of the parties."
[4] Jieying (n 1) 2.

other countries.[5] Commentary suggests that the only choice of law rules in China between 1911 and 1979 were those in the Act on the Application of Law adopted by the Nationalist government on 5 August 1918, and the application of provisions scattered across a few consular treaties between China and other countries dating from the 1950s. This Act contained nothing on choice of law rules where contracts were concerned.[6]

In private international law circles, China is believed to be deficient in developing conflict rules, especially regarding contractual issues. It is only recently that writers in this field have started to develop the Chinese legal system in this area. Two explanations are offered for this underdevelopment.[7] The first is that for over 2000 years China was a closed and self-sufficient society in which there was little need to engage in cross-border transactions. Second, the ideology of "socialist supremacy" which dominated the nation during the period between 1949 when the Communist party took power, and 1978 when the country initiated economic reform, did not allow for private trade and capitalism.[8]

Before 1985 no Chinese conflict rules applied to international contracts. This created a situation where, for almost three decades, China's Foreign Trade Arbitration Commission and a Maritime Arbitration Commission of the time assumed the role of settling disputes arising from economic relations with foreign countries.[9] This notwithstanding, the conflict rules applied by the Arbitration Commissions were not

[5] Jieying (n 1) 2.
[6] Jieying (n 1) 5.
[7] Jieying (n 1) 5.
[8] Yuqing and McLean 1987-1988 *NJIL&B* 120-144; Szawlowski 1989 *TICLQ* 197-207.
[9] Yuqing and McLean (n 8) 120.

widely known as cases were few and far between. The reasoning behind the decisions in the arbitral awards was generally not provided, nor were they published – a practice which persists to this day.[10] Additionally, the People's Courts published no decisions on conflicts disputes.[11]

1.1 Focus of the chapter

This chapter inquiries into the 2010 Conflicts Statute which regulates consumer contracts of adhesion, disputes arising from them, and their effect on the protection of weaker parties. First, Chinese domestic law on consumer protection is considered before moving on to specific provisions in the 2010 Conflicts Statute on consumer adhesion contracts. The chapter also addresses mandatory rules and state policies that serve as a limitation on party autonomy. The chapter concludes by identifying the strengths and weaknesses of the position taken by China on consumer contracts of adhesion and points out that it is a replication of choice of law rules on consumer adhesion contracts in Rome I – albeit somewhat watered down.

2. Chinese domestic laws on the protection of consumers

Various statutes have been promulgated in China to ensure the protection of consumers.[12] Prominent among these is the People's Republic of China Law on

[10] Jieying (n 1) 7.
[11] Jieying (n 1) 7.
[12] These include the Products Quality Law (1993), Anti-Unfair Competition Law (1993), Advertisements Law (1994), Provisional Regulations on the Prevention of Excessive Profiting (1995}, Provisional Regulations on the Administration of Futures Trading (1999), Stipulations on Punishment on Price-Related Law Violations (1999), Anti-Monopoly Law (2007), and Food Safety Law (2009).

Protection of the Rights and Interests of Consumers.[13] In 1992 the government of China adopted a "market-oriented economy" which led to the enactment of the Consumer Protection Act in 1993. Twenty years after this initiative, amendments were made to the 2010 Conflicts Statute to address the growth and changes in the Chinese economy.[14] Some of the problems which led to the amendment to the 1993 Act include: a) the lack of a clear legal definition of "consumer"; b) the limited role or function of Consumer Associations; c) the considerable costs to a consumer who seeks judicial relief; d) the overlapping roles and functions of the relevant administrative agencies of the government; e) the gap between administrative agencies and courts in taking action against consumer-law violators; f) general arbitration as an impractical avenue for an aggrieved consumer to seek relief; and g) the problems with the application of the general civil procedure to consumer disputes.[15]

2.1 Amendments to the Chinese Consumer Act

In response to the problems and criticism which accompanied the 1993 Consumer Act, the Act was amended with the aim of "strengthening consumer protection", "coping with new situations in consumption", and "making consumer protection law

[13] The People's Republic of China Law on the Protection of Consumer Rights and Interests of the People's Republic of China (2013 Amendment). Adopted at the 4th meeting of the Standing Committee of the Eighth National People's Congress on 31 October 1993, and amended for the first time in accordance with the "Decision on Amending Some Laws" adopted at the 10th Meeting of the Standing Committee of the Eleventh National People's Congress on 27 August 2009 and amended for the second time in accordance with the "Decision on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests" adopted at the 5th Session of the Standing Committee of the Twelfth National People's Congress on 25 October 2013. The 2013 Amendment entered into force on 15 March 2014.
[14] Liao 2014 *BLR* 1-10.
[15] S 29 of the People's Republic of China Law on the Protection of Consumer Rights and Interests of the People's Republic of China (2013 Amendment) (n 13).

workable".[16] Some of these problems were addressed by the new amendment to the 2010 Conflicts Statute but others were not.[17] However, the amendment did result in a significant improvement in many aspects of consumer-related contracts. One of the crucial improvements addressed in the amendment to the 2010 Conflicts Statute, involves detailed rules for more vital protection of consumers' personal information and freedom from "junk-information nuisance".[18]

The amendment also imposed more severe penalties for commercial fraud. There was a significant increase in the punitive damages for suppliers' fraudulent conduct in supplying goods or services to a consumer.[19] Thus, if a supplier engages in fraudulent conduct, she is, at the consumer's request, liable to punitive damages of as much as twice the purchase price, with a statutory minimum amount and a full refund of the purchase price.[20] Also, should business personnel knowingly supply defective goods or services which result in serious personal injury or death, the victim may claim compensatory damages, including damages for mental harm, together with punitive damages not exceeding twice the compensatory damages.[21] There was also a significant elevation of the ceiling for fines for fraudulent and other conduct by business operators. Currently, the upper limit for fines is fifty times the previous one.[22]

[16] Explanations to the Consumer Protection Amendment Bill (Draft) and the Clauses by Standing Committee of National People's Congress, 28 April 2013.
[17] S 29 of the 2013 Amendment (n 13).
[18] S 29 of the 2013 Amendment (n 13).
[19] S 55(1) of the 2013 Amendment (n 13).
[20] S 55(1) of the 2013 Amendment (n 13).
[21] S 55 (2) of the 2013 Amendment (n 13).
[22] S 56 of of the 2013 Amendment (n 13).

Arguably, such changes will help to deter business operators from committing consumer-law violations.[23]

The amendment to the Consumer Protection Act further provides "online shopping consumers" with a "cooling off" period.[24] If a consumer purchases goods or services via the internet, television, telephone, or mail order, she may return the goods or services, without having to provide reasons, within seven calendar days from the date of receiving the goods or services and is entitled to a full refund of the purchase price. This is, however, subject to limited exceptions such as where the goods purchased are perishable.[25] With the dissemination of information, operators who supply goods or services via the internet, television, telephone, or mail order must, as with providers of services of the stock exchange, insurance, and banking, provide consumers with sufficient information to allow them to the identity, address, and other contact details of the supplier, the quantity and quality of the goods or services supplied, the price and/or other charges, the deadline for performance and how goods or services are to be delivered, and a warning as to safety and risks, warranties, and liabilities.[26]

The new amendment to the Consumer Protection Act also enforces a "guarantor's liability" or "joint liability" against e-trade "platform" providers. In situations where goods or services are supplied via a widely-used platform – eg, Taobao in China – where different suppliers may open "online shops" and post items on the website for sale and interested purchasers may bid or choose "buy now" directly via the website, an unsatisfied consumer may claim compensation from the supplier or the e-trade

[23] Liao (n 14) 3.
[24] S 25 of the 2013 Amendment (n 13).
[25] A 25 of the 2013 Amendment (n 13).
[26] A 28 of the 2013 Amendment (n 13).

platform provider where the platform provider fails to provide the consumer with the true identity, address, and other contact details of the goods or services provider, or where the terms promised by the platform provider are more favourable to the consumer than the terms promised by the supplier of the goods or services.[27] An e-trade platform provider will be jointly liable to unsatisfied consumers where it deliberately permits the goods or services provider to use the platform to infringe on consumers' rights and interests.[28]

The amendment also places the burden of proof on the supplier where there is a dispute over a defect in durable consumer goods such as vehicles, computers, televisions, refrigerators, air-conditioning units, and washing machines and in specific types of service – eg, house refurbishments – and the defect is discovered and raised by a consumer within six months of the supply.[29] The defect raised will be deemed to exist unless and until the supplier successfully discharges the burden of proving that the defect does not exist. It has been stated that this rule has a narrow application because it applies only to defects in durable consumer goods and limited types of service.[30] The general rules regarding the burden of proof in Chinese civil litigation[31]

[27] A 44 of the 2013 Amendment (n 13).
[28] A 44 of the 2013 Amendment (n 13).
[29] A 23 of the 2013 Amendment (n 13).
[30] Liao (n 14) 4.
[31] A 90 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China as adopted by the Judicial Committee of the Supreme People's Court at its 1636th session on 18 December 2014, and hereby issued and shall come into force as from February 4, 2015 which captures the general rule, provides that: "A party concerned shall furnish evidence to prove the facts on which its own claims are based or on which its refutation of the opposite party's claims is based, unless otherwise prescribed by law. Where a party concerned fails to furnish any evidence to prove the claimed facts or where the evidence so furnished is insufficient to prove the claimed facts prior to the pronunciation of a judgment, the party having the bur den of proof shall be liable for unfavourable consequences."

still apply to consumer cases – a plaintiff consumer must bring evidence to prove to the People's Court[32] the alleged defect in the goods or services or fault on the part of the supplier.[33]

The Consumer Protection Act also makes further amendments to the advertisement of goods and services. The position under the new law is that where advertisers and other related persons are liable for false advertising a consumer may request the relevant government agencies to punish the advertiser when the false or misleading advertisement is discovered. The advertiser is liable to compensate the consumer if she is unable or unwilling to provide the true identity, address, and other valid contact details of the supplier.[34] Where the false advertisement concerns food, drugs, or other goods or services related to consumers' health or safety and harm is caused to a consumer, the advertiser will be jointly liable with the provider of the goods or services to the consumer.[35] A joint liability is imposed on other organisations or persons who recommend or endorse the goods or services to consumers via false advertising.[36]

The amendment also extends the role and function of consumer associations. Consumer associations are now considered statutory bodies for consumers which are

[32] It is important to bear in mind that the legal system of China is inquisitorial and hence the involvement of judges in the determination of the level of burden of proof. Specifically A 91 of the Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China, 2015 provides that: "Unless otherwise prescribed by law, the people's court shall determine the burden of proof between the parties concerned in line with the following principles: (1) A party concerned who claims that a certain legal relationship exists shall have the burden of proof relating to the basic facts for the establishment of the legal relationship; and (2) A party concerned who claims that a certain legal relationship has changed or terminated, or that its rights have been infringed upon shall have the burden of proof relating to the basic facts for the change or termination of the legal relationship, or the infringement upon its rights."
[33] Liao (n 14) 4.
[34] A 45 of the 2013 Amendment (n 13).
[35] A 45 of the 2013 Amendment (n 13).
[36] Liao (n 14) 4.

required and entitled to act for "public interest".[37] Consumer associations now have the new task of participating in making consumer-protection-related laws, regulations, and mandatory standards.[38] A remarkable change worth noting is that consumer associations are mandated to undertake mass representation and institute class actions on behalf of consumers.[39] The amendment further clarifies administrative agencies' regulatory responsibilities. The relevant administrative departments are now required to collect and test samples of consumer goods or services and publish the results from time to time, and to order the operator to stop a sale, to warn consumers, and to recall any defective goods or services that might endanger the safety of humans or property.[40] Also, an administrative agency is now required to handle a consumer complaint within seven days of receipt of the letter of complaint.[41] Despite the improvements resulting from the amendment, some problems have not been resolved. Foremost among these is the absence of a clear legal definition of a "consumer".

2.2 Defects to the amended Chinese Consumer Protection Act

The most notable defect is that the Consumer Protection Act 1993 fails to provide a specific definition or essential interpretation of a "consumer". It provides that where a consumer purchases or uses goods or accepts services for a livelihood, her rights and interests are protected by this Act.[42] This is not a definition of who a consumer is. Article 2, too, talks of "the need of living consumption", but without further

[37] Arts 36 and 37 of the 2013 Amendment (n 13).
[38] A 37(2) of the 2013 Amendment (n 13).
[39] A 37(2) of the 2013 Amendment (n 13).
[40] A 33 of the 2013 Amendment (n 13).
[41] A 46 of the 2013 Amendment (n 13).
[42] A 2 of the 2013 Amendment (n 13).

explanation of what this means.[43] It has been several years since the enactment of the Consumer Protection Act 1993 but there is still no uniform understanding or consensus on whether "the need of living consumption" includes the conditions under which a person purchases a house or buys a multifunction vehicle, or accepts medical treatment, education, brokerage, or telecommunication services, or whether "consumer" refers to a purchaser who purchases fake goods intending to claim punitive damages.[44]

Another critical issue which the 2010 Conflicts Statute fails to address is whether "consumer" is restricted to a natural person or can be extended to cover legal persons. This is because section 2 of the Consumer Protection Act 1993 provides that the Consumer Protection Act protects a consumer with no explanation of whether "consumer" is a natural person, an artificial person, or both.[45] Scholars of private international law have argued that in China a consumer does not include a legal person or an organisation because an organisation is presumed to be in the position of a business operator.[46] However, this view has been debunked by certain by-laws or regulations enacted after the 1993 Act which show that the framers of the 2010 Conflicts Statute intended "consumer" to include a legal person and other organisations.[47]

This lack of a clear legal definition has resulted in uncertainty in the enforcement of consumer laws – a problem arguably exacerbated by the lack of the principle of *stare*

[43] Liao (n 14) 168.
[44] Xiang and Liao 2013 *UWRL* 7.
[45] Xiang and Liao (n 44) 7.
[46] Liao (n 14) 168.
[47] Liao (n 14) 168.

decisis in China's civil law system.[48] As there is no binding judicial interpretation of "consumer" or "the need of living consumption", judicial and administrative officials rely on their discretion and thus define substantially similar cases differently.[49] The unencumbered discretion vested in the judges results in significant ambiguity which undermines the rule of law which requires that like cases should be treated alike.[50] However, as we have seen above, regardless of these pitfalls the Consumer Protection Act (2013 Amendment) affords some protection for consumers who purchase goods in China.

3 Law of the People's Republic of China on the laws applicable to foreign-related civil relations – An overview

The development of the statute on China's conflict rules only began with the Law of the People's Republic of China on Economic Contracts involving Foreign Interests. The party autonomy principle was first acknowledged in the Foreign-related Economic Contract Law. Article 5(1) provided that the parties to a foreign-related economic contract may decide on the law to govern and resolve their contractual disputes.[51] Choice of law rules on consumer adhesion contracts were promulgated in the 2010 Conflicts Statute adopted by the National People's Congress of the People's Republic of China (NPCSC).[52] The 2010 Conflicts Statute was enacted to clarify the application

[48] Liao (n 14) 168.
[49] Liao (n 14) 168.
[50] Liao (n 14) 168.
[51] A 5 of the Law of the People's Republic of China on Economic Contracts involving Foreign Interest adopted at the Tenth Session of the Standing Committee of the Sixth National People's Congress, promulgated by Order No 22 of the President of the Peoples Republic of China on 21 March 1985 and effective as of 1 July 1985.
[52] Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).

of laws concerning foreign-related civil relationships, to resolve foreign-related civil disputes reasonably, and to protect parties' legal rights and interests.[53]

On the issue of party autonomy, the Law of the People's Republic of China on Economic Contracts involving Foreign Interest provides that the law applicable to foreign-related civil relations shall be specified in accordance with the laws of China, and that where other statutes have a unique and different provision on the law applicable to a foreign-related civil relation, that provision shall be followed.[54] The 2010 Conflicts Statute ensures party autonomy by providing that the parties may exercise an express choice of the law to apply to their foreign-related civil relations.[55] This provision in itself limits the autonomy afforded parties in that their choice as their choice must be in accordance with Chinese law. The 2010 Conflicts Statute further enacts the "close connection test" as the determining factor regarding the applicable law in the absence of an express or implied choice by the parties.[56] Concerning mandatory provisions, the statute favours the application of Chinese mandatory rules where there is a conflict between mandatory rules of the forum those of an indicated foreign law.[57]

---

[53] A 1 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[54] A 2 Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[55] A 3 Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[56] A 2(b) Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3). A 2(b) provides: "Where no applicable law to a foreign-related civil relation has been specified in this law or other statutes, the law that is most closely connected with the foreign-related civil relation shall be applied".
[57] A 4 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3). A 4 provides: "Where a mandatory provision of the law of the People's Republic of China ('PRC') exists with respect to a foreign-related civil relation, that mandatory provision shall be applied directly."

The 2010 Conflicts Statute recognises the importance of social and public interest. It states that the People's Republic of China law shall be applied where foreign law will be prejudicial to the social and public interest of the People's Republic of China.[58] It further provides that where foreign law applies to a foreign-related civil relationship and specific laws are implemented in the country's different regions, the law of the region most closely connected with the foreign-related civil agreement must be applied.[59] The 2010 Conflicts Statute indicates that the forum's law governs the characterisation of foreign-related civil relations.[60] Also, it is stated that the application of foreign law to a foreign-related civil relation does not include the conflict rules of that country.[61]

As regards the determination of the foreign law, the 2010 Conflicts Statute provides that the foreign law applicable to a foreign-related civil relation will be determined by the relevant People's Court, arbitration institution, or the administrative agency. Where the parties have chosen an applicable foreign law they must prove the law of that country.[62] Failure to establish the foreign law leads to the application of the law of the People's Republic of China.[63]

[58] A 5 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[59] A 6 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[60] A 8 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[61] A 9 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[62] A 10 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[63] A 10 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).

Where party autonomy involves contractual issues, the 2010 Conflicts Statute imposes some limitations on the parties regarding their choice of law. Thus, although the parties may exercise autonomy in deciding the law applicable to their contract under the 2010 Conflicts Statute, this autonomy restricts the parties from doing so in consumer contracts.[64] In this research the emphasis is on choice of law rules in consumer contracts. The research examines the role the 2010 Conflicts Statue has played in Chinese private international law and how the courts have used its provisions to resolve disputes arising from consumer contracts of adhesion in China.

3.1 Chinese choice of law rules on consumer adhesion contracts

After the Supreme People's Court's Interpretation on Choice of Law Rules on Contracts was promulgated in 2007, legal scholars argued that contracts involving weaker parties, such as consumers, should be distinguished from other contracts so as to provide exceptional protection for weaker parties.[65] These propositions led to the promulgation of the provision on special choice of law rules for consumer contracts in the 2010 Conflicts Statute.[66] Specifically, Article 42 provides that the law of the consumer's habitual residence governs a consumer contract. Where the consumer chooses the law of the place where the commodity or the service is provided or, where the business operator does not engage in any business activity in the consumer's place of habitual residence, the law of the place where the commodity or service is provided

[64] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[65] Provisions of the Supreme People's Court on Certain Issues Concerning the Application of Law in the Trial of Cases Involving Disputes over Foreign related Civil or Commercial Contracts issued on 23 July 2007. Also see Tu *Private international law in China* 42.
[66] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3); Jieying 2012 *JPIL* 98; and Zhang 2011 *NCJICR* 139.

is applied. Thus, where choice of law rules are concerned, the Chinese private international law rules provide that the applicable law of a consumer contract is the law of the place in which the consumer is habitually resident.[67]

This limitation on choosing the applicable law is based on a presumption that the laws of the consumer's habitual residence will afford her better protection.[68] But the 2010 Conflicts Statute also provides that consumers may choose the law where services are provided. In the absence of such choice, consumer contracts are governed by the law where goods and services are provided if the business does not involve any soliciting activities in the place where the consumers are habitually resident.[69] The idea is that where the consumer is allowed to choose, she will most likely select the law of the place where the goods and services are provided if this law is more beneficial to her. It has been stated that permitting consumers such a choice reflects the consideration of protecting the weaker party as the consumer becomes an active consumer in situations where the business solicits activities in the place where the consumer is resident.[70]

3.3 Limitations on consumers' choice in the 2010 Chinese Conflicts Statute

Article 42 suggests a presumption that where suppliers do not engage in any business activity relating to the case in the consumer's place of habitual residence, the law of the place where the product or service is or was supplied will apply to the consumer

[67] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3). See also Xu 2017 *AJCL* 923.
[68] Huo 2011 *ICLQ* 1087.
[69] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 13). See also Huo (n 68) 1087.
[70] Huo (n 13) 1087.

contract.[71] Although a level of protection has been afforded consumers under this law, this protection is not absolute. Regardless of this inadequacy, it has been stated that this results in a balance favouring the supplier, lest consumers be unreasonably protected by an undue sacrifice of the supplier's interests.[72] Thus, the advantages of this provision can be appreciated in two dimensions. The obvious one is the consumer's protection and the consumer's right to select a law beneficial to her and that in the absence of such a choice, the law of her habitual residence applies.[73]

The other aim of the 2010 Conflicts Statute is to protect the legitimate expectations of business operators. Suppose a business operator fails to pursue any related commercial activity in the place of the consumer's habitual residence. In that case, she could not expect to be governed by the law of that place, and the law of the place where the goods or services are provided should apply.[74] This results in the notion that the provision aims to equalise the benefits of the consumer and those of the business operator.[75]

3.4 Defects in Article 42 of the 2010 Chinese Conflicts Statute

It has been argued that consumer contracts are problematic when it comes to bargaining power and access to information. Consumers are seldom knowledgeable regarding other countries' legal systems and consumer laws. This results in situations where consumers are not confident in contracting with foreign traders due to their

[71] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 13). Also see Tu 2011 *AJCL* 590.
[72] Tu (n 71) 581.
[73] Xu 2017 *AJCL* 953.
[74] Xu (n 73) 953.
[75] Xu (n 73) 953.

inability to predict a possible outcome of choice of law rules and the law applicable to their specific contracts.[76] Consumers are often not aware of issues regarding the governing law of their contracts and perform on the presumption that the domestic laws of their countries will at all times protect their interests. Hence, the need for choice of law rules to decide specifically on the law applicable to consumer adhesion contracts which eventually protects a consumer's reasonable expectations and ensures that she does not receive less protection than that afforded consumers in their habitual residence .[77]

Further, regarding the situation where consumers can opt for the law of the place where the service or product is supplied, Article 42 fails to mention whether the mandatory rules protecting the consumer's interest in the law of her habitual residence still apply if the consumer decides to opt for the place of supply.[78] This omission is unsatisfactory as there is a probability that the law of the place where goods or services are provided offers better protection to the consumer. The consumer would be interested in applying the law of that particular country in preference to Chinese law.[79]

3.5 Guidance on what constitutes the consumer's choice in the 2010 Conflicts Statute

The 2010 Conflicts Statute provides no clear guidance on what constitutes the consumer's choice of law or how the choice can be expressed. Arguably the 2010

[76] Tang, Xiao and Huo *Conflict of Laws in the People's Republic of China* 231. Also see Huo (n 68) 1065-1093.
[77] Tang, Xiao and Huo (n 76) 231.
[78] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3); also see Tu (n 71) 581.
[79] Tang, Xiao and Huo (n 76) 231.

Conflicts Statute further raises a presumption that, as regards consumer contracts, the consumer is permitted unilaterally to decide on the law of the place where goods or services are supplied. [80] Where a consumer contract includes a clause on choice of law, Article 42 is not clear on whether this provision overrides a choice of law clause embedded in a consumer contract.[81]

Consumer contracts in China follow the same format as standard form contracts where the consumer is presented with only a "take it or leave it" option.[82] Terms and conditions proposed by dominant parties are seldom read by the consumers. Also, consumers do not have sufficient professional expertise to understand the importance and functioning of choice of law agreements if such a clause is included in a consumer contract and hence considered valid upon the consumer appending her signature – a means by which dominant parties in consumer contracts decide choice of law rules.[83] Based on this, the Chinese position on choice of law may be considered laudable. There have been contrary opinions on the notion that businesses should be permitted to reduce commercial risk by settling on the law of the place where goods or services are supplied.[84] Due to business efficacy, it would be improper to compel dominant parties such as companies and enterprises to adhere to multi-national consumer laws in their cross-border practices hence the need to ensure that the law of a particular country is applied.[85]

[80] Tang, Xiao and Huo (n 76) 231.
[81] Tang, Xiao and Huo (n 76) 231.
[82] Tang, Xiao and Huo (n 76) 232.
[83] Tang *Electronic Consumer Contracts in Conflicts of Laws* (2012) 8-11.
[84] Tang, Xiao and Huo (n 76) 232.
[85] Tang, Xiao and Huo (n 76) 232.

Certain scholars have, on the basis of the close connection test, argued that selecting the law of the place where the goods and services are supplied is a sound choice as it is generally the place with the closest connection to the contract. Applying it, therefore, affords a natural ground for both parties which the law of the consumer's habitual residence does not.[86] Also, the place where the goods or services are supplied is a place familiar to the consumer and so a reasonable, legitimate expectation is that the law of that country will apply.[87] This proposition is laudable if considered because the aim of the protective choice of law clause and its application is not to offer the most valuable protection to the consumer; rather the protective choice of law clause aims to offer the consumer a form of protection that is not inferior to that of her domestic law or the place of her habitual residence.[88] Thus, the protective choice of law clause prevents the dominant party from unilaterally choosing the law of a country that has no substantial connection with the contract and provides a lower level of protection to the consumer.[89] It has also been confirmed that the Chinese protective choice aims not to eliminate party autonomy from consumer contracts but rather to avoid a choice made in bad faith.[90]

The Chinese choice of law rules on consumer contracts also state that the law of the consumer's habitual residence will not apply if the business has not conducted commercial activities in the consumer's place of habitual residence. A typical example of this is when mobile consumers travel to the business's domicile to purchase goods or services. In such an instance, applying the law of the consumer's habitual residence

[86] Tang, Xiao and Huo (n 76) 232.
[87] Tang, Xiao and Huo (n 76) 232.
[88] Tang 2007 *JPIL* 113-136.
[89] Tang (n 88) 113-136.
[90] Tang (n 88) 113-136.

is disruptive for the business.[91] It has been argued that this particular condition of the Chinese choice of law rule on consumer contracts was added to ensure certainty for businesses and reduce commercial risk.[92]

Protecting weaker parties in consumer contracts is equally realised in the National People's Congress amended Consumer Protection Act (2013).[93] This Act has ensured an increase in the standard of consumer protection – eg, the introduction of a seven-day cooling-off period for distance selling.[94] This incentive affords punitive damages for injury to consumers caused by fraud.[95] The Act also permits representative action to be brought by the consumer association for and on behalf of multiple consumers.[96] In such cases, the burden of proof vests in the dominant party to a consumer contract.[97] It has been suggested that the Chinese conflict of law rules should ensure that the Chinese consumer receives the same measure of protection as provided by the Consumer Protection Act when contracting with dominant foreign parties.[98]

The Chinese 2010 Conflicts Statute fails to define what types of contracts fall under consumer contracts. The Chinese Consumer Protection Act, on the other hand, provides that the 2010 Conflicts Statute applies to consumers who purchase or use commodities or receive services for daily consumption and business.[99] It has been argued that the provision in Article 2[100] is likely to be accepted to define the scope of

[91] Tang, Xiao and Huo (n 76) 232.
[92] Tang, Xiao and Huo (n 76) 232.
[93] People's Republic of China 2013 Amendment (n 13).
[94] A 25 of the 2013 Amendment (n 13).
[95] A 55 of the 2013 Amendment (n 13).
[96] A 47 of the 2013 Amendment (n 13).
[97] A 23 of the 2013 Amendment (n 13).
[98] Tang, Xiao and Huo (n 76) 233.
[99] A 2 of the 2013 Amendment (n 13).
[100] A 2 of the 2013 Amendment (n 13).

choice of law rules in Article 42, but this provides a level of uncertainty on whether consumer contracts in Article 42 include certain special contracts, such as insurance contracts and financial-investment contracts.[101] This uncertainty may be eliminated depending on a broad definition of "daily consumption". Where the definition is extended to cover investment by non-professionals, the buyers in these contracts would qualify as consumers.[102] It has also been stated that Article 42 may be extended to include contracts concluded amongst non-professional buyers and professional sellers or service providers in situations where inequality in bargaining power exists. This is because the Act fails to provide a particular choice of law for other contracts involving inequality of bargaining power.[103]

3.6 Comparison of Rome I and 2010 Chinese Conflicts Statue

It is essential to identify the similarity between the Chinese choice of law rules on consumer contracts and those of Rome I. Just as Rome I seeks to protect the interests of weaker parties, specifically in consumer adhesion contracts,[104] the Chinese choice of law rules on consumer contracts do the same.[105] The ideology behind the 2010 Conflicts Statute suggests that consumers should be protected by those rules of their country of habitual residence that cannot be derogated from by agreement.[106]

[101] Tang, Xiao and Huo (n 76) 233.
[102] Tang, Xiao and Huo (n 76) 233.
[103] Tang, Xiao and Huo (n 76) 233.
[104] See A 6 of the Council Regulation (EC) No 593/2008 of The European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).
[105] A 42 of the Law of the Peoples Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010) (n 3).
[106] Zhang (n 66) 140.

Regardless of this similarity, there are some differences between the two choice of law regimes.

Article 6(1) of Rome I defines a consumer contract as "a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional)".[107] While Rome I extends the material scope of the consumer provision, which previously applied only to contracts for the supply of goods or services to the consumer,[108] the Chinese choice of law rules on consumer contracts fail to define or list the types of contracts that fall under the 2010 Conflicts Statute.[109] The Chinese 2010 Conflicts Statute equally provides for the application of mandatory rules and public policies that protect weaker parties, especially in consumer adhesion contracts, and it to this that we now turn our attention.

4 Mandatory rules and public policy on Chinese consumer contracts of adhesion

4.1 Mandatory rules

As discussed in previous chapters, applying mandatory rules and public policy is a means by which party autonomy may be limited in contract. Applying these principles is how domestic laws and the 2010 Conflicts Statute afford some protection to weaker

[107] Wang *Internet jurisdiction and choice of law, Legal practice in EU, USA and China* 107.
[108] A 5 of the Rome Convention on the law applicable to contractual obligations (consolidated version), First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version), Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version) (98/C 27/02).
[109] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).

parties in consumer adhesion contracts. In Chinese private international law, where a contractual dispute relates to mandatory rules the working principle is that the law of China should apply automatically with little consideration for choice of law rules.[110] In China, the term "mandatory rule" is applied in the 2010 Conflicts Statute or judicial interpretation as international mandatory rules.[111] As stated in Article 4 of the 2010 Conflicts Statute, in Chinese conflict of laws, overriding mandatory rules are unilaterally applicable rules applied directly without reference to choice of law rules.[112]

This position is also demonstrated in the case of *ZHU v Jin Ri*[113] in which a Hong Kong company engaged partners and traders to conduct stock exchange transactions using its website. When a dispute arose[114] the court of first insistence reasoned that the contract had been concluded and performed in China and as a result China had the closest connections to the dispute and Chinese law should apply.[115] The matter went on appeal to the Shanghai No 1 IPC, where it was held, overturning the decision of the trial court, that Article 122 of the Chinese Securities Law requires that the establishment of all securities companies be subject to the approval of the securities regulatory unit of the State Council. The court arrived at this conclusion based on

[110] A 4 of The Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3). Also see Tang, Xiao and Huo (n 76) 241.
[111] A 4 of The Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[112] A 4 of The Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3) which provides: "Where a mandatory provision of the law of the People's Republic of China ('PRC') exists with respect to a foreign-related civil relation, that mandatory provision shall be applied directly".
[113] *ZHU v Jin Ri Shanghai* No 1 IPC, (2012) Hu Yi Zhong Min Si (Shang) Zhong Zi S1217. Excerpts from the decision are taken from Tang, Xiao and Huo (n 76) 241.
[114] *ZHU v Jin Ri Shanghai* No 1 IPC, (2012) Hu Yi Zhong Min Si (Shang) Zhong Zi S1217(n 74) as reported in Tang, Xiao and Huo (n 76) 241.
[115] *ZHU v Jin Ri Shanghai* No 1 IPC, (2012) Hu Yi Zhong Min Si (Shang) Zhong Zi S1217(n 74) as reported in Tang, Xiao and Huo (n 76) 241.

Article 4 of the 2010 Chinese Conflicts Statute and applied Article 122 of the Chinese Securities Law directly to invalidate the services contract without considering conflict rules applicable to the dispute.[116]

Further, on the issue of mandatory rules, the Judicial Interpretation on the 2010 Conflicts Statue[117] – special interpretations established properly to try foreign-related civil cases – in accordance with the provisions of the Law of the People's Republic of China defines "mandatory rules" as rules which involve the social and public interest of the People's Republic of China, the application of which cannot be excluded by the parties. They are the laws and administrative regulations directly applicable to foreign-related relationships without referring to conflict rules.[118] Instances of these mandatory rules include rules on the protection of employees, food safety or public health, environmental protection, foreign currency exchange control, and anti-trust and anti-dumping provisions.[119]

However, these definitions have been criticised as too general and vague. The criticism of vagueness is because most laws do not state unequivocally that mandatory rules override an otherwise applicable foreign law. The mandatory nature of law in respect of a choice of law rule is typically decided on the surrounding circumstance of each case by reflecting on the nature and purpose of the specific mandatory rule, the aims it seeks to achieve, and the intention of the drafters of the rule in the 2010 Conflicts

[116] *ZHU v Jin Ri Shanghai No 1 IPC,* (2012) Hu Yi Zhong Min Si (Shang) Zhong Zi S1217(n 74) as reported in Tang, Xiao and Huo (n 76) 241.
[117] Interpretations of the Special People's Court on Several Issues Concerning Application of the Law of the People's Republic of China on Choice of Law for Foreign-Related Civil Relationships (I) ("Conflicts Act Interpretation I").
[118] A 10 of Conflicts Act Interpretation I; Fa Shi [2012] No 24; Tang, Xiao and Huo (n 37) 242.
[119] Tang, Xiao and Huo (n 76) 242.

Statute. These are then compared to the applicable law identified after applying choice of law rules to determine whether those mandatory rules should override the applicable law.

In China, certain areas of contract law have been identified as mandatory.[120] In the case of *China Bank (HK) v Guangxi Zhuang Autonomous Region Department of Commerce*,[121] the defendant was the guarantor for the claimant to provide a loan to a company. Upon default of payment, the claimant sued the guarantor for repayment of the loan and interests.[122] The parties to the guarantee contract chose Hong Kong law as the governing law. However, under the PRC Security Law,[123] state organs cannot act as guarantors.[124] As a result, the contract was invalid.[125] The court decided that the above requirements and limitations on foreign-related contracts of guarantee were overriding mandatory rules which were applicable irrespective of conflict of laws rules. The contract of guarantee was invalid despite the parties' choice of Hong Kong law.[126]

[120] Tang, Xiao and Huo (n 76) 242.
[121] Guangxi Zhuang Autonomous Region HPC (2006) Gui Min Si Chu Zi No 1 as reported in Tang, Xiao and Huo (n 76) 242. Note that this case is not readily available as these Chinese cases are not published.
[122] Tang, Xiao and Huo (n 76) 242.
[123] A 8 People's Republic of China Security Law 1995 promulgated and entered into force on 1 October 1995 ("China Security Law 1995").
[124] A 8 of the China Security Law 1995 (n 123).
[125] A 3 of the Judicial Interpretation on Security Law 1995 promulgated and entered into force on 1 October 1995.
[126] See the decision in *Bank of China HK v Hong Ye* SPC [2002] Min Si Zhong Zi No 6 as reported in Tang, Xiao and Huo (n 76) 243. Note that this case is not readily available as these Chinese cases are not published.

Another example is *Bank of China HK v Hong Ye*.[127] In this case, the parties had chosen Hong Kong law to govern their contract of guarantee. Because the guarantor failed to apply for the approval of the relevant administrative authority, the agreement was contrary to the judicial interpretation of the PRC's Security Law which provides that a guarantee agreement offering a guarantee to a foreign entity requires the approval of, and registration with, the competent administrative authority.[128] The court, in this case, hinted that China is a country that imposes foreign currency exchange control for which it is the requirement to apply. Consequently, approval is mandatory for enforcement of exchange control by the authorities which was important in achieving the goals of Chinese economic policy. The court thus refused to apply Hong Kong law but applied appropriate Chinese law as mandatory rules to invalidate the choice of law clause in the contract of guarantee.[129]

There has been confusion and misunderstanding in Chinese courts in applying mandatory rules due to the concept's vagueness.[130] It is essential to note that overriding mandatory rules apply to substantive domestic law, excluding conflict rules and international mandatory provisions. This position was demonstrated in the case of *Shanghai Jumpo Safety v Moraglis SA.*[131] In this case the Shanghai High People's

[127] *Bank of China HK v Hong Ye* SPC [2002] Min Si Zhong Zi No 6 as reported in Tang, Xiao and Huo (n 76) 243. Note that this case is not readily available as these Chinese cases are not published.
[128] A 6(1) of the Judicial Interpretation of the Superior People's Court SPC on Some Issues Regarding the Application of Security Law of the People's Republic of China adopted by the Judicial Committee of the SPC at its No1133 Conference on 29 September 2000 and entered into force on 13 December 2000; Fashi [2000] 44.
[129] Tang, Xiao and Huo (n 76) 243.
[130] Tang, Xiao and Huo (n 76) 243.
[131] Shanghai HPC (2012) Hu Gao Min Er (Shang) Zhong Zi No 4 as reported in Tang, Xiao and Huo (n 76) 243. Note that this case is not readily available as these Chinese cases are not published.

Court held that for an international sale of goods contract, the applicable law should be the CISG pursuant to Article 4 of the 2010 Conflicts Statute and Article 142 of the GPCL.[132]

The court treated Article 142 as a mandatory international provision on the basis of it not being a substantive law provision but a specialised term dealing with the relationship between Chinese domestic law and international treaties.[133] It was further held that the provision does not provide substantive rights and obligations to the parties and may not be classified as mandatory under Article 4 of the 2010 Conflicts Statue.[134] In another case, the court came to a different conclusion as it treated international mandatory rules as valid mandatory rules under Article 4 of the 2010 Conflicts Statute.[135]

It has been argued that the Chinese position on mandatory rules has caused many difficulties in Chinese judicial practice. This has resulted in the need to clarify the concept and nature of different types of mandatory rules.[136] Their clarification is even more critical when distinguishing mandatory domestic rules from international rules so granting an expanded effect to the former.[137] It has also been argued that the misperception of mandatory rules may also lead to the unwarranted application of

[132] Shanghai HPC (2012) Hu Gao Min Er (Shang) Zhong Zi No 4 as reported in Tang, Xiao and Huo (n 76) 244.
[133] Shanghai HPC (2012) Hu Gao Min Er (Shang) Zhong Zi No 4 as reported in Tang, Xiao and Huo (n 76) 244.
[134] A 4 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[135] *Yang v Zhong* Guangzhou Maritime Court (2011) Guang Hai Fa Chu Zi 373 as reported in Tang, Xiao and Huo (n 76) 244. Note that this case is not readily available as these Chinese cases are not published.
[136] Tang, Xiao and Huo (n 76) 244.
[137] Tang, Xiao and Huo (n 76) 244.

Chinese law in many situations – a traditional problem in Chinese judicial practice that needs to be addressed.[138]

4.2 Public policy

The Chinese position on public policy is addressed in Article 5 of the 2010 Conflicts Statue. The 2010 Conflicts Statute provides that Chinese law shall apply if the application of foreign law will infringe Chinese public interest.[139] It has been argued that public policy generally renders foreign laws inapplicable due to the undesirable way in which it regards foreign law as offensive.[140] Chinese conflict rules expressly provide that foreign law will not be applied if it is contrary to Chinese public policy. The 2010 Conflicts Statute fails to define what constitutes public policy. The traditional Chinese legal system has observed similarities in mandatory rules and public policy. In practice, there may be no clear distinction between overriding mandatory rules and public policy, hence the use of both to justify the application of Chinese law.[141] Nevertheless, there is a clear distinction between overriding rules and public policy. Public policy generally acts negatively by trumping an otherwise applicable law, while overriding mandatory rules constructively and unilaterally apply to the dispute. In practice, however, public policy is used only in extraordinary circumstances in the interests of protecting comity.[142]

[138] Tang, Xiao and Huo (n 76) 244.
[139] A 5 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (n 3).
[140] Tang, Xiao and Huo (n 76) 244.
[141] *Bank of China HK v Hong Ye* SPC [2002] Min Si Zhong Zi No 6 as reported in Tang, Xiao and Huo (n 76) 244.
[142] Tang, Xiao and Huo (n 76) 244.

It is essential to recognise the common ground between mandatory rules and public policy as it applies in China. In terms of Article 5 of the 2010 Conflicts Statute, the social public-interest rule may only be invoked to exclude a foreign law. It may not be relied upon as a means for the critical application of a Chinese substantive rule which cannot be classified as a "mandatory rule" within the scope of Article 4.[143] Thus, to identify mandatory rules in China, the evaluation of the forum's law operates before any rejection of foreign law. The *lex causae* is not set aside because of its application to the dispute.[144] The "social public interest" rule, on the other hand, is a means by which to modify a choice of law designation for substantive reasons, namely the defence of the forum's fundamental legal principles or moral values.[145] As a result, the social public-interest rule should only be applied after a court has considered the content of the foreign law and the outcome of its application.[146]

A court must reflect on the extent of the forum contacts in the case when applying the "social public-interest" rule or classifying mandatory rules. Protective rules of the *lex fori* must be maintained and applied in a situation where the forum state has an overriding interest in the application of such rules based on the surrounding circumstances of each case, which include the importance of the substantive concern, the closeness of the transaction to the forum state, and the justified expectation of the party in need of protection.[147] The importance of this rule and the classification of a rule as mandatory depend on the quality of the link between the forum and the

[143] Jieying (n 1) 175.
[144] Jieying (n 1) 175.
[145] Jieying (n 1) 175.
[146] Jieying (n 1) 175.
[147] Jieying (n 1) 175.

dispute.[148] Eventually, applying a social public-interest rule in consumer conflicts relies on the degree to which a forum is ready to dispense with domestic interests to apply foreign law in achieving fairness and predictability in consumer contracts.[149]

5 Conclusion

Discussions from previous and the current chapter have disclosed modern legal trends that are sensitive to the protection of economically weaker parties, especially in consumer contracts.[150] This position is no different in Chinese choice of law rules in consumer contracts in that a particular choice of law regime has been adopted under the 2010 Conflicts Statute, which serves as a restriction on the party autonomy principle.[151] Regardless of this favourable position, the scope of protection provided in the Statute is vague as the types of contracts that fall under consumer adhesion contracts are not clearly defined, and it is unclear what types of consumer contractual relationships are covered.[152] In practice, the consumer contractual relationship to which the Chinese consumer choice of law rules apply is determined by the discretion of the judge on a case-by-case basis. This has a negative effect on uniformity in the application of the Statute.[153]

The issue of previous decisions not binding lower courts is another problem facing Chinese private international law generally, and choice of law rules on consumer contracts specifically.[154] It is evident that disputes are decided on a case-by-case basis

[148] Jieying (n 1) 175.
[149] Jieying (n 1) 175.
[150] Jieying (n 1) 79.
[151] Jieying (n 1) 79.
[152] A 42 of the 2013 Amendment (n 13).
[153] Jieying (n 1) 79.
[154] Jieying (n 1) 79.

depending, in the main, on the discretion of the judge.[155] Regarding choice of law rules, it is challenging to find Chinese decided cases which will enable a practical discussion on the development and advancement of the law in this area. One relies on the Chinese 2010 Conflicts Statute. Its inadequacies have been discussed above, and the unavailability of decided cases prevents a proper and practical understanding of the application of the 2010 Conflicts Statute to consumer disputes.

This chapter has considered China's domestic law on consumer protection and proceeded to examine specific provisions in the 2010 Conflicts Statute on consumer adhesion contracts. The chapter considered mandatory rules and state policies that serve as a limitation on party autonomy. The chapter then identified the strengths and weaknesses of the position taken by China on consumer contracts of adhesion. It concluded that the position taken in China is a replication of choice of law rules on consumer adhesion contracts in Rome I.

The next chapter embarks on a comparative analysis of the designated jurisdictions to suggest a theoretical framework for the situation in Ghana as regards choice of law rules in consumer adhesion contracts.

[155] Jieying (n 1) 79.

Chapter six: A theoretical framework for Ghana on choice of law rules in adhesion contracts

1 Introduction

Choice of law provides a means by which interaction between two or more legal systems is facilitated in deciding a dispute.[1] Issues of choice of law are rapidly escalating especially in contractual activities due to the personal and commercial interactions between natural or legal persons from different legal systems.[2] The interaction between legal systems demands reform of traditional private international law rules by various governments, regional and supranational institutions across the globe to make their countries attractive to international commerce and investment.[3] Issues of identifying the proper law applicable to cross-border disputes necessitate that states cooperate in drafting rules to facilitate the smooth functioning of cross-border contracts.[4]

Most countries and federations, including those discussed in the preceding chapters, have reformed their laws to meet current private international law requirements. Unfortunately, most African countries have not yet recognised the need to embark on such reforms which are necessary the vast commercial activity between the African continent, Europe, America, and China. Africa essentially consumes these industrial countries' finished products which are imported into the continent.

[1] Oppong (2007) *AJCL* 678.
[2] Oppong (n 1) 678.
[3] Obiri-Korang *Private International Law of Contract in Ghana: The Need for a Paradigm Shift* 12.
[4] Marshal (2012) *MJIL* 508.

In the case of Africa, Forsyth has described the study of private international law as "the Cinderella subject seldom studied and little understood".[5] Private international law is a field that has attracted little attention amongst African lawyers, occupies a small part of the average university curriculum, and remains, by and large, a strange concept to an older generation of practising lawyers.[6] The French-speaking civil law countries of Africa located primarily in West and Central Africa, have moved to reform their substantive laws by concluding a treaty establishing the Organisation for the Harmonisation of Business Law in Africa (OHADA).[7] OHADA, however, failed to tackle the emerging private international law issues in sufficient depth. The resolution of emerging issues is left to the discretion of sovereign member states of OHADA.

Ghana has failed to pay due regard to private international law rules and needs to develop adequate conflict rules, especially on the choice of law relating to consumer adhesion contracts. Ghana's historical colonial ties with the United Kingdom between 1874[8] and 1957, when the country gained its independence,[9] mean that the Ghanaian legal system, by and large, reflects English common law.[10] The majority of the legal principles applicable in Ghana have been adopted from English law and modified to suit the commercial activities of the people.[11] English law was officially introduced in Ghana (then the Gold Coast Colony) under the UK Supreme Court Ordinance of 1876. The British defeated the Ashanti, the most powerful tribe, and formed the British

[5] Forsyth *Private International Law: The Modern Roman-Dutch Law Including the Jurisdiction of the High Court* 43.
[6] Leon 1983 *CILSA* 325.
[7] Uniform Act on Cooperatives for the Organization for the Harmonization of Business Law in Africa of 2010.
[8] Oppong "Ghana" *in International Encyclopaedia of Laws: Private International Law* 15.
[9] Asante 1987 *JAL* 70.
[10] Oppong (n 8) 15.
[11] Oppong (n 8) 15.

Crown Colony of the Gold Coast in 1874.[12] The colony incorporated the Fante states and the newly-subjugated Ashanti kingdom.[13] To consolidate this victory, the Supreme Court Ordinance of 1876 titled "An Ordinance for Constitution of a Supreme Court, and other purposes relating to the Administration of Justice" was enacted.[14]

English law remains a principal source of persuasive authority in Ghanaian courts.[15] The Supreme Court of Ghana demonstrated the bias of the courts towards common law when it observed:

> [W]e do not hold ourselves bound by this English decision but the reason underlying the formulation of these principles appeals to us, and we respectfully follow it. Indeed, we cannot shut our eyes to the desirability of a homogeneous development and application of the law in two Commonwealth countries having cognate jurisprudence.[16]

The jurisprudential position on the persuasive nature of common law is enshrined in the Constitution of Ghana.[17] Specifically, Article 11 of the Constitution lists the following as the sources of Ghanaian law:

> (a) the Constitution; (b) enactments made by or under the authority of the Parliament established by the Constitution; (c) any Orders, Rules, and Regulations made by any person or authority under a power conferred by the Constitution; (d) the existing law; and (e) the common law.[18]

---

[12] Amissah 1976 *FLUGJ* 1.
[13] Quansah *The Ghana Legal System* 55.
[14] Quansah (n 13) 55. The preamble to the Ordinance states that: "Whereas by Letters Patent under the Great seal of the United Kingdom of Great Britain and Ireland, bearing the date 24th day July 1874, Her Majesty's Settlements on the Gold Coast and of Lagos were constituted and erected into one colony, under the title of the Gold Coast Colony; And whereas it is expedient to make provision for the administration of justice in the said colony …".
[15] It is important to emphasise that apart from the Ghanaian judicial courts, there are also the customary arbitral quasi-courts whose practices have been legitimised under Part Three: "Customary Arbitration" of the Alternative Dispute Resolution Act 76 of 2010.
[16] *Fodwoo v Law Chambers* [1965] GLR 363 paras 373–374.
[17] The Ghanaian Constitution is also known as Fourth Republican Constitution of Ghana.
[18] Bimpong-Buta 1983–1986 *RGL* 129; Ogwumike 1967 *UGLJ* 122.

Although customary law plays a central role in Ghanaian law, it is not independently listed as a source of law in Ghana.[19] This is clear from Article 11(2) of the 1992 Constitution which provides that:

> The common law of Ghana shall comprise the rules of law generally known as the common law, the rules generally known as the doctrines of equity and the rules of customary law including those determined by the Superior Court of Judicature.[20]

The Constitution further defines customary law as "rules of law that by custom apply to particular communities in Ghana".[21]

1.2 Focus of the chapter

The focus of this chapter is to consider the choice of law rules applicable to consumer adhesion contracts in Ghana. The chapter undertakes a comparative analysis with the jurisdictions discussed in the previous chapters on choice of law rules in consumer adhesion contracts before concluding that Ghana has no specific set of rules for private international law in general. There are also no clear choice of law rules on consumer contracts which aim to protect weaker parties in cross-border contracts. The chapter suggests possible measures for choice of law rules for consumer contracts in Ghana based on the comparative analysis of the EU, USA (California), and China. The chapter further considers the realisation of justice in arriving at the applicable law for a consumer adhesion contract. Through a comparative lens of conflicts justice and material justice, the chapter concludes that a result-oriented form of justice best suits choice of law rules in consumer adhesion contracts.

[19] Oppong (n 8) 15.
[20] Oppong (n 8) 15.
[21] Article 11(3) of the 1992 Constitution of Ghana (n 17).

2 Brief history of private international law in Ghana

In the past Ghana's cultural and ethnic orientation allowed for conflicts between social norms and laws. During the pre-colonial period various kingdoms and ethnic groups within the country were subject to different customary laws but engaged both commercially and socially. Commercial and interpersonal interaction between the indigenous peoples, including trade, was based on exchange or the barter system.[22] These interactions between the people exposed the need to develop rules on conflict of laws.

Native to the people of the Gold Coast (now Ghana) were the matrilineal and patrilineal family systems. As a result, there were differing rules on customary issues such as marriage, custody, maintenance, and succession which defined the rules of engagement of the people.[23] For instance, children from matrilineal ethnic groups were considered members of their mother's family and inheritance of property was matrilineal, while children from patrilineal ethnic groups were considered members of their father's family and inheritance of property was patrilineal. However, in the event of a union between an individual from a matrilineal group and one from a patrilineal group, internal conflict of laws issues could emerge as to the applicable law in determining to which law children resulting from the marriage were subject – that of the mother's family or that of the father's family.[24]

---

[22] Feinberg 1989 *TAPS* 89.
[23] Oppong (n 8) 16.
[24] *In re Larbi (Deceased); Larbi v Larbi* [1977] 2 GLR 506; *Yirenkyi v Sakyi* [1991] 1 GLR 217. As regards issues before a court to determine the systems of inheritances where the child had parents from both the matrilineal and patrilineal systems, the Intestate Succession Law 1985 (PNDC Law 111) which provides a unified regime for intestate succession has resolved certain of these problems.

In pre-colonial Ghana highly organised ethnic groups established rules and customary practices to avoid conflicts issues. For instance, the works of historians, sociologists, and anthropologists who have explored pre-colonial Ghanaian societies, reveal that in pre-colonial Ghana it was difficult for a person from a matrilineal lineage to marry a person from a patrilineal lineage. There were strict rules against intertribal marriage.[25] There is no historico-legal account from an academic perspective on conflict of laws, especially on issues for determining the law applicable to a conflicts dispute.[26] As regards commerce, trade in pre-colonial Ghana was through a barter system. The sale of immovable property, especially land, was rare as the land was owned by the tribes whose leaders developed strict rules restricting the alienation of land to foreigners.[27] The people allowed foreign merchants to settle in their community and govern themselves by their laws through ancient practices.[28] Based on customary practices, some measures were in place – unintentionally – to circumvent issues of conflict of laws in pre-colonial Ghanaian societies. Research has revealed no comprehensive system of rules that addressed legal issues falling within private international law in pre-colonial Ghana as a conflict of laws treatise akin to those developed in Western legal systems.[29]

This notwithstanding, societies in pre-colonial Ghana were conscious of the demands of justice, especially in cases involving a foreign element. Both judicial decisions and academic research agree that the customary law systems do not apply their rules to foreigners unless it can be established that as a result of their identification with the

[25] McCaskie, 1981 *JAH* 477-494
[26] Oppong (n 8) 17.
[27] Skinner, 1963 *JIAI* 31; Arhin 1971 *HSG* 63.
[28] Alexandrowicz *The European-African Confrontation: A Study in Treaty Making* 22.
[29] Oppong (n 1) 677.

people, it can be inferred that the foreigner has embraced the customs and traditions of the people.[30] In the absence of an historico-legal account of private international law, it has been argued that the realisation and identification of choice of law issues started under the Supreme Court Ordinance of 1876.[31] The promulgation of this Ordinance achieved two significant purposes for Ghana's private international law regime. The Ordinance made common law, the doctrines of equity, and statutes of general application applicable in Ghana.[32] The implication is that issues involving conflict of laws arising before the courts established by the Ordinance could be resolved using English law.[33]

The Ordinance also mandated the application of customary law to the extent that it was not repugnant to natural justice, equity, and good conscience.[34] Arguably, the application of this provision resulted in interaction between the received English common law and customary law which created internal issues of conflict of laws.[35] Consequently, when a court assumes jurisdiction over a legal issue involving customary law or over an indigenous inhabitant, it will be faced with the characterisation of a particular issue and the need to decide in terms of what law it should be decided. In addressing these issues, the court will need to decide whether to apply customary law or the common law rules and doctrines of equity.[36] There were, however, no established rules to resolve conflicts between customary law and English law or between the different customary laws governing the various ethnic

[30] *Youhana v Abboud* [1974] 2 GLR 201 para 208.
[31] Oppong (n 8) 17.
[32] S 14 of the Supreme Court Ordinance of Ghana 1876.
[33] Oppong (n 8) 17.
[34] S 19 of the Supreme Court Ordinance of Ghana 1876.
[35] Oppong (n 8) 17.
[36] Oppong (n 8) 17.

groups.[37] The need to address these issues provoked the awareness of the value of private international law principles.[38] The subsequent paragraph will consider the sources of private international law in Ghana.

2 Sources of private international law in Ghana

2.1 International instruments

It is important to note that Ghana follows a dualist approach to public international law and to take account of how this affects the sources of private international law. The effect of this dualist approach is that treaties concluded by Ghana become effective domestically only after a successful parliamentary process of ratification and subsequent domestication as prescribed by the Constitution.[39] As a result Ghana is party to specific conventions dealing with private international law but the majority of these have not yet been domesticated. Most conventions concern the proper law in specific commercial contracts, while others are conflicts instruments.[40] These instruments include the United Nations Convention on Contracts for the International Sale of Goods (CISG) of 1980 which Ghana signed on 11 April 1980 but has not ratified.

---

[37] Oppong (n 8) 17.
[38] Oppong (n 8) 17.
[39] A 73 read with A 75 of the 1992 Constitution of Ghana (n 17).
[40] It is importance to note that there are other conventions on the conflict of laws but these do not apply to the scope of this research as a result of their procedural nature. Thesis treaties include the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards and the ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States, which was signed by Ghana on 7 June 1959 but ratified only on 9 April 1968. This Convention was implemented in Ghana by the adoption of the Arbitration Act 38 of 1961, which has now been repealed by section 137 of the Alternative Dispute Resolution Act 795 of 2010. The ICSID Convention on the Settlement of Investment Disputes between States and Nationals of Other States is another of these instruments. The Convention entered into force on 14 October 1966 but its operation was delayed till 1995 when Ghana passed the Investment Promotion Centre Act 478 of 1994. The current position of the law is codified in Act 478, the Ghana Investment Promotion Centre Act 865 of 2013.

As a result, the CISG is not domesticated. Ghana is also signatory to the Convention on the Limitation Period in the International Sale of Goods of 1974 but this Convention, too, has not been ratified by the parliament of Ghana and is thus not enforceable within Ghana.

2.2 Statutory instruments

Statutory instruments are another source of private international law in Ghana. It is essential to note that private international law is not codified in a single statute.[41] A few parliamentary laws address private international law issues in Ghana directly. The relevant statutes on applicable law issues in commercial contracts are the Bills of Exchange Act 55 of 1961 and the Electronic Transactions Act 772 of 2008.

The Electronic Transactions Act 772 of 2008 which stands out amongst the fragmented legislations aims to develop a safe, secure and effective environment for the consumer, business and the Government to conduct and use electronic transactions[42] and promote the development of electronic transaction services responsive to the needs of consumers.[43] The Act specifically, mandates electronic sellers to provide detailed information about their identity, return policy, price, payment terms, and security and privacy policies.[44] Failure to comply can lead to consumer cancellation of contracts within 14 days of receipt, and the seller refunding payments within 30 days.[45] Consumers can also cancel electronic transactions within 14 days or 7 days of

[41] Oppong (n 8) 17.
[42] S 1(d) of the Electronic Transactions Act 772 of 2008.
[43] S 1(e) of the Electronic Transactions Act 772 of 2008.
[44] S 46 to S 54 of the Electronic Transactions Act 772 of 2008.
[45] S 46 to S 54 of the Electronic Transactions Act 772 of 2008.

service agreement conclusion without penalty with the only charge being the cost of returning goods.[46]

Another relevant legal instrument in this regard is the Courts Act 459 of 1993, which only establishes that English common law regulates private international law issues in Ghana.[47] The Bills of Exchange Act 55 of 1961 concentrates on issues of conflict of laws relating to the issuing of bills of exchange.[48] The relevant provision determines the law which regulates

> the rights, duties, and liabilities of parties as regards the formal validity of a bill, formal validity of the supervening contract,[49] and the interpretation of contracts as regards the drawing, endorsement and acceptance of a bill in situations where a bill drawn in a foreign country is negotiated, accepted, or payable in Ghana or *vice versa*.[50]

Section 71(b) provides that the *lex loci contractus* is applicable.[51]

---

[46] S 46 to S 54 of the Electronic Transactions Act 772 of 2008.
[47] Oppong (n 8) 17.
[48] S 71 of the Ghana's Bills of Exchange Act 55 of 1961.
[49] S 71(a) of Bills of Exchange Act 55 of 1961.
[50] S 71 of the Bills of Exchange Act 55 of 1961.
[51] "Where a bill drawn in one country is negotiated, accepted, or payable in another, the rights, duties, and liabilities of the parties to the bill are determined as follows: (a) the validity of a bill as regards requisites in form is determined by the law of the place of issue, and the validity as regards requisites in form of the supervening contracts, such as acceptance, or endorsement, or acceptance is determined by the law of the place where the contract was made; but (i) where a bill is issued outside of the Republic it is not invalid because it is not stamped in accordance with the law of the place of issue; (ii) where a bill issued outside of the Republic conforms, as regards requisites in form, to the law of the Republic, it may for the purpose of enforcing payment there, be treated as valid as between the persons who negotiate, hold, or become parties to it in the Republic; (b) subject to this Act, the interpretation of the drawing, endorsement, acceptance, or acceptance of a bill, is determined by the law of the place where the contract is made; but where an inland bill is endorsed in a foreign country the endorsement shall as regards the payer be interpreted according to the law of the Republic; (c) the duties of the holder with respect to presentment for acceptance or payment and the necessity for or sufficiency of a protest or notice of dishonour, or otherwise, are determined by the law of the place where the act is done or the bill is dishonoured; (d) where a bill is drawn out of, but payable in, the Republic and the sum of money payable is not expressed in the currency of the Republic, the amount shall be calculated in the absence of an expressed stipulation, according to the rate of exchange for sight drafts at the place of payment on the day the bill is payable; (e) where a bill is drawn in one country

The Economic Transaction Act 772 of 2008 is another legal instrument that attempts to resolve the problem of conflict of laws in Ghana. Specifically, section 53 of the Act is a mandatory consumer protection rule responsible for regulating electronic transactions within Ghana. The law provides that the Act will always apply irrespective of the chosen law either expressly or tacitly agreed on by a consumer to govern her electronic contract for the supply of goods. The Courts Act 459 of 1993 also attempts to deal with choice of law issues. Section 54(2) of the Act ensures that the common law rules of private international law have been adopted and incorporated into the laws of Ghana.[52] It provides that:

> [S]ubject to this Act, any other enactment, the rules of law and evidence, including the rules of private international law that have before the coming into force of this Act been applicable in proceedings in Ghana shall continue to apply, without prejudice to any development of the rules which may occur.

Consequently, the Act does not establish rules to determine the applicable law in private international law contractual issues, but rather directs judges to apply the common law rules of private international law in settling conflict of laws issues and affirms that this is the position enshrined in the Constitution.[53]

2.3 Constitution and common law

Based on the constitutional mandate, common law is also a source of private international law in Ghana. The common law of Ghana, as provided in Article 11(2) of the 1992 Constitution, encompasses the rules of law generally known as the English

---

and is payable in another, the due date of the bill is determined according to the law of the place where it is payable".

[52] *Godka Group of Companies v PS International Limited* 1999-2000 1 GLR 409 para 2.

[53] A 11(2) of the 1992 Constitution of Ghana (n 17).

common law, English rules of equity, and the rules of customary law (which includes those determined by the Superior Court of Judicature). Customary law may be invoked but is subject to a "repugnancy test".[54] The implication is that before a particular customary law rule is applied it must be established that it is not repugnant to natural justice, equity, and good conscience.[55] The Constitution does not provide specific rules for determining whether customary law is repugnant to natural justice, equity, and good conscience. The determination is based solely on the common law and the courts' discretion. Where private international law is involved, the courts apply the common law principles directly as the laws and customs of the people do not address private international law issues.

There appears to be a limitation on the application of section 54(2) of the Courts Act 459 of 1993. As mentioned above, this section instructs the courts to apply the common law to resolve private international law disputes. This is subject to contrary provision(s) in other rules, particularly those dealing with a specific type of contract or with mandatory rules. The position emerges clearly in the case of *Godka Group of Companies v PS International Limited.*[56] In this case, the Court of Appeal in Ghana, relying on section 54(2) of Act 459 of 1993, stated that the English common law rules on private international law have been adopted and incorporated into the laws of Ghana.[57] In arriving at this decision, the Court of Appeal relied on the English cases of *Boissevain v Weil*[58] and *Bonython v Commonwealth of Australia*.[59] It concluded that

[54] S 19 of the Supreme Court Ordinance of Ghana 1876.
[55] *Loromeke v Nekegho* 1957 3 WALR 306 para 4.
[56] *Godka Group of Companies v PS International Limited* 1999-2000 1 GLR 409 para 2.
[57] *Godka Group of Companies v PS International Limited* 1999-2000 1 GLR 409 para 2.
[58] *Boissevain v Weil* 1949 1 KB 482 para 490.
[59] *Bonython v Commonwealth of Australia* 1961 AC 201 para 219.

the law of Ghana governed the contract as Ghana was the country of performance and the country with the most substantial connection to the contract. The brief facts of the *Godka case* are that the plaintiff, an American company incorporated in Indiana, USA, concluded a sale-of-goods contract with the defendant, a company incorporated in Ghana. As the parties had not included an agreement on the choice of the applicable law for the contract the court intervened to decide on its governing law. The court held that the English common law rules of private international law applied.

Regardless of not having a specific legal instrument on international commercial and consumer contracts, the *Godka* case shows that there are instances in which the courts in Ghana have been approached on issues of choice of law. Another case in point is *Fodwoo v Law Chambers*[60] where the Supreme Court of Ghana observed that a significant reason for the court's reliance on foreign cases in judicial decision making is the desire to ensure consistent development and application of the law in Commonwealth countries with related jurisprudence. As stated earlier, Ghana is deficient in private international law. The country does not have a statute to legalise and regulate international commercial law specifically, or private international law in general. Section 54(2) of Act 459 of 1993, which was promulgated to assist judges in resolving conflict of laws issues, directs judges to apply the common law to decide such cases. The effect is a move by the courts into the uncertain realm of the common law to uncover solutions on issues of choice of law based on the principle of *stare decisis*.[61]

[60] *Fodwoo v Law Chambers* 1965 GLR 363 para 373–374.
[61] Obiri-Korang (n 3) 12.

The parties to an international commercial contract have the express choice of law option available under English common law. This principle of party autonomy allows the parties to decide on the law to govern contracts in private international law.[62] This position reflects the English common law rules in terms of which the courts give effect to an express choice of law by the parties as established in the case of *Vita Food Products Inc v Unus Shipping Co Ltd.*[63] In the *Godka* case, the Ghanaian Court of Appeal recognised that contracting parties might agree on the applicable law, either expressly or by implication. Regardless of this position, the courts failed expressly to outline conditions to be met for the court to recognise a choice of law by the parties. This omission can be ascribed to the fact that the issue of express and implied choice of law was not a matter to be decided by the courts in that case. However, an inference is drawn from the position of the Ghanaian courts in relying on the English common law to decide private international law cases and, also, based on the provision in section 54(2) of Act 459 of 1993, to the effect that the Ghanaian courts will only give effect to contracting parties' choice of law in a manner recognised at common law and as established in the *Vita Food* case.[64] Thus, the express choice of law requirements in the *Vita Food* case[65] applies.

The Ghanaian courts also consider implied choice of law in determining the applicable law of a contract. The courts apply the standard of the reasonable man in determining the parties' intention when the contract was executed.[66] This means that the system of law presumed to have been selected by the parties will be the system of law that a

[62] *Godka Group of Companies v PS International Limited* 1999-2000 1 GLR 409 para 2.
[63] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7 para 228.
[64] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7 para 228.
[65] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] UKPC 7 para 228.
[66] Oppong (n 1) 53; see *Garcia v Torrejoh* [1992] GLR 143 para 32.

reasonable individual in such a position would have chosen. This was illustrated in *Garcia v Torrejoh*[67] where the High Court of Ghana held that in situations where the parties fail to decide on the proper law of a contract, an implied choice of law can be established from "the nature and terms of the contract and the general circumstances of the case".[68] At common law there are indicators to suggest an implied choice of law. Although not conclusive in themselves, these indicators aid in establishing the implied intention of the parties from the contract as a whole.[69] Some of these indicators to determine an implied choice of law include exclusive jurisdiction or arbitration clauses, the use of a standard form contract, or the inference of choice from the parties' previous dealings or related transactions where they made a choice.[70] Other indicators include the use of a particular language, reference to provisions of a foreign statute,[71] and the use of technical terms known to a particular legal system.[72]

The problem with this common law approach is that no single factor is more significant than another in deciding whether the parties have made a genuine choice.[73] At best, this is left to the discretion of the courts. The result is a difficulty in precisely predicting whether the parties intended an implied choice of law. Thus, in this instance, the common law fails to place a premium on the principle of predictability, and the legal system of Ghana fails to make provision for choice of law rules in private international law generally and consumer contracts specifically. Subsequent paragraphs will

[67] *Garcia v Torrejoh* [1992] GLR 143 pare 32.
[68] *Garcia v Torrejoh* [1992] GLR 143 para 32.
[69] Marshall (n 4) 14.
[70] Marshall (n 4) 14.
[71] Nygh *Autonomy in International Contracts* 118.
[72] Nygh (n 71) 118.
[73] Neels and Fredericks 2018 *SLR* 9.

consider the way choice of law issues, specifically related to consumer contracts, have been decided to protect weaker parties in international commercial transactions.

3 Choice of law rules on consumer contracts in Ghana: The applicable rules

Applying the principle of party autonomy, especially in consumer contracts, presents a situation detrimental to the interests of the weaker parties. For this reason, supranational organisations and countries have taken steps to promulgate special laws to protect weaker parties in consumer contracts. Unfortunately, Ghana has no special laws to protect consumers in international commercial contracts. If a Ghanaian court is faced with such a situation, it is directed to apply the common law which, in turn, points the court to apply the common law principles applicable to standard form contracts. The development of adhesion contracts at common law resulted from the economic revolution of the nineteenth century and created a situation where industry owners were compelled to contract on an individual basis with their consumers.[74] The solution was the introduction of standard form contracts to assist in contracting with consumers on a mass-production basis.[75]

The intrinsically unfair nature of contracts of adhesion also saw a rise in disputes. This development at common law represented a drastic change in the sense that the traditional model of contracting, which represented the intentions of both parties, was in itself evidence of the agreement between the parties to the contract while contracts of adhesion represented the intention of the seller to which the buyer could only assent

[74] Gluck 1979 *ICLQ* 73.
[75] Gluck (n 74) 73.

to or not.[76] A debate arose as to whether a consumer's assent to a contract of adhesion constituted valid consent, especially whether the parties' minds were *ad idem.*[77] There was the possibility of the weaker party not familiarising herself with all the contract terms before signing the contract. In the case of *Unico v Owen*[78] Francis J stated that "…the ordinary consumer goods purchaser more often than not does not read the fine print; if [s]he did, it is unlikely that [s]he would understand the legal jargon and the significance of the clauses is not explained to [her]".

3.1 The strict contract theory test at common law

The common law courts applied the strict contract theory to resolve disputes arising from adhesion contracts. This theory holds that the courts will not assist weaker parties who sign contracts without reading and understanding them.[79] The courts at common law applied this reasoning even in instances where the document was unavailable for the party to read.[80] Clearly, this resulted in consumers involved in contracts of adhesion suffering a high level of injustice. The problem is illustrated most clearly in the case of *L'Estrange v F Graucob Ltd.*[81] The facts of the case were that the claimant purchased a cigarette vending machine for use in her cafe. During the purchase process, she signed an order form that stated in small print "…any express or implied condition, statement of warranty, statutory or otherwise, is expressly

[76] Gluck (n 74) 74.
[77] Gluck (n 74) 74.
[78] *Unico v Owen* (1967) 50 NJ 101.
[79] *LeRoy Plow Co v J Clark & Son* (1921) 65 DLR para 370.
[80] *The Provident Savings Life Assurance Society of New York v Mowat* (1902) 32 para 147.
[81] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 para 395.

excluded". The vending machine failed to work as expected and the claimant sought to reject it under the Sale of Goods Act as not being of "merchantable quality".[82]

The claimant brought an action for damages for breach of an implied warranty for fit for purpose. The claimant argued that the machine was not "fit for purpose". She contended that she did not read the contract and that the clause could not have been read due to the size of the print.[83] The court held that by signing the order form she was bound by all the terms in the form irrespective of whether she had read it or not. Delivering judgment, Scrutton LJ stated that: "[W]hen a document containing contractual terms is signed, then, in the absence of fraud, or, I will add, misrepresentation, the party signing it is bound, and it is wholly immaterial whether [s]he has read the document or not".[84]

3.2 Common law measures on the strict contract theory

As a result of the harsh realities presented by the strict contract theory and the unfair outcome of its application, various measures have been taken to resolve these issues. The English common law courts sought to redress the balance by developing restrictive rules for the interpretation of exclusion clauses in contracts of adhesion and enacting rigorous conditions of notice as requirements for the validity of such clauses.[85] The issues of unfair treatment suffered by weaker parties in standard form contracts were not fully addressed by the strict rules of interpretation at common law, hence the initiative by legislators to depart from the common law approach and draft a consumer

[82] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 paras 395-396.
[83] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 paras 395-396.
[84] Gluck (n 74) 76; *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 para 406.
[85] Dowuona Hammond *The Law of Contract in Ghana* 156.

protection legal instrument to ensure the protection of weaker parties where necessary in the UK.[86] If consumers are involved in international commercial contracts the law currently applicable is Rome I. The UK government indicated its intention to retain the Rome Regulations after the UK exited the EU and promulgated secondary legal instruments to transpose the Rome Regulations into UK law. This led to the domestication of Rome I in UK law.[87]

To authenticate the validity of a choice of law clause in a contract of adhesion, the Ghanaian court considers whether the clause is an integral part of the contract. Where the choice of law clause is regarded as a term and not a warranty, the court must verify that both parties were aware of the existence of the choice of law clause and consented to its inclusion in the contract.[88] The general view in common law is that where the choice of law clause is in a written contract signed by the consumer, the consumer is bound by the clause regardless of whether she read it or understood the content.[89] Where there is a misrepresentation of the effect of the choice of law clause, the consumer, although having signed the contract, may plead misrepresentation or invoke the plea of *non-est factum*.[90]

If the consumer does not sign the document containing the contractual terms, the onus vests in the dominant party to prove that the terms of the choice of law in the contract were adequately brought to the consumer's attention. This implies that the dominant party can only rely on the choice of law clause to the extent that she can

[86] Dowuona Hammond (n 85) 156.
[87] Conway "Brexit: UK Consumer Protection Law" Briefing Paper (2021) 5.
[88] Dowuona Hammond (n 85) 156.
[89] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 para 406.
[90] *L'Estrange v F Graucob Ltd* [1934] 2 KB 394 paras 406-407.

prove that the clause was adequately incorporated into the contract.[91] In proving this, the dominant party must show that she took reasonable and adequate steps based on the surrounding circumstances of the case, to notify the consumer of the choice of law clause and its effects on the contract before or at the time the contract was concluded. Where the dominant party proves this, the consumer will be bound regardless of whether she read the contract or knew that it contained terms.[92]

The case of *Parker v South Eastern Railway*[93] illustrates this position. The trial judge directed the jury to consider whether the plaintiff had read or was aware of the condition on the ticket upon which the bag had been deposited. The jury responded negatively and judgment was entered for the plaintiff. The defendants took the case on appeal. The Court of Appeal identified the misdirection to the jury and pointed out that the real question facing the jury was whether the defendant had taken reasonably sufficient steps to notify the plaintiff of the condition embedded in the contract. The court ordered a new trial.[94] The issue of adequate notice of a choice of law clause at common law is a question of fact based on evidence available to the court. Based on the case law, some guidelines have been established.

First, if the condition is printed on the back of the contract document without any reference to it on the face of the document – eg, "see back for conditions" – the courts are likely to decide that sufficient notice was not given. The courts may also hold that sufficient notice was not given when a stamp, faded or illegible, obliterates the choice

[91] *Parker v South Eastern Railways* (1877) 2 CPD 416 paras 428-429.
[92] Dowuona Hammond (n 85) 157.
[93] *Parker v South Eastern Railways* (1877) 2 CPD 416 paras 428-429.
[94] *Parker v South Eastern Railways* (1877) 2 CPD 416 paras 428-429.

of law clause.[95] Second, the courts at common law have decided that if the choice of law clause relied on by the dominant party is exceptionally far-reaching in the circumstances of a case, the dominant party must prove to the court that she took extraordinary measures to bring it to the consumer's notice.[96] The courts will use connecting factors to decide whether a choice of law clause is far-reaching or not. The Ghanaian court will not reject a far-reaching choice of law cause provided special notification is given to the consumer.

3.3 Defects of the common law measures applicable to the strict contract theory

This position taken by the courts hampers predictability, especially in international consumer contracts where parties rely on a predictable outcome to decide whether or not to contract. Essentially, determining whether the choice of law by the dominant party is far-reaching is based on the judge's discretion which rules out consistency. The judge's discretion does not consider whether such a choice is favourable or not; the court will enforce a far-reaching choice of law clause which protects the interests of the consumer. To avoid this problem, certain jurisdictions have implemented rules on choice of law clauses in a consumer contract to protect weaker parties.[97] Most of these rules concentrate on the consumer's habitual residence on the premise that the laws of the consumer's habitual residence will offer her appropriate protection.[98]

[95] *Richardson, Spence & Co v Rowntree* [1894] AC 217 paras 217-219.
[96] *Thornton v Shoe Lane Parking Ltd* [1971] 2 QB 163 at 169 para E.
[97] A 41, 42 and 43 of Law of The People's Republic of China on The Laws Applicable to Foreign-Related Civil Relations (2010 Conflicts Statute).
[98] Dowuona Hammond (n 85) 157.

On the issue of adequate notice, the courts have held that the standard choice of law term in a contract is only effective if the dominant party proves that she notified the consumer of the existence of the choice of law clause before or at the time the contract was concluded.[99] The courts have further held that a choice of law clause is enforceable at common law. The document containing the clause is a single document which can be adequately described as a contractual document containing the conditions or terms of the contract.[100] The last condition to determine sufficient notice by the court relates to the parties' consistent course of dealings. If the court is able to establish a consistent course of dealing between the parties as regards the inclusion of a choice of law clause in their agreements, which is of such a nature that any reasonable person privy to the previous dealings can attest that the dominant party invariably intends to include a choice of law clause in the contract, the consumer will be bound by the choice of law even if she was not expressly notified of that term in the particular transaction.[101]

Terms and conditions may be incorporated into a contract based on the parties' previous dealings. There are instances where the surrounding circumstances of a particular contract are fashioned in such a manner that the dominant party relying on the clause need not have given actual sufficient notice of the clause to the consumer. If circumstances reveal that the consumer should have known that a choice of law clause was included in the contract, she will be deemed to have had reasonable notice of the clause even if her attention was not specifically drawn to it.[102] For the court to

[99] *Olley v Marlborough Court Ltd* [1949] 1 KB 532 para 537.
[100] *Chapeltown v Barry UDC* [1940] 1 KB 532 paras 538-539.
[101] *McCutcheon v David MacBrayne Ltd* [1964] 1 WLR 125 para 137.
[102] Dowuona Hammond (n 85) 161.

consider the course of dealing to establish sufficient notice, dealings between the parties must be regular and consistent. Thus, the parties must have dealt with each other consistently and regularly on those specific terms over an extended period of time to the extent that a clear pattern can be established.[103] After the courts have established the existence of a choice of law clause in a contract of adhesion, it must determine whether the choice of law clause, correctly interpreted, applies.[104]

3.4 Common law rules of construction applicable to adhesion clauses

The common law courts have created several rules of construction or interpretation to avoid inequitable clauses. These include the *contra proferentem* rule,[105] the exclusion of liability for negligence rule,[106] and the exclusion of the liability of third parties rule.[107] Prevalent amongst these tools is the rule of construction regarded as grounds for a fundamental breach of the contract.[108] The rule applies in that an exemption clause may assist a party only if she performs her contract in a way that reflects its fundamental nature.[109] The doctrine of fundamental breach was, in times past, the most potent judicial tool used to control the use of exception clauses. The case of *Photo Production v Securicor Transport*[110] changed this.

In the *Photo Production* case the respondent, Photo Production Ltd, contracted the appellant, Securicor Transport Ltd, to provide security services on its premises. One

[103] Dowuona Hammond (n 85) 161.
[104] Dowuona Hammond (n 85) 161.
[105] *Wallis, Son and Wells v Pratt and Haynes* [1911] AC 394 para 400.
[106] *White v John Warwick & Co* [1953] 2 All ER 1021 para 1294.
[107] *Adler v Dickson* [1955] 1 QB 158 para 461.
[108] Gluck (n 74) 76.
[109] Gluck (n 74) 76.
[110] *Photo Production v Securicor Transport* 1980 AC 827 para 828.

Sunday night an employee of Securicor intentionally started a fire which damaged the Photo Production factory. Photo Production sued for damages. The appellant, Securicor, relied on an exclusion clause in the contract which stated that: "under no circumstances shall the company be responsible for any injurious act or default by any employee of the company unless such act or default could have been foreseen and avoided by the exercise of due diligence on the part of the company as his employer…".[111] Photo Production, however, contended that through its employee Securicor was in fundamental breach of the contract and could not rely on the exclusion clause. The trial court ruled in favour of Securicor. Photo Production appealed and the Court of Appeal allowed the appeal relying of the principle of fundamental breach. Securicor appealed to the House of Lords. The fundamental issue to be decided by the House of Lords dealt with the exclusion clause and its ability to limit or exclude the liability of Securicor under the contract with Photo Production.[112]

Lord Wilberforce was of the view that a breach of a fundamental term, or indeed any breach of contract, is a matter of construction of the contract. The court then interpreted the contract to establish the principle that a party to a contract is entitled to rely on an exclusion clause when conducting her contract, not when she is departing from it or when she is guilty of a fundamental breach of the contract which goes to the root of the contract.[113]

In terms of choice of law, this presupposes that where a dominant party decides on the applicable law in a consumer contract, that choice will only be applied by the court

[111] *Photo Production v Securicor Transport* 1980 AC 827 para 828.
[112] *Photo Production v Securicor Transport* 1980 AC 827 para 828.
[113] *Photo Production v Securicor Transport* 1980 AC 827 paras 843-844.

to the extent that the dominant party enforces that choice in the process of performing the contract according to its true nature. The fundamental breach principle was developed to resolve the problems created by contracts of adhesion. But in practice the principle is similarly applied, as a rule of law, to every contract containing an exemption clause, without considering whether it is a contract of adhesion.[114] Should the fundamental breach rule be applied strictly to contracts of adhesion, the problem of unfair conditions for weaker parties will persist.[115] In applying the doctrine, the courts assume that a limitation clause can be interpreted to reflect the parties' intention. If an interpretation reveals that the limitation clause is unambiguous, the parties must have intended it to apply. If the interpretation reveals otherwise, the courts will conclude that the parties could not have intended the clause to apply in the face of a "fundamental breach".[116]

None of these common law measures aimed at resolving the problems raised by contracts of adhesion offers a permanent solution to the problem which bedevils weaker parties. The main limitation of the common law solutions in consumer adhesion contracts is the level of discretion accorded the courts. The solutions at common law may be raised only when the matter goes to court and a resolution is arrived at by applying common law principles in the judge's discretion. In international consumer contracts the parties need to be able to predict an outcome that guarantees fairness.

Due to the cumbersome nature of international commercial transactions, such as the involvement of various jurisdictions, parties would generally wish to enter into

[114] Dowuona Hammond (n 85) 169.
[115] Gluck (n 74) 76.
[116] Gluck (n 74) 76.

contracts where there is a legitimate expectation of a predictable outcome. Where this cannot be ensured parties are reluctant to enter into cross-border commercial transactions. It is only proper that the parliament of Ghana put measures in place to establish choice of law rules for consumer adhesion contracts. To the extent that the common law principles do not offer a lasting solution to a legal issue, the custodians of the common law legal tradition depart from common law principles and adopt legal instruments to address the matter. Clinging on to outmoded legal principles, especially in an era of rapid change, only hampers the economic growth of Ghana as these outmoded principles do not ensure commercial security for international commerce and deter consumers and investors from focusing on Ghana commercially. As a result, it is necessary to observe the developments in other jurisdictions, especially as regards choice of law rules in consumer contracts and develop a suitable framework for Ghana.

4 Comparative analysis of the designated jurisdictions

4.1 European Union

The promulgation of comprehensive provisions on consumer adhesion contracts by the EU is not immune to the problems associated with unfettered discretion. It will be recalled that Article 6 of Rome I provides that a contract concluded by a natural person for a purpose which can be regarded as being outside her trade or profession shall be governed by the law of the country where the consumer has her habitual residence.

Although the EU seeks to attain justice at all levels, this justice is, in some instances, left to the individual opinions of judges which may hamper the unification sought by the EU. This position is validated by Article 6(3) which provides that where the

requirements in points (a) or (b) of paragraph 1 are not fulfilled, the law applicable to a contract between a consumer and a professional shall be determined pursuant to Articles 3 and 4 of the Regulation. Article 4(3)[117] of Rome I provides the option of applying the close connection test which, in the discretion of the presiding judge, may override the rules set out in Rome I, specifically in Article 6. The position of Article 4(3) of Rome I is not different from section 187 of the Restatement (Second)'s of California's idea of under-regulation which leaves room for manipulation based on the discretion afforded the courts in ensuring the interests of the state as against the party autonomy in choice of law where the judicial precedence developed does not depend on the efficacy of choice of law provisions but rather dependent on the state's policy and the ideology of the presiding judge.

The position under Article 4(3) of Rome I is also similar to the position in China. Article 10 Chinese 2010 Conflicts Law provides that:

> [T]he foreign law applicable to a foreign-related civil relation will be ascertained by the relevant People's Court, arbitration institution or the administrative agency. Where the parties have chosen a foreign law to be applicable, they shall adduce the law of that country. Where the foreign law cannot be ascertained or the law of that country does not have a relevant provision, the PRC law shall be applied.

Article 10 fails expressly to state what parameters the People's Court, arbitration institution, or the administrative agency must consider in establishing the applicability of foreign law but leaves this up the adjudicating body to decide.

[117] A 4(3) of the Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) provides that: "Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply."

The definition of a consumer as provided in Article 6(1) of Rome I is worth considering. Article 6(1) provides that a consumer is "a natural person for a purpose which can be regarded as being outside her trade or profession". This definition presents some challenges in identifying the limit to which Article 6 of Rome I applies in regard to the protection of consumers. First, it is important to bear in mind that where the consumer fails to use the object of the transaction personally or uses it outside her trade or profession, this does not preclude her classification as a consumer.[118] Neither is this transaction excluded from being classified as a consumer transaction to the extent that the consumer makes a financial profit. For example, buying shares on the stock exchange can be classified as a consumer transaction.[119]

Second, the idea of limiting the definition of a consumer to a natural person should be extended to cover legal persons in certain instances. For example, arguments have been made that where a legal person establishes that it does not have, nor should it have, the professional competence to acquire or use goods or services, it should be treated as a consumer.[120] This position is clear from the activities of small scale enterprises. There is also a question whether small-scale businesses fall into the category of consumers when they purchase goods and services from professionals for purposes which can be regarded as falling outside the professional's trade or profession or whether they are professionals as defined in Article 6(1) of Rome I. Most of these enterprises purchase goods and services without any expertise or professional

[118] Hondius 2006 *SLR* 89.
[119] Hondius (n 118) 89.
[120] The Belgian "Commission d'Žtude pour la rŽforme du droit de la consommation" (CERDC), chaired by Thierry Bourgoignie in 2005, proposed to extend the notion of consumer to some legal moral persons in a limited sense.

competence to acquire or utilise goods and service.[121] There is a need to provide a clear definition of small-scale businesses and to identify the category to which they belong to afford better and more effective protection.

Another issue to consider is the degree to which consumers must identify themselves. In terms of the definition in Article 6(1), a natural person must, within the limit provided, identify herself as a natural person for a purpose which can be regarded as falling outside her trade or profession.[122] This is interesting as most consumers innocently enter into contracts without knowing the legal definition which applies to their status and the implications thereof.[123] In such a situation it is not clear whether the consumer contract is concluded and valid at the time at which the consumer concludes the contract with the professional or at the time at which the status of the consumer is defined. This position is unclear under Article 6, Rome I.

Rome I equally fails to deal with agency relationships. If a natural person or the dominant party is represented by a professional such as a broker or commissioner, what are the implications of that fiduciary relationship?[124] At common law the agent assumes the fiduciary obligation of the principal to the extent authorised by the principal.[125] A clear explanation of the agency relationship as it applies to Article 6(1) of Rome I is necessary. Some member states have implemented laws in this regard – eg, as regards the representation of a seller the Dutch Civil Code provides that:

> Where the good (movable thing) is sold by a representative who, when concluding the agreement in the name of her principal, acts in the course of her professional practice or business, the sale is regarded as a consumer sale,

[121] Hondius (n 118) 89.
[122] Hondius (n 118) 89.
[123] Hondius (n 118) 89.
[124] Wyse 1979 *MLR* 31-58 32.
[125] Wyse (n 124) 32.

> unless the buyer knows at the time of conclusion of the agreement that the principal does not act in the course of her professional practice or business.[126]

The enormous work undertaken by the EU in promulgating rules on choice of law, although highly commendable, is not complete in that the promulgation of Article 4(3) of Rome I, which allows a judge room to apply the laws which favour the public interest of a member state, rather defeats the objective of unification where Rome I is concerned. As indicated above, the definition of a consumer under Article 6(1) also presents some challenges.

However, despite the shortcomings of Rome I, the choice of law regime for consumer adhesion contracts as set out in Article 6 is still one of the most progressive and it has raised the standards for the protection of weaker parties. Chief amongst its merits is its definition of consumer contracts, clearly stating that the consumer is a natural person entering into a contract for purposes regarded as falling outside her trade or profession. Rome I also defines the "other party" – the professional – as another person who may be a natural person or legal entity acting in the exercise of her trade or profession.[127] Furthermore, there is no closed list of contracts falling under the special provision for consumer contracts; in fact, Rome I provides that all contracts may be consumer contracts save for the types of contracts listed in Article 6(4).[128]

In addition, Article 6 of Rome I sets further qualifications by requiring that the professional be either a person who pursues her commercial or professional activities in the country where the consumer has her habitual residence, or a person who directs such (commercial or professional) activities to that country or to several countries,

[126] A 7(5)(2) of the Dutch Civil Law 1992.
[127] A 6(1) of Rome 1 (n 117).
[128] A 6(4) of Rome 1 (n 117).

including that country, provided that in doing so the contract falls within the scope of such activities.[129] The parties to a consumer contract may also decide on the applicable law in accordance with Article 3 of Rome I. However, there are additional provisions to ensure the consumer's protection in the form of mandatory provisions of the law applicable in the absence of a choice of law which, under Rome I, is the law of the country of the consumer's habitual residence.[130] The improvement of consumer protection under Article 6 of Rome I reflects the huge emphasis on consumer protection in the EU and is worth emulating.

4.2 California: United States of America

In comparing California's choice of law rules with those of the EU, it emerges that unlike the Restatement (Second), which limits party autonomy in all contracts to the substantive limitations of the *lex causae*, Rome I is far more comprehensive. It comprises the general choice of law rules on contracts in article 3[131] as well as the specific choice of law rules for consumer contracts in Articles 6[132] and overriding mandatory rules in Article 9[133] as discussed in chapter 3. For consumer contracts, Article 6 provides that a choice of law agreement may not deprive a consumer of the protection of the mandatory rules of the *lex causae*. This provision further indicates that the *lex causae* is the country in which the consumer has her habitual residence provided that the other party pursues commercial or professional activities in that

[129] A 6(1) of Rome I (n 117).
[130] A 6(2) of Rome I (n 117).
[131] A 3(3) of Rome I (n 117).
[132] A 6(2) of Rome I (n 117).
[133] A 9 of Rome I (n 117).

country or directs such interests to that country or to several countries including that country.[134]

Where mandatory rules are concerned, while the Restatement (Second) limits party autonomy to policies that are fundamental to the state with the most material interest, Rome I has two categories of mandatory rules – rules that cannot be derogated from by agreement,[135] and overriding mandatory rules, which are defined as those rules "the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract".[136] As discussed in chapter 3 of the thesis.

Although these provisions differ, their distinction affords the weaker party greater protection in that the threshold for applying the overriding mandatory rules is higher than that for the rules that cannot be derogated from by agreement.[137] Thus a rule that cannot be derogated from by agreement does not embody a public policy of the same high level as an overriding mandatory rule under Article 9 of Rome I, or for that matter, the fundamental policy limitation of the Restatement (Second).[138] The point here is that the rule that cannot be derogated from by agreement and the overriding mandatory rules set a higher threshold than the Restatement's fundamental policy limitation.[139] Symeonides has stated that the drafters of Rome I are to be commended

[134] A 6 (1) of Rome I (n 117). Also see Symeonides 2007 *SIULJ* 527.
[135] A 3(3-4), 6(2), 8(1) of Rome I (n 117).
[136] A 9(1) of Rome I (n 117).
[137] Preamble to and R 37 of Rome I (n 117).
[138] A 9(1) of Rome I (n 117); S 187 of the Restatement (Second) of Conflict of Laws. See Symeonides (n 138) 530.
[139] Symeonides (n 138) 530.

for providing targeted protection for the weaker party in consumer contracts by enacting specific rules.

Under Rome I the chosen law must remain within the limitations imposed by public policy and the overriding mandatory provisions of the *lex fori*.[140] Where the matter involves consumer contracts, the chosen law must also remain within the boundaries imposed by the simple mandatory rules of the law of the consumers' habitual residence.[141]

California also applies the "state policy" test which is based on its objective of protecting the consumer against the effects of efficient state regulation. However, it has been suggested that this test is unnecessary as other methods can be used which are less intrusive in the effective determination of choice of law clauses.[142] Such intrusion creates a situation where the parties may not readily establish whether a court will find that the chosen law contravenes a "fundamental policy of a State which has a materially greater interest than the chosen State".[143] An alternative is to disclose significant regulation under the law that would apply in the absence of choice.

This will protect the non-drafting party without jeopardising predictability as is the effect of Article 6 of Rome I. In this instance, the consumer is well informed of her rights and legal responsibilities when agreeing to a consumer contract of adhesion.[144]

---

[140] A 21 of Rome I (n 117); Symeonides 2014 *BJIL* 1134. Also see A 9(2) Rome I (n 117) on overriding mandatory provisions of the *lex fori* and Article 9(3) Rome 1 (n 117) which permits courts to "give effect" to the overriding mandatory provisions of the place of performance so long as those provisions render the performance of the contract unlawful.
[141] Symeonides (n 138) 1134.
[142] S 187(b) Restatement (Second) (n 138).
[143] S 187(b) Restatement (Second) (n 138).
[144] O'Hara and Ribstein 1999 *UCLR* 1549.

It is important to provide clear and specific rules for choice of law conflicts in consumer adhesion contracts.[145] Rome I validates its superiority as compared to the Restatement (Second), which fails to offer any specific protection to weaker parties in consumer adhesion contracts and instead leaves it to the courts to provide *ad hoc* protection, based on the immediate circumstance of each case.[146]

4.3 China

The Chinese choice of law rules on consumer contracts follow Rome I, but are not as developed as Rome I when it comes to the interpretation and application of the 2010 Conflicts Statute and terminology. While Article 6(1) of Rome I extends the material scope of the consumer provision, which previously applied only to contracts for the supply of goods or services to the consumer,[147] the Chinese choice of law rules on consumer contracts fail to define or list the types of contracts covered by the 2010 Conflicts Statute.[148] Thus, as regards the statutory definition of "consumer" the EU has adopted a more rational approach. Rome I uses the term "natural person" in defining a group of people included under the term "consumer".[149] The Chinese legislator, on the other hand, fail to point out unequivocally what kind of private actors

[145] Symeonides (n 138) 530.
[146] Symeonides (n 138) 531.
[147] A 6 (Rome I) (n 117).
[148] A 42 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010 Conflicts Statute) (2013 Amendment) adopted at the 4th meeting of the Standing Committee of the Eighth National People's Congress 31 October 1993, and amended for the first time in accordance with the "Decision on Amending Some Laws" adopted at the 10th Meeting of the Standing Committee of the Eleventh National People's Congress 27 August 2009 and amended for the second time in accordance with the Decision on Amending the Law of the People's Republic of China on the Protection of Consumer Rights and Interests adopted at the 5th Session of the Standing Committee of the Twelfth National People's Congress 25 October 2013. The 2013 Amendment entered into force on 15 March 2014.
[149] See definition of a consumer in A 6 Rome I (n 117). Also see Ge *A Comparative Analysis of Policing Consumer Contracts in China and the EU* (2019) 91.

could be granted consumer status in its 2010 Conflicts Statute.[150] At best, the legislator provides some definition in the amended Chinese Consumer Protection Act 1993.[151] When one resorts to Article 2 of the Chinese Consumer Protection Law 2013 to provide an answer to who qualifies as a consumer, one is faced with a tautology – "a consumer is a consumer".[152]

As regards the definition of terminology, it is essential to have greater clarity on the terminology used in choice of law rules. The clearer the definitions, the more certainty for parties swiftly to predict a probable outcome to their contract and other related matters.[153] Rome I is the preferred option in this instance as it provides a list of definitions and explanations to the Articles in the Recitals to Rome I and adopts a relatively coherent approach to the implications of the definitions.[154] It has been stated that this approach resonates well with the competitive market as the higher the level of certainty, the greater the notion and creation of legal certainty and clarity.[155]

As regards mandatory rules, Article 4 of the Chinese 2010 Conflicts Statute was the first instrument to specify the effect of mandatory rules in private international law in China.[156] This notwithstanding, the 2010 Conflicts Statute fails to define "mandatory rules" or to clarify the distinction between mandatory domestic rules and those applicable to foreign-related cases.[157] Comparing the Chinese position to Article 9 of

[150] Ge (n 149) 91.
[151] A 2 of the People's Republic of China Law on the Protection of Consumer Rights and Interests of the People's Republic of China (2013 Amendment) (n 148).
[152] Ge (n 149) 91.
[153] Ge (n 149) 94.
[154] Ge (n 149) 94.
[155] Ge (n 149) 94.
[156] A 4 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (2010 Conflicts Statute) (n 148).
[157] Ge (n 149) 121.

Rome I provides some contradictory rules applicable to a consumer contract regardless of the choice made by the parties involved. Thus, unlike ordinary mandatory provisions, overriding mandatory provisions cannot be circumvented by choosing the law of another country in a consumer contract, making these provisions binding.[158] Where Article 9 of Rome I applies to consumer contracts, the position is that the overriding mandatory rules of a country are applicable irrespective of the provision promulgated in Rome I, hence drawing a proper distinction between mandatory domestic rules and foreign mandatory rules.[159]

Article 5 of the Chinese 2010 Conflicts Statue provides that where the application of a foreign law will be prejudicial to the social and public interests of the PRC, PRC law shall be applied. The notion of public policy as a means of restricting party autonomy is generally accepted by most jurists.[160] Like Rome I, Article 5 fails expressly to state what interests constitute a "state" or "public" interest in respect of which the application of the parties' choice of law will be a violation. It has been argued that the application of a state interest as a limitation on party autonomy can focus on the strength of the policy – is the policy strong or fundamental enough to justify overriding the parties' choice? Is the policy embodied in a statute or common law rule? And is the contract immoral, inherently vicious, wicked, abhorrent to public policy, or offensive to justice or the public welfare?[161] Codifying the state or public interest violated by the application of the parties' choice of law provides clarity and a remit in which jurists must act. This also addresses the issues arising from judges' unfettered

[158] Bochove 2014 *ELR* 148.
[159] A 9 of Rome I (n 117).
[160] Junming *IICLR* 1996 445.
[161] Junming (n 150) 445.

discretion in deciding issues before them. Undeniably, Ghana can emulate the steps taken by the EU, but it is important to consider the position of Ghana and her relations to regional bodies within the subregion to develop a viable framework which does not affect Ghana's relations with these bodies.

5 Ghana's relation to regional bodies in Africa and its effect on a framework for choice of law rules in consumer contracts

5.1 Economic Community of West African States

A major problem arising from the process of economic integration is generally the challenge of enacting or adopting legal norms applicable within the community as a whole. This is especially true of private international law. Ghana is a member of the Economic Community of West African States (ECOWAS), hence the need to consider the choice of law rules on cross-border consumer contracts within the ECOWAS region.[162] The ECOWAS has no regional law on choice of law rules in consumer adhesion contracts. The Community leaves the decision on choice of law provisions to the domestic laws of the Community member states.[163] However, the principle of party autonomy is recognised and parties to a regional consumer transaction may select the laws of a Community member state as the applicable law of the consumer adhesion contract.[164]

[162] Oppong *Legal Aspects of Economic Integration in Africa* 22.
[163] Oppong (n 162) 22.
[164] Oppong (n 162) 22.

5.2 African Union

Ghana became a member of the African Union (AU) on 26 May 1963.[165] The AU has introduced the African Continental Free Trade Area (AfCFTA) which provides a unique opportunity for countries in the region to integrate competitively in the global economy, reduce poverty, and promote inclusion.[166] Although Africa has made substantial progress in recent decades in raising living standards and reducing poverty, increasing trade can provide the impetus for reforms to boost productivity and job creation, so further reducing poverty.[167] It is interesting to note that the Agreement Establishing The African Continental Free Trade Area does not address issues of private international law or, more specifically, issues of choice of law in consumer adhesion contracts.[168] To the extent that continental free trade is a work in progress there is the need to consider the introduction of private international law rules specifically directed at choice of law to address issues arising from cross-border transactions between private persons within the African continent and to ensure the protection of weaker parties in these transactions. A law of this nature is only binding on Ghana if it is ratified and domesticated.[169]

---

[165] The African Union website https://au.int/en/member_states/countryprofiles2 accessed 23 August 2022.
[166] Free Trade Area Economic and Distributional Effects © 2020 International Bank for Reconstruction and Development / The World Bank https://www.worldbank.org/en/topic/trade/publication, The African Continental /the-african-continental-free-trade-area accessed 15 August 2022.
[167] Free Trade Area Economic and Distributional Effects (n 160) IX.
[168] The African Union website https://au.int/en/treaties/agreement-establishing-africancontinental-free-trade-area 26 August 2022.
[169] A 75 of the 1992 Constitution of Ghana (n 17).

6 Achievement of justice in choice of law rules on consumer adhesion contracts

The identification of a "just" cause in the law is any act or omission which is approved and allowed by law.[170] In choice of law, it is prudent to consider whether the processes to determine the applicable law in consumer adhesion contracts ensures justice for all parties but specially for the weaker party. In some respects, the legal concept of justice has been related to utilitarianism – the greater good in society is prioritised over the consequences of that the interest of the individual, be they laudable or otherwise.[171] Therefore, the utilitarian rule does not measure the consequences of a decision or policy on a relevant population's interest but rather prioritise the greater good.[172] The situation which affects a consumer in an adhesion contract is sympathetic to the problem of utilitarianism – preference of the "greater good" over the "total good". As a result, it is necessary to consider whether choice of law rules in consumer adhesion contracts offer justice to the parties, and to consumers in particular.

Justice for consumers in this regard takes the form of corrective justice – the idea that liability rectifies the injustice inflicted by one person on another.[173] Corrective justice ensures the preservation and renewal of the perceived equality within which the parties enter an agreement – the notion of persons receiving what is lawfully due to them. An injustice is established where one party realises an increase and the other party a resultant loss.[174] In private international law some legal instruments have

[170] Pollock 1895 *HLR* 296.
[171] Lyons 1972 *TJP* 526.
[172] Freeman *Lloyd's Introduction to Jurisprudence* 518.
[173] Weinrib 2003 *UTLJ* 349.
[174] Weinrib (n 173) 349.

sought to correct this injustice by re-establishing the initial equality by means of stripping one party of its gains and allocating them to the other party.[175] This, in consumer adhesion contracts, is most evident in choice of law rules promulgated under Article 6 of Rome I discussed in Chapter three. In choice of law specifically, corrective justice is considered in the light of conflicts justice and material justice.

This section concludes by considering conflicts justice as against material justice in consumer adhesion contracts. The conclusion reached is that in consumer adhesion contracts the dilemma between conflicts justice and material justice should not be resolved in an "either-or" manner. The premise of material justice considerations should be approached as one of the factors that should guide the pursuit of conflicts justice and should explore the question of when and how such considerations should be preferred.[176]

6.1 Conflicts justice and material justice

The impasse between conflicts justice and material justice stems from the question: "Should the choice of law process aim to find the proper law … without regard to the quality of the result it produces, or should it aim for the proper result – a result that produces the same quality of justice in the individual case as is expected in fully domestic, non-conflicts cases?"[177] There is a need to recognise that private international law is characterised by the peculiarities between substantive law and conflict rules, and between substantive rules and rules of reference.[178] Conflict rules

[175] Weinrib (n 173) 349.
[176] Symeonides 2001 *ICLTM* 126.
[177] Bagheri 2014 *PLLSR* 121.
[178] Cavers 1933 *HLR* 181.

accept the substantive legal norms of different countries in cross-border private transactions. This accommodation of different substantive rules from different jurisdictions always raises the issue of ensuring a just result. Hence the dilemma of merely identifying the proper law, or of identification with a "just" result.[179]

6.2 Conflicts justice

The principle of conflicts justice argues for the need to ensure that each multi-jurisdiction legal dispute is resolved according to the law of the country which has the "most appropriate" relation to the dispute.[180] Conflicts justice, therefore, identifies the appropriate country whose law should apply, rather than directly identifying an appropriate law or, much less, the appropriate result.[181] Conflicts justice involves rights-based policies that are justified not on the basis of their outcomes for society, but because they represent the people's sense of justice by identifying moral responsibilities within social relations.[182] This can be achieved through substantive laws or rules of conflict of laws. Principally, the purpose of conflict rules is to deal only with private issues that reflect a sense of justice; they are not intended to achieve goals beyond justice in private legal relations.[183] This approach implies that conflict rules have no distributional motives, that private international law signifies domestic corrective justice and is a mechanism for the promotion of global harmony.[184]

[179] Bagheri (n 177) 121.
[180] Symeonides (n 176) 126.
[181] Symeonides (n 176) 126.
[182] Singer 1989 *BULR* 35.
[183] Bagheri (n 177) 122.
[184] Bagheri (n 177) 122.

Proponents of conflicts justice have observed the difficulty of private international law to determine the outcome of the law applied by the appropriate country in that conflict rules do not control the process and application of substantive rules.[185] These rules point to the appropriate country whose law applies. Thus, conflict rules disappear into the "black hole" of substantive law.[186] Domestic rules are *prima facie* territorial in terms of application.[187] However, private international law harks back to an unsophisticated culture characterised by the application of the private and neutral laws of one country in another country. Adjudicative and administrative procedures have opened the door to the application of foreign private law in a domestic forum – although these courts are hesitant to give effect to laws that pursue welfare objectives which conflict with domestic provisions.[188] It has been argued that to rely on conflict rules to determine the extraterritorial scope of regulatory and welfare-oriented laws is not proper as conflict rules apply only to private-law issues.[189]

6.3 Material justice

The concept of material justice is premised on the fact that conflict rules must strive to achieve the same type and quality of justice as is pursued in the application of substantive rules. Furthermore, it assumes that judges always uphold their obligation to resolve disputes justly and fairly, regardless of the presence of foreign elements.[190] Proponents of this view assert that private international law aims to resolve disputes

[185] Von Mehren AT 1949 *LCP* 32.
[186] Kegel 1979 *AJCL* 617.
[187] Dodge 1998 *HILJ* 105-06.
[188] Dodge (n 187) 106.
[189] Dodge (n 187) 106.
[190] Symeonides (n 176) 3.

in a way that is substantively fair and equitable to the litigating parties. It is not proper for private international law to be content with a trivial form of justice – "conflicts justice"[191] – it must strive to achieve "material justice". It has been stated that the position of material justice rejects the presupposition that the law of the chosen country is always the appropriate law. Alternatively, it examines the applicable law to determine whether its application will yield laudable results.[192] It can be argued that the quest for justice is not plausible if what is attained is a minimum form of justice. Material justice has ousted the classical view in choice of law. The position in the United States where material justice is elevated to a major choice of law rule illustrates this.[193]

6.4 Justice in choice of law: Material justice or conflicts justice?

Modern societies have adopted legal constructs focusing on amalgamated corrective means to ensure justice where conflict rules are concerned. Measures reflecting this include protecting weaker parties, using particularisation processes, and pursuing public interests rather than individual interests.[194] The Rome I and the Chinese private international law rules on consumer contracts are typical examples of amalgamated corrective means to justice.[195] The position taken by some of these legal instruments suggests that conflict rules should be based on policies designed to achieve material justice.[196] Opinions have shown that rules on choice of law must provide a legal

[191] Symeonides (n 176) 3.
[192] Symeonides (n 176) 3.
[193] Symeonides (n 176) 123.
[194] Bagheri (n 177) 123.
[195] Bagheri (n 177) 123.
[196] Bagheri (n 177) 123.

ordering that goes as far as possible toward maximising global welfare and decide conflicts optimising the aggregate utility of persons involved in affected societies.[197] It has been stated that an extensive policy injection into the legal sphere of private international law will breed crises as it will lead to private international law usurping the mandate of substantive law in the domestic sphere.[198] Thus, an international influence on domestic regulatory laws and the use of private law as a system for the enactment of policy objectives, pose a problem for conflict rules, and theories of conflict of laws based on the localised nature of domestic legal instruments.[199] The justiciability of substantive rules is subject to the jurisprudence of particular legal systems. Therefore, it is impossible to obtain absolute uniformity across different jurisdictions.[200]

6.5 Result-oriented choice of law rules: A preferred solution

Symeonides urges proponents of private international law to focus on a result-oriented statutory choice of law rule rather than on conflicts justice and material justice. He argues that a common feature amongst result-oriented rules is that they are specially constructed to realise a particular practical result considered *a priori* which makes them desirable.[201] With reference to the US, these results are preferred by the domestic law of the forum state and the majority of states that participate in the same legal system.[202] Result-oriented choice of law rules can be classified as:

[197] Guzman 2002 *GLJ* 885.
[198] Bagheri (n 177) 123.
[199] Bagheri (n 177) 125.
[200] Bagheri (n 177) 125.
[201] Symeonides (n 176) 4.
[202] Cavers 1977 *ICLQ* 712.

> (a) favouring the formal or substantive validity of a juridical act, such as a testament, a marriage, or an ordinary contract; (b) favouring a certain status, such as the status of legitimacy or filiation, the status of a spouse, or even the dissolution of a status (divorce); or (c) favouring a particular party, such as a tort victim, a consumer, an employee, a maintenance obligee, or any other party whom the legal order considers weak or whose interests are considered worthy of protection.[203]

Suggestions indicate that the first two result-oriented rules may be accomplished by choice of law rules that contain alternative references to the laws of numerous jurisdictions – alternative reference rules. The alternatives allow the court to select a law that validates the juridical act or confers the preferred status.[204] The third rule may be met by promulgating choice of law rules that offer a court a choice by permitting the weaker party to decide on the applicable law from among the laws of more than one state either before or after the dispute has occurred, or to protect the weaker party from the "adverse consequences of a potentially coerced or uninformed choice of law".[205]

The enactment of choice of law rules specifically designed to accomplish a particular substantive result is no indication of full attainment of material justice; neither does this refute the position on conflicts justice. This phenomenon only presents that "the dilemma is no longer – and perhaps it never should have been – an 'either-or' choice between conflicts justice and material justice".[206] Instead, emphasis should be placed on the question of when, how, and how much the prerequisite of material justice should interfere with the realisation of conflicts justice. Thus, the discipline of private international law is not value-free and should not be unsympathetic to the concerns

[203] Symeonides (n 176) 5.
[204] Symeonides (n 176) 5.
[205] Symeonides (n 176) 5.
[206] Symeonides (n 176) 14.

of material justice, especially when modern legislatures are perfectly capable of considering the impact of material justice in private international law.

The importance of noting that the focus of result-oriented choice of law rules is not a reorientation of conflict rules towards material justice cannot be over emphasised. As important as the attainment of justice may be, it is necessary to remember that choice of law rules are exceptional in the way that they operate and address a small range of conflicts problems. More crucially, they are intended to generate outcomes that collective justice will consider desirable and uncontroversial.[207] The result-oriented means of resolving conflicts questions demonstrates that even codified private international law systems are capable of making targeted modifications when necessary to support the preservation of collective justice.[208]

Selective pre-authorised adjustments in favour of material justice do not advocate an *ad hoc* method in which material justice completely replaces conflicts justice. This notion is perhaps not plausible due to the dangers of judicial subjectivism in ratifying this "*de facto* situation and elevating it to a *de jure* method of conflict resolution".[209] The EU case of *Verein für Konsumenteninformation v Amazon EU Sàrldemonstrates* shows how the courts apply the result-oriented rule in favouring a particular party, the consumer, to protect her interests in choice of law.

6.6 Importance of the CJEU's decision in *Verein für Konsumenteninformation v Amazon EU Sàrl* to justice in choice of law

[207] Symeonides (n 176) 14.
[208] Currie 1959 *DLJ* 171.
[209] Symeonides (n 176) 14.

6.6.1 Discussion of the applicable law clause

The *Verein für Konsumenteninformation v Amazon EU Sàrl* case, discussed extensively in Chapter three, demonstrates how the CJEU uses Rome I to achieve result-oriented justice. In deciding the applicable law, the Austrian Supreme Court *(Oberste Gerichtshof)* also referred to whether the applicable law clause was an unfair term under the Directive on Unfair Terms.[210] VKI sought an injunction to prohibit Amazon EU from using its general terms and conditions of sale in Austria, including the clause specifying that: "Luxembourg law shall apply". VKI claimed that the clause breached Article 3(1) of Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts. Article 3(1) provides that:

> A contractual term which has not been individually negotiated shall be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer.

The matter came before the Austrian Supreme Court *(Oberste Gerichtshof)* where the court opted to stay the proceedings and seek guidance from the CJEU on this issue.[211]

The CJEU observed that a term might be unfair within the meaning of Article 3(1) of Directive 93/13 if it is not couched in plain and intelligible language. The court also stated that where mandatory statutory provisions specify the effect of a term, it is essential that the seller or supplier informs the consumer of those provisions. The CJEU also referred to Article 6(2) of Rome I, which provides that the choice of applicable law in a consumer contract must not have the result of depriving the

[210] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 61.
[211] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 61.

consumer of the protection afforded her by provisions that cannot be derogated from by agreement under the law which would have been applicable in the absence of a choice of law, in this case the law of the country where the consumer had her habitual residence. The CJEU then ruled that the clause on the law applicable to the dispute in Amazon's standard terms was unfair to the extent that it led the consumer to err by creating the impression that only the law of Luxembourg applied to the contract. As a result, the supplier was required take a further step to inform the consumer of her rights under Article 6(2) of Rome I which enables her to enjoy the protection of the mandatory provisions of Austrian law.[212]

At this point the CJEU transferred the matter back to the Austrian Supreme Court *(Oberste Gerichtshof)* to establish this in light of all the relevant surrounding circumstances of the case. The effect of this decision on cross-border consumer transactions is that international companies contracting with EU consumers on terms that do not apply the law of the consumer's habitual residence, will have to update their standard choice of law clauses to include Article 6 of Rome I to ensure adequate protection for EU consumers. The standard clause must explain in plain and intelligible language that consumers will always benefit from any mandatory consumer protection rules applicable in the country of their habitual residence.[213]

In arriving at its conclusion on choice of law the CJEU observed that in terms of Article 3(2) of Directive 93/13[214] a contractual term, which has not been individually

[212] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 71.
[213] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 68.
[214] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.

negotiated must be regarded as unfair if, contrary to the requirement of good faith, it causes a significant imbalance in the parties' rights and obligations to the detriment of the consumer. Article 3(2) of Directive 93/13 specifies that a term must always be regarded as not having been individually negotiated where it has been drafted in advance by the seller or supplier and the consumer has, therefore, not been able to influence the substance of the term – particularly in the context of a pre-formulated standard contract.

The court further observed that under Article 4(1) of Directive 93/13[215] a contractual term may be declared unfair only after a case-by-case investigation of all the significant circumstances, including the nature of the goods or services which are the subject of the contract. The obligation consequently rests on the member state's court to establish whether, based on the surrounding circumstance of the case, a term meets the requirements of good faith, balance, and transparency. It stated further that it was within the jurisdiction of the member state's court to draw the criteria that it may or must apply when making such a determination from the provisions of Directive 93/13.[216]

Based on Article 6(2) of Rome I the court also observed that Rome I allows choice of law terms. The parties may choose the law applicable to a consumer contract provided the protection afforded the consumer by the law of her country of habitual residence

[215] Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts.
[216] See the decision in *Kásler and Káslerné Rábai* (2014) Case C-26/13 282, para 40 where the courts held: "As regards such a position of weakness, Directive 93/13 requires Member States to provide for a mechanism ensuring that every contractual term not individually negotiated may be reviewed in order to determine whether it is unfair. In that context, it is for the national court to determine, taking account of the criteria laid down in Articles 3(1) and 5 of Directive 93/13, whether, having regard to the particular circumstances of the case, such a term meets the requirements of good faith, balance and transparency laid down by that directive."

is not derogated from by agreement. This position implies that a pre-formulated term on the choice of the applicable law designating the law of the member state in which the seller or supplier is established, is unfair only in so far as it displays certain specific characteristics inherent in its wording or context which result in a significant imbalance in the rights and obligations of the parties. In particular, the unfairness of such a term may result from a formulation that does not comply with the requirement of plain and intelligible language in Article 5 of Directive 93/13. As regards the consumer's weaker position *vis-à-vis* the seller or supplier as a result of her level of knowledge, the requirement must be interpreted broadly.[217]

The court also stated that where mandatory statutory provisions specify the effects of a term, the seller or supplier must inform the consumer of those provisions.[218] Therefore, in the case of Rome I, Article 6(2) provides that the choice of applicable law must not result in the consumer being deprived of the protection afforded her by provisions that cannot be derogated from by agreement under the law which would have been applicable in the absence of choice, that is the law of her habitual residence. The court further explained that, based on Article 6(2) of Rome I, a court faced with a choice of the applicable law provision where a consumer with her habitual residence in Austria is involved, must apply those Austrian statutory provisions which, under Austrian law, cannot be derogated from by agreement.

6.6.2 A result-oriented approach in Verein für Konsumenteninformation v Amazon EU Sàrl

[217] *In Van Hove* (2015) C-96/14 para 40.
[218] *In Invitel* (2012) C-472/10242 para 29.

The CJEU observed that Rome I recognises the autonomy of the parties to decide the terms of their contract, thereby ensuring the fundamental principle of freedom of contract. Where such a choice is significantly detrimental to the consumer's interests based on her weaker position, Article 6(2) of Rome I intervenes with mandatory provisions from the country of the consumer's habitual residence as a means of protection.[219] In effect, Article 6(2) of Rome I not only directs the court to the country's law – which applies in the absence of choice (conflicts justice) – but takes a further step to protect the EU consumer where an unfavourable clause on choice of law has been included in the contract.

The mandatory rules of the consumer's habitual residence protect her from unfair terms in standard contracts. Arguably, the framers of Rome I expressly sought to strike a balance by arriving at a fair result in situations involving consumers. Acknowledging the autonomy of the parties to contract favours the dominant party when a consumer consents to standard terms in an adhesion contract.[220] To afford the consumer better protection in standard term contracts, Rome I provides that the consumer should be covered by the mandatory provisions of the law of her habitual residence which are believed to favour the consumer.

The position in the EU concerning issues of choice of law (Article 6 of Rome I) in consumer contracts departs from the point of divergence between conflicts justice and material justice. Instead, the provision aims to achieve an acceptable outcome for both the consumer and the dominant party. The position under Article 6 of Rome I reflects Symeonides's result-oriented third rule – rules favouring a particular party,

[219] Rutgers 2017 *NILR* 172.
[220] *Parker v SouthEastern Railway* (1877) 2 CPD 416.

such as a tort victim, a consumer, an employee, a maintenance obligee, or any other party whom the legal order considers weak or whose interests are considered worthy of protection.[221] These rules favour weaker parties to ensure equity in cross-border consumer transactions involving a choice of law. The rules also create room to apply a modern purposive interpretation by considering the peculiarities distinct to each case.[222]

6.7 Justice: a theoretical framework for Ghana

Adopting a result-oriented form of obtaining justice for a consumer is best suited to the situation in Ghana. The notion of legal instruments resulting in a realistic outcome in drafting choice of law rules offers a higher sense of predictability for investments and cross-border transactions from the consumer's point of view. Adopting the rules in Article 6 of Rome I without promulgating a Consumer Protection Act in Ghana defeats the purpose of result-oriented justice. This will result in the strict application of common law rules on standard terms to the consumer's detriment. There is a need to research the development of a framework for a Consumer Protection Act that will suit the Ghanaian legal system.

7 Conclusion: A suggested theoretical framework for Ghana

Ghana turns to English common law to seek solutions to choice of law in consumer contracts. As this approach has not offered a meaningful solution, it is essential to

[221] Symeonides (n 176) 5.
[222] *Verein für Konsumenteninformation v Amazon EU Sàr* (2016) Case C-191/15 ECLI:EU:C:2016:612 para 58.

propose workable solutions for this area of the law. From the comparative analysis above, it suffices to say that mirroring choice of law rules on consumer contracts in Rome I serves as a suitable conditional solution to the situation in Ghana. This suggestion is conditional in that its application to the Ghanaian situation depends on the promulgation of an appropriate Consumer Protection Act by the Ghanaian parliament.

Within the contextual definition of a consumer as a natural person acting for purposes which can be regarded as outside her trade or profession,[223] it important that a proposed framework extends the definition of a consumer to cover legal persons who establish that they lack professional competence to acquire or use goods or services at the time of contracting. The definition of a consumer should include a person who uses the object of the transaction within her trade or profession. It is also important that the proposed framework addresses the issue of identity with respect to the status of a consumer and at what point a consumer contract is perfected.

Rome I provides for party autonomy by permitting the parties – to the extent that negotiation is possible – to choose the law applicable to their contract.[224] This guarantees the very foundation of contract law.[225] The question arising is whether adopting Rome I in the Ghanaian situation should apply to a Ghanaian consumer generally, or only the Ghanaian consumer within the contextual remit in Rome I.[226] The provisions in Rome I are preferable as they seek to protect weaker parties by

[223] A 6(2) of Rome I (n 117).
[224] A 6(2) of Rome I (n 117).
[225] Viner 1927 *JPE* 198.
[226] See definition in A 6(1) and the remit provided in A 6(4) of Rome I (n 117).

modifying the reach of party autonomy and the determination of the applicable law in consumer adhesion contracts better to reflect consumer interests.[227]

It has been argued that adopting the EU position and how effective this will be, depends on limiting the extent of consumer choice. Consequently, any new regime must ensure that the applicable law should not be the law of a foreign country which denies consumers protection afforded by Ghanaian law or that of the consumer's country of habitual residence.[228] This will ensure that Ghana applies the idea inherent in the EU method of promoting choice of law while safeguarding the weaker party in consumer adhesion contracts and establishes a rule that operates more reliably than the current fundamental public policy approach.[229] The proposed regime for Ghana must also consider the limitations provided in Rome I, specifically "that companies must be advertising or otherwise holding themselves out for business in jurisdictions before consumers can have the benefits of those laws".[230]

Where there is absence of choice of the applicable law for the consumer adhesion contract, Rome I provides that the applicable law is that of the consumer's habitual residence.[231] Article 9 of Rome I provides that overriding mandatory rules are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests – eg, its political, social, or economic organisation – to such an extent that they apply to any situation falling within their scope irrespective of the law otherwise applicable to the contract.[232] These provisions provide further protection for

[227] R 32 of Rome I (n 117).
[228] Healy 2009 *DJC&IL* 553.
[229] Healy (n 228) 553.
[230] Healy (n 228) 553.
[231] A 6(1) of Rome I (n 117).
[232] A 9(1) of Rome I (n 117).

the consumer. Adopting them as a model for Ghana is realistic in that they favour the domestic laws of the consumer to the extent that frameworks capture vividly what constitutes the state or public interests the violation of which will violate public policy. It is equally important that a clear distinction be drawn between mandatory rules and public policy.

The advantage of promulgating a legal instrument on choice of law in consumer adhesion contracts in Ghana is that it will ensure and improve the predictability of the outcome of litigation and arbitration, provide certainty as to the applicable law, and regulate the free movement of judgments cross-border matters.[233] To a large extent, this approach will ensure the proper functioning of the internal market in Ghana by attracting more investors and consumers. By and-large Rome I (in conjunction with Brussels Recast) ensures this – it is easy to predict the outcome of a legal suit as the law of the habitual residence of the buyer applies in the absence of a choice of law by the parties. Adopting similar provisions to Rome I will equally protect the vulnerable consumer in Ghana who contracts with dominant parties from other jurisdictions. In instances where there is no agreement on the applicable law, the law of Ghana to which the consumer will be familiar will apply.

To ensure certainty in predicting the outcome of a dispute, the discretionary powers of judges must be defined in the proposed framework. There is a need to define the circumstances and the factors which must be in place for a judge to exercise her discretion. In an extreme case, Article 4(3) of Rome I allows a judge room to apply the law which favours the public interest of a member state. The proposed framework

[233] R 6 of Rome 1 (n 117).

for Ghana should clearly and specifically state those interests which qualify as public interests in order to manage the issues of unfettered discretion and define the scope of the discretionary powers of the judge.

As regards Ghana's dealings with some of her major trading partners, this initiative will be beneficial in that choice of law rules on consumer adhesion contracts in countries like China reflect the position in Rome I. The position in the state of California is not a preferred solution because California follows a combined approach to choice of law involving the application of both Restatement (Second) and an interest analysis.[234] This means that the forum must search to find the appropriate law to apply based on the surrounding circumstances of the case. Under the governmental interest approach, the courts do not disregard the contacts concerning the Restatement (Second) of Conflict of Laws; instead, these contacts are examined during the analysis of the states' interests based on the nature of the state concerned.[235]

This option guarantees neither a predictable outcome nor that the protection of the consumer is ensured. The position in the State of California is also not a preferred choice because the Restatement (Second) limits party autonomy by demanding a specified geographical connection with the state of the chosen law, or a reasonable basis for that choice, and by guaranteeing that the application of the chosen law remains within the substantive limitations of the interest of the state of California.[236]

A disadvantage of the application of Article 6 of Rome I, referring to the Ghanaian law as the law of a consumer's habitual residence, is that it will result in the application of

[234] Symeonides 2010 *CDIPIL* 517.
[235] Symeonides (n 234) 518.
[236] S 187 comment (g) of the Restatement (Second) of Conflict of Laws (n 138).

the outdated English common law on contracts of adhesion. This is because Ghana has no domestic legal instrument addressing consumer protection. It is, therefore, necessary for the Ghanaian parliament to promulgate suitable legal instruments on domestic consumer protection as well as choice of law rules that mirror the choice of law rules on consumer contracts in Rome I.

This chapter has identified that there are no choice of law rules on consumer adhesion contracts in Ghana. To suggest necessary revisions, a comparative analysis was undertaken of the jurisdictions discussed in earlier chapters. The chapter discussed the achievement of justice in deciding the law applicable to consumer adhesion contracts and concluded that the best option lies in a result-oriented form of justice. Recommendations for drafting a theoretical framework on choice of law rules for consumer contracts which suit the Ghanaian situation were proposed. The following chapter concludes the research.

Chapter seven: Conclusion

1 Introduction

Harmonisation of choice of law rules has gained well-earned recognition due to its role in providing uniform solutions to cross-border litigation involving more than one legal system. As Juenger explains, uniform rules reduce "uncertainty in determining what national or local law should be applied and the tendency of parties to 'shop' for a favourable forum".[1] This research considered the formulation of choice of law rules in consumer adhesion contracts to develop a theoretical framework suitable for cross-border consumer transactions in Ghana. The principle of party autonomy is compromised in consumer adhesion contracts and specifically in choice of law clauses on the basis of consumers not having equal bargaining power.[2] This results in a fundamental paradigm shift as regards the principle of freedom of contract – a shift from "party autonomy" to "one-sided autonomy" favouring the dominant party.[3] Domestic laws intervene to provide legal protection in the form of mandatory rules as an exception to the contractual principle of party autonomy in consumer contracts.[4] In the EU, a choice of law clause in a consumer adhesion contract is not *mutatis mutandis* law[5] that is chosen by the parties, it applies only to the extent that it is not

[1] Berman 2005 *PL&LTR*.
[2] Ali and Hernoko 2019 *YURIDIKA YFHUA* 55.
[3] Ali and Hernoko (n 2) 55.
[4] Ali and Hernoko (n 2) 55.
[5] Ali and Hernoko (n 2) 55.

detrimental to the consumer and is in conformity with the mandatory rules of the consumer's country of habitual residence.[6]

The research concludes in this chapter by summarising the various comparative chapters and offers concrete recommendations for a framework for choice of law rules in consumer adhesion contracts in Ghana.

2. Summary of the chapters in the research

2.1 Jurisprudence of consumer adhesion contracts

The research commenced by presenting a jurisprudential analysis of the choice of law rules in private international law. It was shown that party autonomy in private international law allows the parties to decide on the particular law that will govern their contract, be it expressly or by implication.[7] The absence of the choice of an applicable law obliges the courts to impute an intention by considering the peculiarities of the case to which the principle of autonomy does not apply. The courts may use the closest and most real connection test to decide on the applicable law for a consumer contract.[8] In presenting a brief history of contracts of adhesion and how this type of contract developed, it emerged that choice of law in contracts of adhesion

[6] A 6 of the Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I); Ali and Hernoko (n 2) 55.
[7] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.
[8] *Vita Food Products Inc v Unus Shipping Co Ltd* (1939) AC 277 (PC) 290.

suggests a situation where the determination of the applicable law depends on the choice of the dominant party to which the consumer must consent.[9]

Parties who have expressed their consent by signing a contract are bound by its provisions.[10] Arguably, so literal an approach to enforcement leaves no room for consumers to dispute their contract under the legal justification that they have a "duty to read" and are presumed to have read and understood what they have signed.[11] This notion led to the exploitation of consumers under adhesion contracts. The chapter also inquired into how consumers can be protected from such exploitation and discussed the concept of mandatory laws from two angles – by establishing an "objective" rule which favours the weaker party; and by restricting party autonomy in general.[12] This aims to develop a more vigorous position which, in appropriate circumstances, allows the courts to apply both the mandatory laws of the forum and the mandatory laws of other countries connected with the transaction in question.[13]

The chapter further discussed the exploitative nature of contracts of adhesion and the effect these forms of exploitation have on consumer contracts. The study focused on adhesion contracts infringing weaker parties' rights to an agreement. It emerged that in adhesion contracts weaker parties are subjected to unfair and unconscionable terms.[14] The study suggests measures that could alleviate the problem of exploitation in consumer contracts. These measures include the need to utilise third-party

[9] D'Agostino *Contracts of Adhesion Between Law and Economics: Rethinking the Unconscionability Doctrine* 2.
[10] D'Agostino (n 9) 4.
[11] D'Agostino (n 9) 4.
[12] Bochove 2014 *ELR* 148.
[13] Bochove (n 12) 148.
[14] Bochove (n 12) 148.

organisations regulated by law to draft adhesion contracts for and on behalf of both parties to ensure equal representation of the interests of both parties to the consumer contract. The contracts can be drafted by trade union organisations to ensure that the equitable interests of both the dominant and the weaker parties are represented.

Arguably, this third-party organisational intervention in the drafting of consumer contracts defeats the purpose of freedom of contract. But the meaning of an adhesion contract in its peculiarity defeats the whole purpose of the principles of freedom of contract and party autonomy. This may be ascribed to the commercial environment in which adhesion contracts operate and that they are in high demand in twenty-first-century commercial activity.[15] In short, third-party organisational intervention in drafting these standard terms is a possible solution to curb the exploitation of weaker parties to adhesion contracts.

In regard to choice of law a third-party institution regulated by law – eg, global organisations providing similar goods and services – can suggest rules based on the principles governing choice of law in private international law that are favourable to dominant parties by ensuring business efficacy and protection for weaker parties. An example is seen in the *Compagnie D'armement Maritime SA* case where the parties entered into a contract based on the tanker voyage charter-party standard form drafted by the Association of Ship Brokers and Agents.[16] A general example is also the

[15] Rakoff 1982 *HLR* 1180.
[16] *Compagnie Tunisienne de Navigation SA v Compagine d'Armement Maritime SA* (1971) AC 572, 585 paras B-F.

Incoterm rules drafted by the International Chamber of Commerce to regulate terms of trade for the sale of goods.[17]

Chapter three of the research concentrated on the EU's position on the unification of choice of law rules in consumer adhesion contracts and is summarised below.

2.2 European Union: Rome I

Chapter three of the research concentrated on the choice of law rules on consumer contracts as promulgated in Articles 6 and 9 of Rome I. Arguably, Rome I is the most suitable example of an exceptional framework on choice of law rules for consumer contracts and is worth emulating. Rome I ensures the fundamental principle of freedom of contract by allowing the parties the right to choose the applicable law for their contract. In line with other private international law instruments in the EU, Rome I defines contracts that fall within Article 17 of Brussels Recast[18] and has been amended to adapt the provision to electronic contracts. The general rule on applying the law of the consumer's habitual residence remains the same as that in the Rome Convention.[19] The effect of Rome I on consumer contracts is that parties may submit their contract to the law of another country and their choice will apply insofar as it does not deprive the consumer of the protection guaranteed by the law of her habitual

[17] International Chamber of Commerce *"Incoterms 2020"* International Rules for the Interpretation of Trade Terms.
[18] Regulation (EU) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast).
[19] A 5 of the Council Regulation on 1980 Rome Convention on the law applicable to contractual obligations (consolidated version).

residence. This must be verified *ex officio* by the judge.[20] Where the choice of law is detrimental to the consumer, the mandatory provisions of the law of the consumer's habitual residence apply.[21] Arguably, the framers of this legal instrument sought to find a compromise between the concept of freedom of contract and the protection of weaker parties.[22] However, the provisions in Rome I reveal certain loopholes. To this end it has been argued that the quest to establish a single set of choice of law rules which applies to all member states with diverse social, cultural, ethical, and philosophical ideologies is an ambitious undertaking which may cause more harm than good.

Another designated jurisdiction for comparative analysis was the choice of law rules in consumer adhesion contracts in the State of California, USA which is summarised in the next paragraph.

2.3 California (United States of America)

California applies a joint test – the state interest analysis; and the Restatement (Second) of Conflict of Laws. Based on section 187 of the Restatement (Second), the "chosen law" in a contract will apply to the extent that it does not violate a fundamental public policy of that state.[23] Applying this system in consumer contracts has produced unpredictable interpretations in California's jurisprudence, in the main because the courts are unwilling to apply the public policy immunity to offer consumers

[20] Diego "Consumer Protection in Private International Relationships" *in General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé* 154.
[21] A 6(2) Rome I (n 6).
[22] Diego (n 20) 154.
[23] S 187 of the Restatement (Second) of Conflict of Laws.

protection under the laws of the state of their habitual residence.[24] California may look to the EU's position on issues of choice of law in consumer contracts if it wishes to adopt a more uniform, coherent, and favourable jurisprudential consumer protection provision based on the laws of the state of habitual residence.[25] It has been suggested that adopting the EU position and its effectiveness will depend on limiting the extent of consumer choice. Thus, a new regime must ensure that the law indicated should not be the law of another American state or foreign country which denies consumers protection afforded by the laws of the state of their habitual residence.[26] This position will ensure that California applies the idea inherent in the EU method — promoting choice of law while safeguarding the weaker party in consumer adhesion contracts — and adopts a rule that operates more reliably than the current fundamental public-policy approach.[27] The new regime must also consider the limitations provided in Rome I, specifically "that companies must be advertising or otherwise holding themselves out for business in jurisdictions before consumers can have the benefits of those laws".[28]

The following paragraph summarises the chapter on China's approach to choice of law rules on consumer adhesion contracts.

2.4 China

[24] Healy 2009 *DJCIL* 535.
[25] Healy (n 24) 535.
[26] Healy (n 24) 553.
[27] Healy (n 24) 553.
[28] Healy (n 24) 553.

As regards promoting international trade, the similarity between Chinese private international law and Rome I offers a higher sense of predictability for consumers in the EU and China. China has adopted choice of law rules on consumer adhesion contracts similar to Rome I.[29] This realises the aim of protecting consumers in China and encourages consumer confidence in cross-border transactions.[30] It also ensures consistency and reliability in the judicial interpretation of choice of law provisions in consumer contracts. The provisions provide the Chinese courts with a straightforward choice of law model in a consumer adhesion contract.[31] Regardless of these advantages, the position taken by China on choice of law rules in consumer adhesion contracts is not as developed or advanced as that of Rome I. The 2010 Conflicts Statute is vague and fails clearly to define the types of contracts that may be classified as consumer adhesion contracts. It is also far from clear what form of consumer contractual relationship is covered by the provisions.[32] The issue of *stare decisis* is a further problem in Chinese private international law in general, and choice of law rules in consumer contracts in particular. This problem of *stare decisis* therefore hampers consistency in judicial decisions in general.[33]

The main focus of my research has been to develop a theoretical framework for choice of law rules in consumer adhesion contracts suited to Ghana and I now turn to recommendations in this regard.

[29] A 41-43 of the Law of The People's Republic of China on The Laws Applicable to Foreign-Related Civil Relations (2010 Conflicts Statute).
[30] Healy (n 24) 535.
[31] Healy (n 24) 536.
[32] A 42 of the People's Republic of China Law on the Protection of Consumer Rights and Interests of the People's Republic of China (2013 Amendment).
[33] Jieying *Party Autonomy in Contractual Choice of Law in China* 79.

3 Recommendations for Ghana

From Chapter six it emerged that Ghana has no choice of law rules on consumer adhesion contracts. For Ghana, the most appropriate route is to adopt the position of Rome I on consumer contracts on the conditions for limiting the extent of choice of law. In doing so, Ghana will adopt a theory innate in the EU's approach and establish a regime that operates more reliably than the current fundamental public policy approach.[34] However, adopting the EU's approach will only be viable if the country also enacts a domestic legal instrument which addresses consumer protection. This instrument needs to focus on issues such as unfair terms, rights, and responsibilities of the consumer and dominant parties, and other pre-emptive measures to protect consumers. Consequently, although autonomy should be preserved, the proposed theoretical framework must ensure that the chosen law is not the law of another country which denies consumers the protection afforded them by the laws of their habitual residence.[35]

An Act on Consumer Protection for Ghana must at the very minimum include the following provisions in order to support the choice of law regime:

* A comprehensive definition of who qualifies as a consumer: A typical example is where a consumer is widely defined to include a purchaser, user, as well as a legal person

* The rights and duties of the consumer as well as the rights and duties of the dominant party: Ensuring the consumer's rights can take the form of remedies,

[34] Healy (n 24) 553.
[35] Healy (n 24) 553.

including rescission of the contract, the right to damages and injunctive and declaratory relief. This may be applied against the backdrop of the lack of a complete, balanced, and flexible range of remedies which may have the effect, in practice, of neutralising the rights that these statutes seek to confer upon the consumer.

I now turn to the recommendations regarding choice of law.

3.1 A Consumer Protection Act including private international law provisions

The Consumer Protection Act of Ghana must, as regards private international law, include provisions on jurisdiction, recognition and enforcement, and choice of law generally. For purposes of this thesis, the focus is on choice of law. The choice of law provisions for consumer adhesion contracts must provide for specific choice of law rules to ensure suitable conditions and additional protection for the consumer. Therefore, choice of law rules should focus on areas such as definitions, scope of application, party autonomy, applicable law in the absence of choice, mandatory rules, and public policy.

3.2 Definitions

It is important to have a preferred definition of who a consumer and her contracting partner are. This proposed theoretical framework may apply to contracts concluded by a natural person – the consumer – with another person for a purpose falling outside her trade or profession.[36] A contract on the part of the consumer "for a purpose regarded as being outside [her] trade or profession" must be clearly defined and

[36] A 6(1) of Rome I (n 6).

indicate clearly at what point a consumer contract with a professional is perfected? A suggested definition of a "consumer contract regarded as being outside [her] trade or profession"[37] is the consumer not having the legal, professional, technical, or trade competence over the consumption and use of goods and services as a matter of necessity.

The definition of a consumer must be extended to legal persons who are able to establish that they neither have, nor should they have, the professional competence to acquire or utilise goods or services under a consumer contract.[38] An extension of the definition of a consumer to cover legal persons such as small-scale businesses which fall into the category of consumers when they purchase goods and services from professionals and do not have the professional competence to acquire the goods or services, will be beneficial for Ghana where small-scale enterprises dominate and serve as intermediary transactors between actual professionals and natural persons. As regards meeting the consumer requirements, the consumer need not to have performed the acts required to conclude the contract in the country of her habitual residence as this condition is superfluous – especially in contracts concluded via the internet.[39]

The other person contracting with the consumer may be a professional acting in the exercise of her trade or profession.[40] "Professional" should include the professional who pursues her commercial or professional activities in the country where the

[37] A 6(1) of Rome I (n 6).
[38] The Belgian "Commission d'Žtude pour la rŽforme du droit de la consommation" (CERDC), chaired by Thierry Bourgoignie in 2005, proposed to extend the notion of consumer to some legal moral persons in a limited sense.
[39] A 6(1)(a) of Rome I (n 6).
[40] A 6 of Rome I (n 6).

consumer has her habitual residence (Ghana), or by any means directs such activities to that country, or to several countries including that country, and the contract falls within the scope of such activities.[41] The definition of the professional should not be restricted to a professional conducting her business solely within the territorial borders of Ghana, but must include those operating outside Ghana to ensure adequate provision for cross-border and electronic consumer contracts. In order to safeguard the interest of the professional from fraudulent consumers – eg, contracting with a consumer who has lied about her habitual residence in a contract concluded via the internet – it is incumbent on the professional to ensure that her standard form contract requires as much information as possible from the consumer.[42] In the event of a dispute, the standard form contract itself serves as proof.

To ensure legal certainty there should be a clear definition of habitual residence, in particular for companies and other bodies, corporate or unincorporated.[43] The definition in Article 19 of Rome I is an excellent example:

> The habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.[44] Where the contract is concluded in the course of the operations of a branch, agency, or any other establishment, or if, in terms of the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence.[45]

[41] A 6(1)(a) of Rome I (n 6).
[42] De Sousa Gonçalves 2015 *MUJLT* 10.
[43] R 39 of Rome I (n 6).
[44] A 19 Rome I (n 6).
[45] A 19 Rome I (n 6).

For the purposes of determining habitual residence, the relevant point at which residence must exist is the time of conclusion of the contract.[46]

3.3 Scope of applicability

It is important to define the scope of operation of the consumer and the professional within the suggested theoretical framework. To the extent that the professional pursues her commercial or professional activities in the country where the consumer has her habitual residence – in this case Ghana – or by any means directs such activities to that country or to several countries including Ghana, and the contract falls within the scope of such activities,[47] the rules suggested in this theoretical framework should apply to all forms of consumer contracts to the exclusion of:

a. A contract for the supply of services where the goods or services are to be supplied to the consumer exclusively in a country other than that in which she has her habitual residence.[48]

Note that in such an instance, it is only proper to apply the law of the other country where the goods and services are to be supplied.

b. A contract for the carriage of goods and services.[49]

This type of contract should be excluded because there are special laws promulgated on the carriage of goods. Specifically, Part IV of the Sale of Goods Act,[50] sections 59 to 65, which has domesticated the CIF and FOB sales of Incoterms[51] deal with carriage of goods.

[46] A 19 Rome I (n 6).
[47] A 6(1)(a) of Rome I (n 6).
[48] A 6(4)(a) of Rome I (n 6).
[49] A 6(4)(b) of Rome I (n 6).
[50] Ghana's Sale of Goods Act 137 of 1962.
[51] The Incoterms or International Commercial Terms, updated at Incoterms 2022.

c. A contract relating to a right *in rem* in an immovable property or the tenancy of immovable property[52] as the Contract Act[53] and Conveyancing Decree[54] deal with issues of rights *in rem* in immovable property or a tenancy over immovable property.

These types of contracts should also be excluded because there are special laws that regulate rights *in rem* in immovable property or the tenancy of immovable property. Such Acts include the Mortgages Act 1972 (NRCD 96) which regulates the creation of mortgages and associated matters.

d. Rights and obligations which constitute a financial instrument; rights and obligations constituting the terms and conditions governing the issuing or offer to the public and public take-over bids of transferable securities; and the subscription and redemption of units in collective investment undertakings in so far as these activities do not constitute provision of a financial service.[55]

Contracts that fall under these categories are governed by specific Acts, including: the Ghana Deposit Protection Act 931 of 2016; the Bank of Ghana Act 612 of 2002:, the Payment Systems and Services Act 987 of 2019; the Borrowers and Lenders Act 773 of 2008; the Anti-Money Laundering Act 749 of 2008; the Mortgages Act 1972 (NRCD 96); the Anti-Terrorism Act 762 of 2008; the Income Tax Act 896 of 2015; the Credit Reporting Act 726 of 2007; the Foreign Exchange Act 723 of 2006; the Securities Industry Act 929 of 2016; the Companies Act 992 of 2019; and the Insurance Act 1016 of 2021.

3.4 Party autonomy

[52] A 6(4)(c) of Rome I (n 6).
[53] Ghana's Contracts Act 25 of 1960.
[54] Ghana's National Redemption Council Decree Conveyancing Decree 1973 (NRCD 175).
[55] A 6(4)(d) of Rome I (n 6).

The autonomy of the parties under the principle of freedom of contract is paramount. The parties' freedom to choose the applicable law should be one of the cornerstones of any choice of law regime where consumer contracts are involved.[56] The parties to the contract should have the right to choose the law to govern their consumer contract. This choice can be decided expressly or by implication based on the terms of the contract and the circumstances of the case.[57]

3.5 Applicable law in the absence of choice

In the absence of a choice of law by the parties, the law which should govern the contract is the law of the country where the consumer has her habitual residence, in this case Ghana, provided that the professional pursues her commercial or professional activities in the country where the consumer has her habitual residence, or by any means directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.[58] As regards contracts concluded with consumers with weaker bargaining power, the consumers should be protected by rules that are more favourable to their interests than those that generally apply.[59] The purpose of selecting the habitual residence of the consumer is that the consumer can easily have specific legal knowledge or seek legal advice without having to cope with a language barrier or incurring exorbitant cost in seeking legal knowledge.[60] Based on the competence that accompanies professionalism, dominant parties generally enter into various forms of standard contracts. It is

[56] R 11 Rome I of (n 6).
[57] A 3(1) of Rome I (n 6).
[58] A 6(2) of Rome I (n 6).
[59] R 23 Rome I (n 6).
[60] Okoli and Arishe 2012 *JPIL* 513.

therefore reasonable to suggest that where the professional pursues her commercial or professional activities in the country of the consumer's habitual residence – ie, the professional should be familiar with the laws of Ghana.[61]

3.5 Mandatory rules and public policy

According to Rome I, overriding mandatory provisions are provisions the respect for which is regarded as so crucial by a country for safeguarding its public interests, such as its political, social, or economic organisation, that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract.[62] For mandatory rules to override the chosen law in a consumer contract, there must be an infringement which constitutes a manifest breach of a rule of law regarded as essential for legal order in the state in which enforcement is sought, or of a right recognised as being fundamental within that legal order.[63] A mandatory rule which should be promulgated in this respect is the application of the laws of the habitual residence of the consumer in the absence of choice of the applicable law.[64] An application of the laws of the consumer's habitual residence – in this case Ghana – will only be successful if a Consumer Protection Act, which addresses pertinent issues in consumer protection in detail, is enacted. There should be no clause or future regulation which could restrict the application of Ghana's overriding mandatory provisions where choice of law rules on consumer adhesion contracts are concerned.[65]

---

[61] R 25 of Rome I (n 6). Also see Plender and Wilderspin *European Private International Law of Obligations* 168–69.
[62] A 9(1) of Rome I (n 6).
[63] *Gambazzi v DaimlerChrysler Canada Inc* (Case C-394/07) Judgment of 2 April 2009 para 27.
[64] R 21 of Rome I (n 6).
[65] A 9(2) of Rome I (n 6).

Effect should be given to the overriding mandatory provisions of the law of Ghana where the obligations arising from the contract have to be or have been performed in so far as they render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard must be had to their nature and purpose and to the consequences of their application or non-application.[66] The concept of overriding mandatory provisions should be distinguished from the expression provisions which cannot be derogated from by agreement and be construed restrictively.[67]

Considerations of public interest justify giving the courts of Ghana the power, in exceptional circumstances, to apply exceptions based on public policy.[68] Therefore, in determining any matter arising from the parties' consumer adhesion contract the courts shall decline to apply a provision of the law chosen by the parties or the applicable law in accordance with these principles if, and then only to the extent that its application to the case in question would be manifestly incompatible with the public policy of the forum.[69]

4. Model choice of law provision on consumer adhesion contracts for Ghana

A model choice of law provision may be mirroring the following:

a. Transnational consumer contracts are private contracts for the exchange of goods and services across national borders.

b. The parties may expressly or impliedly choose the law applicable to their transnational consumer contract in accordance with the provisions of the Consumer Protection Law of Ghana (once promulgated).

[66] A 9(3) of Rome I (n 6).
[67] R 37 Rome I (n 6).
[68] R 37 Rome I (n 6).
[69] Dickinson 2012 *SLS* 5.

c. In the absence of a choice of law by the parties, the law of the habitual residence of the consumer shall be applied, provided that the professional pursues her commercial or professional activities in the country where the consumer has her habitual residence, or by any means directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities. Should this not be the case, the law of the place that is most closely connected with the contract shall be applied.

d. Overriding mandatory provisions are provisions the respect for which is regarded as so crucial by a country for safeguarding its public interests, such as its political, social, or economic organisation, that they apply to any situation falling within their scope, irrespective of the law otherwise applicable to the contract. Where an overriding mandatory provision of the law of the Ghana exists with respect to a consumer transaction, that mandatory provision shall apply.

5. Conclusion

On the issue of applicable law in a consumer adhesion contract the Ghanaian parliament should adopt the position taken by Rome I. The law of the consumer's habitual residence should apply in the absence of a choice of law by the parties. There is also a need to establish whether the consumer has easy access to justice in a dispute arising from a consumer adhesion contract. Failure to promulgate a legal instrument on consumer protection will only lead to the application of the strict common law principles to the consumer's detriment. Domestic consumer protection legislation is essential to the extent that the goal of achieving a result-oriented outcome in choice of law.

The theoretical framework proposed will present a higher sense of predictability for consumers in Ghana. Its adoption will equally ensure the protection of consumers in

Ghana and promote consumer confidence in cross-border transactions.[70] The proposed theoretical framework should ensure consistency and reliability in judicial interpretation of choice of law provisions in consumer contracts as is the case in the EU, in that the provisions provide the Ghanian courts with a straightforward choice of law model for a consumer adhesion contract.

This chapter concludes the study on the law applicable to trans-border contractual obligations consumer contracts of adhesion with a special focus on Ghana. The chapter has summarised the various chapters on the designated jurisdictions in the comparative research and made concrete recommendations for a theoretical framework for the promulgation of a choice of law regime for consumer adhesion contracts in Ghana.

[70] Healy (n 24) 535.

BIBLIOGRAPHY

Books, Chapters in Books, and Theses

Alexandrowicz CH *The European-African Confrontation: A Study in Treaty Making* (AW Sijthoff 1973)

Andeans M and Andersen C *Theory and Practice of Harmonisation* (Edward Elgar Publishing 2011)

Atamer YM and Pichonnaz P "Control of Price Related Terms in Standard Form Contracts General Reports" in "Control of Price Related Terms in Standard Form Contracts" (Atamer YM and Pichonnaz P) *Comparative Law* vol 36 (Springer 2020)

Atiyah P *The Rise and Fall of Freedom of Contract* (OUP 1979)

Basedow J *et al* (eds) *Encyclopaedia of Private International Law* "Denmark" (Edward Elgar Publishing Inc 2017)

Bigwood R *Exploitative Contracts* (OUP 2003)

Black G *Handbook of Research on International Consumer Law* (Edward Elgar Publishing 2010)

Boele-Woelki K *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws* (Volume 340 *Recueil des Cours* 2010)

Collins of Mepesbury *et al* (eds) *Dicey, Morris & Collins on the Conflict of Laws* vol 2 15ed (Sweet & Maxwell Ltd 2012)

Collins H *The European Civil Code: The Way Forward* (CUP 2008)

D'Agostino E *Contracts of Adhesion Between Law and Economics: Rethinking the Unconscionability Doctrine* (Springer 2015)

Dicey AV, Morris JHC and Collins L *Dicey, Morris & Collins on the Conflict of Laws* vol 2 14ed (Sweet & Maxwell 2006)

Dowuona-Hammond C *Law of Contract in Ghana* (Frontiers Printing & Publishing Co Ghana 2011)

Faulkner T *Law and Authority in the Early Middle Ages* (CUP 2016)

Fawcett JJ, Carruthers JM and North PM *Cheshire & North Private International Law* 15ed (OUP 2017)

Fernandes-Arroyo DP "Consumer Protection in Private International Relationships" in Brown K and Snyder DV (eds) *General Reports of the XVIIIth Congress of the International Academy of Comparative Law/Rapports Généraux du XVIIIème Congrès de l'Académie Internationale de Droit Comparé* (Springer 2011)

Forsyth C *Private International Law, The Modern Roman-Dutch Law Including the Jurisdiction of the High Courts* 5ed (Juta 2012)

Freeman M *Lloyd's Introduction to Jurisprudence* 19ed (Sweet & Maxwell 2014)

Friedmann W *Law and Social Change in Contemporary Britain* (Stevens & Sons 1951)

Furmston MP *Cheshire, Fifoot and Furmston's Law of Contract* 16ed (OUP 2012)

Ge JA *Comparative Analysis of Policing Consumer Contracts in China and the EU* (Springer 2019)

Gillies L *Electronic Commerce and International Private Law* (Routledge 2008)

Gharavi HG *The International Effectiveness of the Annulment of an Arbitral Award* (Kluwer Law International 2002)

Hart HLA *Essays in Jurisprudence and Philosophy* (Clarendon Press 1983)

Hartley TC *International Commercial Litigation: Text, Cases and Materials on Private International Law* 2ed (CUP 2020)

Hill J *Cross-Border Consumer Contracts* (OUP 2008)

Howells G, Twigg-Fleshner C and Wilhelmsson T *Rethinking EU Consumer Law* (Routledge Taylor & Francis Group 2018)

Howells G, Micklitz H and Wilhelmsson T *European Fair-Trading Law* (Ashgate Publishing Limited 2006)

Jieying L *Party Autonomy in Contractual Choice of Law in China* (CUP 2018)

Schmitthoff CM *Selected Essays on International Trade Law (*edited by Chia-Jui Cheng), (Dordrecht, Boston, London: Martinus Nijhoff Publishers/Graham & Trotman 109 1988)

Kalenský P *Trends of Private International Law* (Martinus Nijhoff 1971)

Kenny M and Devenney J (eds) *European Consumer Protection: Theory and Practice.* (CUP 2012)

Kuipers JJ *EU Law and Private International Law: The Interrelationship in Contractual Obligations* (Martinus Nijhoff 2012)

Mann FA (ed) *Harmonisation of Private International Law by the EEC* (Institute of Advanced Legal Studies, University of London 1978)

McKendrick E *Contract Law: Textbook, Case and Materials* 5ed (OUP 2018)

Meyerson D *Understanding Jurisprudence* (Routledge-Cavendish 2007)

Micklitz HW "The Targeted Full Harmonisation Approach: Looking Behind the Curtain" in Geraint H and Reiner S (eds) *Modernising and Harmonising Consumer Contract Law* (European Law Publishers 2009) 47-86

Mills A *Party Autonomy in Private International Law* (CUP 2018)

Morris JHC, McClean D and Beevers K *Conflict of Laws* (Thomson Reuters (Legal) Ltd 2009)

Mortensen R, Garnett R and Keyes M *Private International Law in Australia* 4ed (LexisNexis 2019)

Nygh P *Autonomy in International Contracts* (OUP 1999)

Obiri-Korang P *Private International Law of Contract in Ghana: The Need for a Paradigm Shift* (LLD University of Johannesburg 2017)

Oppong RF *"Ghana"* in Verschraegen B and Alphen aan den Rijn NL (eds) *International Encyclopaedia of Laws: Private International Law* (Kluwer Law International 2010)

Oppong RF *Legal Aspects of Economic Integration in Africa* (CUP 2011)

Plender R and Wilderspin M *European Private International Law of Obligations* (Sweet & Maxwell 2009)

Quansah EK *Ghana Legal System* (Black Mask Limited Accra Ghana 2011)

Radin MJ *Boilerplate: The Fine Print, Vanishing Rights, and the Rule of Law* (Princeton University Press 2013)

Rickett CEF and Telfer T *International Perspectives on Consumers' Access to Justice* (CUP 2003)

De Boer TM "Unwelcome Foreign Law: Public Policy and Other Means to Protect the Fundamental Values and Public Interests of the European Community" in A Malatesta *et al* (eds) *The External Dimension of EC Private international law in Family and Succession Matters* (2008 CEDAM) 295-330

Salmond JW *Jurisprudence or the Theory of the Law* (Stevens and Haynes 1902)

Sandberg D *Jura novit arbiter? How to Apply and Ascertain the Content of the Applicable Law in International Commercial Arbitration in Sweden* (LLD University of Gothenburg Sweden 20110)

Stone P *EU Private international law* (Edward Elgar Publishing 2014)

Story J *Commentaries on the Conflict of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Successions, and Judgments* (Hilliard Gray & Co 1834)

Symeonides SC *Choice of Law* (OUP 2016)

Tang ZS *Electronic Consumer Contracts in Conflicts of Laws* 2ed (OUP 2012)

Tang ZS, Xiao Y and Huo Z *Conflict of Laws in the People's Republic of China* (Edward Elgar Publishing 2016)

Tollitson J *Contract Law in Perspective* (Butterworths 1981)

Tu G *Private International Law in China* (Springer 2016)

Von Savigny FK *Private International Law and the Retrospective Operation of Statutes: A Treatise on the Conflict of Laws, and the Limits of their Operation in*

Respect of Place and Time 2ed Revised by T and T Clark (Law Publishers London 1880)

Wang FF *Internet Jurisdiction and Choice of Law, Legal Practice in EU, USA and China* (CUP 2011)

Watson A *Digest of Justinian* vol 4 (trans) (University of Pennsylvania Press 1986)

Weatherill S *EU Consumer Law and Policy* 2ed (Edward Elgar Publishing 2013)

Wilhelmsson T "The Ethical Pluralism of Late Modern Europe and Codification of European Contract Law" in Smits J (ed) *The Need for a European Contract Law: Empirical and Legal Perspectives* (Europa Law Publishing 2005) 123-146

Yuthayotin S *Access to Justice in Transnational B2C E-Commerce: A Multidimensional Analysis of Consumer Protection Mechanisms* (Springer International 2015)

Dictionary

Bryan AG (ed) *Black's Law Dictionary* 9ed (West Thomson Reuters Publishing 2009)

Journal Articles

Adar Y and Becher SI "Ending the license to exploit: Administrative oversight of consumer contracts" 2021 *Boston College Law Review* 2405-2462

Agarwal K "Party autonomy in international commercial arbitration" 2007 *Indian Institute of Management Ahmedabad* 1-15

Ali M and Hernoko AY "Characteristics of party autonomy in a transnational electronic consumer contract" 2019 *Yuridika Jurnal Ilmu Kukum* 55-74

Allott A "The Unification of laws in Africa" 1968 *The American Journal of Comparative Law* 51-87 https://www.jstor.org/stable/838247 accessed 3 March 2023

Andrew TG "Choice of law: New foundations" 2002 *Georgetown Law Review* 884-938

Auld FC "Methods of comparative jurisprudence" 1949 *The University of Toronto Law Journal* 82-92

Bagheri M "Conflict of laws, economic regulations and corrective/distributive justice" 2014 *Penn Law: Legal Scholarship Repository* 113-151

Banu R "Conflicting justice in conflict-of-law" 2019 *Vanderbilt Journal of Transitional Law* 1-62

Batiffol H "The objectives of private international law" 1966-1967 *American Journal of Comparative Law* 159-163

Beale JH "What law governs the validity of a contract" 1910 *Harvard Law Review* 260-271

Behr V "Rome I a mostly unified private international law of contractual relationships within most of the European Union" 2011 *Journal of Law and Commerce* 233-272

Berg KF "The Israeli standard contracts law 1964: Judicial controls of standard form contracts" 1979 *International and Comparative Law Quarterly* 560-574

Berman H "Is conflict of laws becoming passe? A historical response" 2005 *Emory Public law Research Papper* 5-42

Bezáková D "The Consumer Rights Directive and its implications for consumer protection regarding intangible digital content" 2013 Masaryk University Journal of Law and Technology 177-191

Bochove LM "Overriding mandatory rules as a vehicle for weaker party protection in European private international law" 2014 *Erasmus Law Review* 147-156

Burton JFJ "The Uniform Commercial Code and conflict of laws" 1960 *The American Journal of Comparative Law* 458-470

Buxbaum H "Mandatory rules in civil litigation: Status of the doctrine post-globalization" 2008 *Indiana University Maurer School of Law Review* 21-36

Carpinello GF "Testing the limits of choice of law clauses: Franchise contracts as a case study" 1990 *Marquette Law Review* 57-89

Cavers DF "A critique of the choice-of-law problem" 1933 *Harvard Law Review* 173-208

Cavers DF "The Proper Law of Producer's Liability" 1977 *The International and Comparative Law Quarterly* 703 -773

Chow DCK "Limiting Erie in a new age of international law: Toward a federal common law of international choice of law" 1988 *Iowa Law Review* 165-226

Cohen MR "The basis of contract" *Harvard Law Review* 553-592

Collins H "Harmonisation by example: European laws against unfair commercial practices" 2010 The *Modern Law Review* 89-118

Cook WW "Contracts and the conflict of laws: 'Intention' of the parties" 1932 *The University of Illinois Law Review* 423-432

Corr JB "Modern choice of law and public policy: The emperor has the same old clothes" 1985 *University of Miami Law Review* 647-696

Craven M "Between law and history: The Berlin Conference of 1884-1885 and the logic of free trade" 2015 *London Review of International Law* 31-59

Crawford EB and Carruthers JM "Connection and coherence between and among European instruments in the private international law of obligations" 2014 *International and Comparative Law Quarterly* 1-29

Currie B "Notes on Methods and Objectives in the Conflict of Laws" 1959 *Duke Law Journal* 171-181

De Sousa Gonçalves AS "The e-commerce international consumer contract in the European Union" 2015 *Masaryk University Journal of Law Technology* 5-20

Deskoski T and Dokovski V "*Lex contractus* for specific contracts under the Rome I" 2019 *Iustinianus Primus Law Review* 1-12

Dickinson A "The role of public policy and mandatory rules within the proposed Hague Principles on the Law Applicable to International Commercial Contracts" 2012 *Sydney Law School* 5-31

Dodge WS "Extraterritoriality and conflict-of-laws theory: An argument for judicial unilateralism" 1998 *Harvard International Law Journal* 105-106

Dowuona-Hammond C "Consumer law and Policy in Ghana" 2018) 41 *Journal of Consumer Policy* 333-354

Drahozal CR "Unfair arbitration clauses" 2001 *University of Illinois Law Review* 695-790

Duina F "Explaining legal implementation in the European Union" 1997 *The International Journal of the Sociology of Law* 155-179

Ehrenzweig A "Adhesion contracts in conflict of laws" 1953 *Columbia Law Review* 1072-1090

Ehrenzweig A "Choice of law: Current doctrine and 'true rules" 1961 *California Law Review* 240-253

Freund PA "Chief Justice Stone and the conflict of laws" 1946 *Harvard Law Review* 1210-1236

Friedler E "Party autonomy revisited: A statutory solution to a choice-of-law problem" 1989 *University of Kansas Law Review* 471-528

Frosch MD "Determinism and the law" 1971 *Kentucky Law Journey* 350-371

Furth-Matzkin M and Sommers R "Consumer psychology and the problem of fine-print fraud" 2020 *Stanford Law Review* 503-560

Gillette CP "Rolling contracts as an agency problem" 2004 *New York University School of Law* 679-737

Gillette-CP "Rolling contracts as an agency problem" 2004 *Wisconsin Law Review* 679-736

Gluck G "Standard form contracts: The contract theory reconsidered" 1979 *International and Comparative Law Quarterly* 72-90

Goolam N "Jurisprudence" 2010 *Rhodes University Faculty of Law* 1-8

Goral G "Standard conditions and form contracts in Italian law" 1962 *The American Journal of Comparative Law* 1-20

Graves JM "Party autonomy in choice of commercial law: the failure of revised UCC § 1-301 and a proposal for broader reform" 2005 *Seton Hall Law Review* 59-123

Graveson RH "Lectures on the conflict on the conflict of law and international contract" 1951 *University of Michigan Law Review* 635-639

Gutmann T "Theory of contract and the concept of autonomy" 2013 *The Zvi Meitar Center for Advanced Legal Studies* 1-22

Healy JJ "Consumer protection choice of law. European lesson for the United States" 2009 *Duke Journal of Comparative & International Law* 535-588

Hesselink MW "CFR & social justice: A short study for the European parliament on the values underlying the Draft Common Frame of Reference for European Private Law - What roles for fairness and social justice?" 2008 *New York University School of Law* 1-72

Hondius E "The notion of consumer: European Union versus member states" 2006 1 *Sydney Law Review* 89

Hopkins K "Standard-form contracts and the evolving idea of private law justice: a case of democratic capitalist justice versus natural justice" 2003 *Journal of South African Law* 150-160

Horowitz HW "The law of choice of law in California - A restatement" 1974 (21) *Juridica International Law Review University of Tartu* 748-758

Huang J "The structure of China's conflicts law: New developments of the Rules on Special Commercial Law" 1998 *NILR* 200-201

Huo Z "An imperfect improvement: The new Conflict of Laws Act of the People's Republic of China" 2011 *ICLQ* 1065-1093

Jieying L "Statutory restrictions on party autonomy in China's private international law of contract: How far does the 2010 codification go?" 2012 *Journal of Private International Law* 77-112

Junming L "Choice of law for contracts in China: A proposal for the objectivization of standards and their use in conflicts of law" 1996 *Indian International Comparative Law Review* 439-460

Kaplow L and Shavell S "Fairnes versus welfare" *Harvard Law Review* 961-1388

Kegel G "Paternal home and dream home: Traditional conflict of laws and the American reformers" 1979 *The American Journal of Comparative Law* 615-633

Kelson MJ "Choice-of-law, venue, and consent-to-jurisdiction provisions in California commercial lending agreements: Can good draftsmanship overcome bad choice-of-law doctrine" 1990 *The Loyola of Los Angeles Law Review* 1337-1384

Kessler F "The contracts of adhesion–some thoughts about freedom of contract role of compulsion in economic transactions" 1943 *Columbia Law Review* 629-643

Korobkin R "Bounded rationality, standard form contracts, and unconscionability" 2003 *The University of Chicago Law Review* 1203-1295

Kronenberg A "Foreign overriding mandatory provisions under the Regulation (EC) No 593/2008 (Rome I). Judgment of The European Court of Justice of 18 October 2016, Case C-135/15" 2018 *Institute for Private International and Comparative Law University of Cologne* 873-886

Kunnecke A "New standards in EU consumer rights protection? The new Directive 2011/83/EU" 2014 *European Scientific Journal* 426-437

Lando O "Can Europe build unity of civil law while respecting diversity?" 2006 *European Private Law* 1-18

Lando O and Nielsen PA "The Rome I proposal" 2007 *Journal of Private International Law* 29-51

Leflar RA "Conflict of laws under the UCC" 1981 35 *American Law Report* 87-110

Levin MJ "Party autonomy: Choice-of-law clauses in commercial contracts" 1957 *Georgetown Law Journal* 260-280

Liao Z "The recent amendment to China's consumer law: An imperfect improvement and proposal for future changes" 2014 *Beijing Law Review* 1-10

Lorenzen EG "Huber's *De Conflictu Legum*" 1919 *Yale Law School Faculty Scholarship* 199-242

Lorenzen EG "Story's Commentaries on the Conflict of Laws–One hundred years after" 1934 *Harvard Law Review* 15-38

Lorenzen EG "Territoriality, public policy and the conflict of laws" 1924 *Yale Law Journal* 736-747

Łuczak A "Evolution of consumer protection law in the light of the proposal for a horizontal directive on consumer rights and Rome I" *2013 Wroclaw Review of Law, Administration & Economics* 198-213

Lyons D "Rawls versus utilitarianism" 1972 *Macalester Journal of Philosophy* 535–545

Maniruzzaman AFM "Choice of law in international commercial contracts–Some fundamental conflict of law issues" 1999 *Kluwer law Review* 15-41

Mann FA "The proper law of the contract" 1950 *The International Law Quarterly* 60-73

Marcel F "Law harmonization and local specificities – a case study: OHADA and the law of contracts" 2013 *Uniform Law Review* 50-64

Meeuen J "Instrumentalisation of private international law in the European Union: Towards a European conflict revolution" *European Journal of Migration and Law* 2007 287-305

Mills A "The identities of private international law–Lessons from the US and EU Revolutions" 2013 *Duke Journal of Comparative and International Law* 445-472

Murray J and Sou K "Choice of law standards re: insurance coverage" 2016 *Sydney law Review* 1- 7

Nafziger JAR "Resolving international conflict of laws by Federal and State law" 1990 *Pace International Law Review* 67-81

Nussbaum A "Conflict theories of contracts: Cases versus restatement" 1942 *The Yale Law Journal* 893-923

O'Hara EA and Ribstein LE "From politics to efficiency in choice of law" 1999 *The University of Chicago Law Review* 1151-1232

Okoli CSA and Arishe AG "Rome Convention, Rome I Regulation and Rome II Regulation" 2012 *Journal of Private International Law* 513-545

Pollock F "Justice according to law" 1895 *Harvard Law Review* 295-308

Pound R "Liberty of contract" 1909 *The Yale Law Journal* 457-487

Preston CB and McCann E "Llewellyn slept here: A short history of sticky contracts and feudalism" 2012 *Oregon Law Review* 130-159

Rakoff T "Contracts of adhesion: An essay in reconstruction" 1982 *Harvard Law Review* 1173-1284

Reich N "Consumer law and e-commerce–Initiatives and problems in recent EU and German legislation" *ERA Forum Academy of European Law* 41-49

Reynolds WL "Legal process and choice of law" 1997 *Maryland Law Review* 1371-1411

Rheinstein M "Conflict of laws in the Uniform Commercial Code" 1951 *Law and Complementary Problems* 114-140

Rheinstein M "The constitutional bases of jurisdiction" 1955 *The University of Chicago law R* 775-811

Rosett A "Unification, harmonization, restatement, codification, and reform in international commercial law" 1992 *The American Journal of Comparative Law* 683-697

Rowley KA "The often imitated, but not yet duplicated, Revised Uniform Commercial Code Article" 2005 *University of Nevada Las Vegas* 1-23

Rühl G "Consumer protection in choice of law" 2011 *Cornell International Law Journal* 570-609

Rühl G "Party autonomy in the private international law of contracts: Transatlantic convergence and economic efficiency" *Comparative Research in Law & Political Economy* 153-183

Sales HB "Standard form contracts" 1953 *Modern Law Review* 318-342

Shahar OB "Regulation through boilerplate: An apologia" 2014 *Modern Law Review* 883-855

Singer JW "Real conflicts" 1989 *Cornell International Law Journal* 1-35

Slawson WD "Standard form contracts and democratic control of lawmaking power" 1971 *Harvard Law Review* 529-566

Spencer JR "Signature, consent, and the rule in *L'Estrange v Graucob*" 1973 Cambridge *Law Journal* 104-122

Sterkin SD "Challenging adhesion contracts in California: A consumer's guide" 2004 *Golden Gates University Law Review* 285-324

Stolle DP and Slain AJ "Standard form contracts and contract schemas: A preliminary investigation of the effects of exculpatory clauses on consumers' propensity to sue" 1997 (15) *Behavioural Sciences and the Law* 83-94

Symeonides SC "A new Conflicts Restatement: Why not?" 2009 *Journal of Private International Law* 1-46

Symeonides SC "American federalism and private international law" 2010 *Hellenic Journal of International Law* 62-101

Symeonides SC "Choice of law in the American courts in 2004: Eighteenth Annual Survey" 2004 *The American Journal of Comparative Law* 920-978

Symeonides SC "Choice of law in the American courts in 2006: Twentieth Annual Survey" 2007 *The American Journal of Comparative Law* 1-90

Symeonides SC "Material justice and conflicts justice in choice of law" 2001 International *Conflict of Laws for the Third Millennium: Essays In Honour of Friedrich K. Juenger* 125-140

Symeonides SC "Party autonomy in international contracts and the multiple ways of slicing the apple" 2014 *Brooklyn Journal of International Law* 1123-1142

Symeonides SC "Party autonomy in Rome I and II from a comparative perspective" 2010 Convergence *and Divergence in Private International Law - Liber Amicorum* 515-516

Symeonides SC "The First Conflicts Restatement through the eyes of old: as bad as its reputation?" 2007 *Southern Illinois University Law Journal* 1-41

Symeonides SC "The scope and limits of party autonomy in international contracts: A comparative analysis" 2018 *Willamette University - College of Law* 1-47

Szawlowski R "Reflections on the laws of the People's Republic of China, 1979-1986" 1989 *The International and Comparative Law Quarterly* 197-207

Teubner G "Legal irritants: Good faith in British Law or how unifying law ends up in new divergences" 1998 *Modern Law Review* 11-32

Trávníčková S "Limitations of choice of law–mandatory rules and internationally mandatory rules" 2010 *Právnická fakulta Masarykovy univerzity, Česká republika* 1-10

Traynor RJ "Is this conflict really necessary?" 1959 *UC Hastings Scholarship Repository* 657-675

Tu G "China's new Conflicts Code: General issues and selected topics" 2011 *The American Journal of Comparative Law* 563-590

Tu G "The flowing tide of parties' freedom in private international law: Party autonomy in contractual Choice of Law in China" 2019 *The Journal of Private International Law* 234-246

Twigg-Flesner C "Good-bye harmonisation by directives, hello cross-border only regulation? A way forward for EU Consumer Contract Law" 2011 *European Review of Contract Law* 235-252

Twigg-Flesner C "No sense of purpose or direction? The modernisation of European consumer law" 2007 *European Review of Contract Law* 198-212

Twigg-Flesner C and Metcalfe D "The proposed Consumer Rights Directive–Less haste, more thought?" 2009 *European Review of Contract Law ERCL* 368-383

Valentina V "Comparative law, methods and reasoning" 2016 African International Economic Law Network 16-44

Verhagen HLE "The tension between party autonomy and European Union law: Some observations on *Ingmar GB Ltd v Eaton Leonard Technologies Inc*" 2002 *The International and Comparative Law Quarterly* 135-154

Viner J "Adam Smith and laissez faire" 1927 *Journal of Political Economy* 198-232

Von Mehren AT "Choice of Law and The Problem Of Justice" 1949 14 Law and Contemporary Problems 27-43

Wayne B "Consumer assent to contracts of adhesion and the voting analogy" 2010 *West Virginia Law Review* 839-926

Weinberger AD "Party Autonomy and Choice-of-Law: The Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis" 1976 *Harvard Law Review* 605-641

Weinrib JE "Corrective justice in a nutshell" 2003 The *University of Toronto Law Journal* 349-356

Wethmar-Lemmer M "the development of the modern *Lex Mercatoria*: A historical perspective" 2005 *Sabinert African Journals* 184-199

Whitmore G "Opinion of the Supreme People's Court on questions concerning the implementation of the general principles of civil law of the People's Republic of China" 1989 *Law and Contemporary problems* 59-87

Wilhelmsson T "Private law in the EU: Harmonised or fragmented Europeanisation?" 2002 *European Review of Private Law* 77-94

Wilkinson-Ryan T "A psychological account of consent to fine print" 2014 *Iowa Law Review* 1747-1784

Wilson NS "Freedom of contract and adhesion contracts" *International and comparative law Quarterly* 172-193

Woodward WJ "Contractual choice of law: Legislative choice in an era of party autonomy" 2001 (54) *SMU Law Review* 697-784

Wyse RC "A framework of analysis for the law of agency" 1979 *Montana Law Report* 31-58

Xu G "Contract in Chinese private international law" 1989 *The International and Comparative Law Quarterly* 648-653

Xu Q "The codification of conflicts law in China: A long way to go" 2017 *The American Journal of Comparative Law* 919-962

Yasmin M "Legal liability in standard form of contract" 2016 *International Research Journal of Engineering IT & Scientific Research* 39-45

Yidana N "Enacting a Consumer Protection Law in Ghana: Possible lessons from the UK Consumer Rights Act 2015" 2020 *Law Research Review Quarterly* 323- 342

Yntema HE "Contract and Conflict of Laws: 'Autonomy' in choice of law in the United States" 1955 *New York Law Forum* 341-358

Yuqing Z and McLean JS "China's Foreign Economic Contract Law: Its significance and analysis" 1987-1988 *Northwestern Journal of International Law and Business* 120-144

Zaphiriou GA "Harmonization of Private Rules between Civil and Common Law Jurisdictions" 1990 *The American Journal of Comparative Law* 71-97

Zhang M "Codified choice of law in China: Rules, processes and theoretic underpinnings" 2011 North Carolina Journal of International Law 81-157

Zhang M "Contractual choice of law in contracts of adhesion and party autonomy" 2008 *Akron Law Review* 1-51

Zhang M "Party autonomy and beyond: An international perspective of contractual choice of law" 2006 *Emory International Law Review* 511- 562

Zheng T "Parties' choice of law in e-consumer contracts" 2007 *Journal of Private International Law* 113-136

Constitution

The 1992 Constitution of Ghana

Judicial Decisions

Australia

Golden Acres Ltd v Queensland Estates Pty Ltd [1936] AC 277

Mount Albert Borough Council v Australasian Temperance and General Assurance Society [1938] AC 224

Oceanic Sun Line Special Shipping Co Inc v Fay (1988) 165 CLR 197

Canada

Giana v Meyer (1796) 2 Hy BI 603

China

Bank of China HK v Guangdong Zhanjiang No 2 Light Industry United Ltd, Guangdong HPC (2004) Yue Gao Fa Min Si Zhong Zi No 26

Bank of China HK v Hong Ye, SPC [2002] Min Si Zhong Zi No 6

Guangxi Zhuang Autonomous Region HPC (2006) Gui Min Si Chu Zi No 1

Namtuong (Macao) Investment Ltd v Fuoshan Xinhui, Guangdong Fuoshan IPC (2002) Fuo Zhong Fa Min Si Chu Zi No 50

Shanghai Jumpo Safety v Moraglis S.A. Shanghai HPC (2012) Hu Gao Min Er (Shang) Zhong Zi No 4

Tan Liyi v Bank of Communications HK, Guangdong HPC (2004) Yue Gao Fa Min Si Zhong Zi No 46

Yang v Zhong, Guangzhou Maritime Court (2011) Guang Hai Fa Chu Zi 373

ZHU v Jin Ri Shanghai No 1 IPC (2012) Hu Yi Zhong Min Si (Shang) Zhong Zi S1217

United Kingdom

Adler v Dickson [1955] 1 QB 158

Akai Pty Ltd v the People's Insurance Co Ltd (1996) 188 CLR 418

Amin Rasheed Shipping Corp v Kuwait Insurance Co [1984] AC 50

Assunzione [1954] P 150 (CA)

Boissevain v Weil (1949) 1 KB 482

Bonython v Commonwealth of Australia AC 201 219

Campagnie D' Armement Maritime SA v Compagnie Tunisienne de Navigation SA [1971] AC 572

Chapelton v Barry UDC [1940] 1 KB 532

Codelfa Construction Pty Ltd v State Rail Authority of New South Wales (1982) 149 CLR 337

Couchman v Hill [1947] KB 554

Entores v Miles Far East Corporation [1955] 2 QB 327 (CA)

First Energy (UK) Ltd v Hungarian International Bank Ltd [1993] 12 Lloyd's Rep 194 (CA)

Hamlyn v Talisker Distillery (1894) AC 202

Harling v Eddy [1951] 2 KB 739 (CA)

In Re Missouri Steamship Company 1889 42 Ch D 321

Karsales (Harrow) Ltd v Wallis [1956] 2 All ER 866

L'Estrange v F Graucob Ltd [1934] 2 KB 394

Lloyd v Guibert (1856) LR 1 QB 115

Lloyd v Guibert (1865) 6 B&S 100

Macaulay v Schroeder Publishing Co Ltd [1974] 1 WLR 1308 (HL)

Neuchatel Asphalt Co Ltd v Barnett [1957] 1 All ER 362

Olley v Marlborough Court Ltd [1949] 1 KB 532

LeRoy Plow Co v J Clark & Son (1921) 65 DLR 370

Parker v South Eastern Railway Co (1877) 2 CPD 416

Printing & Numerical Registering Co v Sampson 19 LR-EQ 462, 465 (MR 1875)

R v International Trustee [1937] AC 500

Richardson, Spence & Co v Rowntree [1894] AC 217

Robinson v Bland (1760) 96 ER 141

Schroeder Music Publishing Co Ltd v Macaulay [1974] 1 WLR 308

Thornton v Shoe Lane Parking Ltd [1971] 2 QB 163

Unico v Owen (1967) 50 NJ 101

Vita Food Products Inc v Unus Shipping Co Ltd [1939] UKPC 7

Wallis, Son and Wells v Pratt and Haynes [1911] AC 394

Webster v Higgin [194812 All E.R. 127

White v John Warwick & Co [1953] 2 All ER 1021

European Union

Case C-218/12 L Emrek v Sabranovic ECLI:EU:C:2013:666

Case C-548/12 Brogsitter v Fabrication de Montres Normandes EURL, Karsten Fräßdorf EU:C:2014:148

Case C-548/12 Brogsitter v Fabrication de Montres Normandes EURL, Karsten Fräßdorf EU:C:2014:148

CJEU 11 July 2002 – Case C-95/00, Rudolf Gabriel v Schlank & Schick [2002] ECR

CJEU 11 July 2002 – Case C-95/00, Rudolf Gabriel v Schlank & Schick [2002] ECR

CJEU 14 November 2013 – Case C-478/12 A Maletic, M Maletic v Lastminute.com GmbH, TUI O¨sterreich GmbH ECLI:EU:C:2013:735

CJEU 14 November 2013 – Case C-478/12 A Maletic, M Maletic v Lastminute.com GmbH, TUI O¨sterreich GmbH ECLI:EU:C:2013:735

CJEU 19 January 1993, Shearson Lehman Hutton v TVB I-6367

CJEU 19 January 1993, Shearson Lehman Hutton v TVB I-6367

CJEU 20 January 2005 – Case C-464/01, Gruber v Bay Wa, [2005] ECR

CJEU 20 January 2005 – Case C-464/01, Gruber v Bay Wa, [2005] ECR

CJEU 27 April 1999 – Case C-99/96, Mietz v Yachting Sneek, [1999] I-2277

CJEU 27 April 1999 – Case C-99/96, Mietz v Yachting Sneek, [1999] I-2277

CJEU 3 July 1997 – Case C-269/95, Benincasa v Dentalkit, [1997] ECR, I-3767

CJEU 3 July 1997 – Case C-269/95, Benincasa v Dentalkit, [1997] ECR, I-3767

CJEU 6 September 2012 – Case C-190/11 D Mu¨hlleitner v A Yusufi, W Yusufi ECLI:EU:C:2012:542; CJEU 17 October 2013

CJEU 6 September 2012 – Case C-190/11 D Mu¨hlleitner v A Yusufi, W Yusufi ECLI:EU:C:2012:542; CJEU 17 October 2013

CJEU 7 December 2010 – Joined Cases C-585/08 and C-144/09 P Pammer v Reederei Karl Schlu¨ ter GmbH & Co KG, Hotel Alpenhof GesmbH v O Heller ECLI:EU:C:2010:740

CJEU 7 December 2010 – Joined Cases C-585/08 and C-144/09 P Pammer v Reederei Karl Schlu¨ ter GmbH & Co KG, Hotel Alpenhof GesmbH v O Heller ECLI:EU:C:2010:740

CJEU, 28 July 2016 – Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl ECLI:EU:C:2016:612

CJEU, 28 July 2016 – Case C-191/15, Verein für Konsumenteninformation v Amazon EU Sàrl ECLI:EU:C:2016:612

CJEU, 30 April 2014 – Case C-26/13 Kásler and Káslerné Rábai

CJEU, 30 April 2014 – Case C-26/13 Kásler and Káslerné Rábai

EU, 23 April 2015– C-96/14, in Van Hove page?

EU, 23 April 2015– C-96/14, in Van Hove page?

EU, 26 April 2012, C-472/10, in Invitel 242

EU, 26 April 2012, C-472/10, in Invitel 242

Ingmar GB Ltd v Eaton Leonard Technologies Inc Case C-381/98, [2000] ECR I-9305

Ingmar GB Ltd v Eaton Leonard Technologies Inc Case C-381/98, [2000] ECR I-9305

Republik Griechenland v Grigorios Nikiforidis Case C-315/15, ECJ 18 October 2016

Republik Griechenland v Grigorios Nikiforidis Case C-315/15, ECJ 18 October 2016

Ghana

Fodwoo v Law Chambers [1965] GLR 363

Garcia v Torrejoh [1992] GLR 143

Godka Group of Companies v P S International Limited 1999-2000 1 GLR 409 2

In re Larbi (Deceased); Larbi v Larbi [1977] 2 GLR 506

Loromeke v Nekegho 1957 3 WALR 306

Mccutcheon v David Macbrayne Ltd [1964] 1 WLR 125

Yirenkyi v Sakyi [1991] 1 GLR 217

Youhana v Abboud [1974] 2 GLR 201

United States of America

Allstate Ins Co v Hart 327 Md 526, 611 A 2d 100 (1992)

American Motorists Ins Co v ARTRA Group Inc 338 Md 560, 659 A 2d 1295 (1995)

Arblade case Joined Cases C-396/96 and C-376/96

Boyer v Piper Jaffray & Hopwood Inc 391 F Supp 471 (DSD 1975)

Brazones v Prothe 489 NW 2d 900 (SD 1992)

Burbank v Ford Motor Company 703 F 2d 865, 866-867 (5th Cir 1983)

Burnside v Simpson Paper Company 832 P 2d 537 (Wash App 1992)

D'Agostino v Johnson & Johnson Inc 605 A 2d 252 (NH App 1992)

Daley v American States Preferred Ins Co 587 NW 2d 159 (ND 1998)

DeSantis v Wackenhut Corporation 793 SW 2d 670 (Tex1990)

Dix v ICT Group Inc 106 P 3d 841 (Wash CA 2005)

Ferrofluidics Corporation v Advanced Vacuum Components Inc 789 F Supp 1201 (DNH 1992)

Forney Industries Inc v Andre 246 F Supp 333 (DND 1965)

Germany v EP and Council C-376/98 [2000] ECR I-8419

Harrison v Insurance Company of North America 318 So 2d 253 (Ala 1975)

Interfrigo SC (ICF) v Balkende Oosthuizen BC case C-133/08 [2009] ECR I-9687

Johann Gruber v Bay Wa AG case C-464/01, 20.01.2005 ECR 2005

Nasco Inc v Gimbert 239 Ga 675 (1977)

New Hampshire Insurance Co v Strabag Bau AG [1992] 1 Lloyd's Rep 361

O'Neal v State Farm Mutual Auto Ins Co 533 SE 2d 781 (Ga CA 2000)

Parets v Eaton Corporation 479 F Supp 512 (ED Mich 1979)

Priestman v Canadian Pacific Ltd 782 F Supp 681 (D Me 1992)

Sangamo Weston Inc v National Surety Corp 414 SE 2d 127 (S Car 1992)

Stonewall Surplus Lines Ins Co et al v Johnson Controls Inc 17 Cal Rptr 2d 713 (Cal Ct App 1993)

The Provident Savings Life Assurance Society of New York v Mowat 32 (1902) 32 S.C.R. 147

Unamar v Navigation Maritime Bulgare case C184/12 ECLI:EU:C:2013:663

Unico v Owen (1967) 50 NJ 101, 232 A (2d) 405F

USA (California)

A & M Produce Co v FMC Corp 135 Cal App 3d 473 (Cal CA 1982)

Acceptance Corp v Jordan 198 Ca. 618, 246 P 796 (1926)

Ashland Chemical Co v Provence 129 Cal App 3d 790 (Cal CA 1982)

Bernhard v Harrah's Club 16 Cal 3d 313 (Cal 1976)

Bernkrant v Fowler 55 Cal 2d 588, 360 P2d 906, 12 Cal Rptr 266 (1961)

Brooks v People's Bank 233 NY 87 (134 NE 846)

Chan v Society Expeditions 123 F 3d 1287 (9th Cir 1997)

Cochran v Ellsworth 126 Cal App 2d 429, 272 P 2d 904 (2d Dist 1954)

Consul Ltd v Solide Enterprises Inc 802 F 2d 1143

Discover Bank v Superior Court 36 Cal 4th 148 (Cal 2005)

Foley v Interactive Data Corp (1988) 47 Cal 3d 654

Frame v Merrill Lynch, Pierce, Fenner & Smith Inc 20 Cal App 3d 668, 97 Cal Rptr 811 (1971)

Gamer v du Pont Glore Forgan Inc 65 Cal App 3d 280 (Cal CA 1976)

Graham v Scissor-Tail Inc 623 P 2d

Hall v Superior Court 150 Cal App 3d

Hoyt v Wickham 25 F 2d 777

Hurtado v Superior Court 11 Cal 3d 574 (1974)

In re Archy 9 Cal 147 (1858)

Lennar Homes of Cal Inc v Stephens 181 Cal Rptr 3d 638

Lomanto v Bank of America 22 Cal App 3d 663 (Cal CA 1972)

Mell v Goodbody & Co 10 Ill App 3d 809, 295 NE 2d 97 (1973)

Mencor Enterprises Inc v Hets Equities Corp 190 Cal App 3d 432 (Cal CA 1987)

Mullinix v Hubbard 6 F 2d 109

Neal v State Farm Ins Cos 188 Cal App 2d 690 (Cal CA 1961)

Nedlloyd Lines BV v Superior Court 3 Cal 4th 459 (Cal 1992)

Ohio ex rel Squire v Porter 21 Cal 2d 45, 129 P 2d 691 (1942)

Palomino v Facebook Inc No 16-cv-4230-HSG (ND Cal)

People v Globe Rutgers Fire Ins Co (1950) 96 Cal App 2d 571

People v One 1953 Ford Victoria 48 Cal 2d 595, 311 P 2d 480 (1957)

Reich v Purcell 67 Cal 2d 551, 432 P 2d 727, 63 Cal Rptr 31 (1967)

Schmidt v Pacific Mut Life Ins Co 268 Cal App 2d 735 (Cal CA 1969)

Sommer v Graber 40 Cal App 4th 1455 (1995)

Ury v Jewelers Acceptance Corp 227 Cal App 2d 11, 38 Cal Rptr 376 (1st Dist 1964)

Washington Mut. Bank, FA v Superior Court 24 Cal 4th 906 (2001)

Williams v Taylor (1982) 129 Cal App 3d

Windsor Mills Inc v Collins Aikman Corp 25 Cal App 3d 987 (Cal CA1972)

Statutory Instruments

Australia

Australian Consumer Law (ACL)

Australian Carriage of Goods by Sea Act

China

Anti-monopoly Law of the People's Republic of China (adopted at the 29th Meeting of the Standing Committee of the Tenth National People's Congress 30 August 2007

Explanations to the Consumer Protection Amendment Bill (Draft) and the Clauses (Standing Committee of National People's Congress 28 April 2013)

Interpretations of the Supreme People's Court on Applicability of the Civil Procedure Law of the People's Republic of China (adopted by the Judicial Committee of the Supreme People's Court at its 1636 the session 18 December 2014 in force from 4 February 2015)

Law of the People's Republic of China on Economic Contracts involving Foreign Interest (adopted at the 10th Session of the Standing Committee of the 6th National People's Congress, promulgated by Order No 22 of the President of the Peoples Republic of China 21 March 1985, and effective from 1 July 1, 1985)

Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (adopted at the 17th Session of the Standing Committee of the 11th National People's Congress 28 October 2010)

People's Republic of China Consumer Protection Act (2013 Amendment) (adopted by the 8th NPC Standing Committee 4th Meeting on 31 October 1993, first amendment by the 11th NPC Standing Committee 10th Meeting on 27 August 2009, and second amendment by the 12th NPC Standing Committee 5th Meeting 25 October 2013. The 2013 Amendment entered into force 15 March 2014)

People's Republic of China Security Law 1995 promulgated and entered into force 1 October 1995

Croatia

Croatian Private international law Act

European Union

Commission EU Policy Strategy 2007-2013: Empowering Consumers, Enhancing their Welfare, Effectively Protecting Them, Brussels, 13.3.2007 COM (2007) 99 final

Commission Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernization' COM (2002) 654 final

Communication from the Commission to the European Parliament and the Council, A More Coherent European Contract Law: An Action Plan, Brussels, 12.2.2003, COM (2003) 68 final; Communication from the Commission to the European Parliament and the Council, European Contract Law and the Revision of the acquis: The Way Forward, Brussels, 11.10.2004, COM (2004) 651 final

Council Convention on the law applicable to contractual obligations (consolidated version) First Protocol on the interpretation of the 1980 Convention by the Court of Justice (consolidated version) Second Protocol conferring on the Court of Justice powers to interpret the 1980 Convention (consolidated version) (98/C 27/02)

Council Directive 93/13/EEC of 5 April 1993 on Unfair Terms in Consumer Contracts

Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters

Council Report on the Convention on the law applicable to contractual obligations' Giuliano and Lagarde Report OJ C282 of 31.10.80

Council Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)

Directive (EU) 2019/2161 of The European Parliament and of the Council of 27 November 2019 on Amending Council Directive 93/13/EEC and Directives 98/6/EC, 2005/29/EC and 2011/83/EU of the European Parliament and the Council as Regards the Better Enforcement and Modernisation of Union Consumer Protection Rules

Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on Certain Aspects Concerning Contracts for the Supply of Digital Content and Digital Services

Directive 2009/22 on Injunctions for the Protection of consumers Interests [2009] OJ L 110/30

Directive 2009/22/EC of the European Parliament and of the Council of 23 April 2009 on Injunctions for the Protection of Consumers Interests (Codified version)

Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council

Directive of The European Parliament and of The Council of 20 May 2019 on certain aspects concerning contracts for the sale of goods, amending Regulation (EU) 2017/2394Directive 2009/22/EC and Repealing Directive 1999/44/EC

European Commission Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I), COM (2005) 650 Final p. 7; Green Paper, COM (2002) 654 Final, Para 3.2.8.3

European Union Consolidated Versions of The Treaty on European Union and of The Treaty Establishing the European Community

Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community Instrument and its modernisation COM (2002) 654 final

Proposal for a Regulation of The European Parliament and The Council on the law applicable to contractual obligations (Rome I) COM (2005)

Protocol (No 19) on the Schengen Acquis integrated into The Framework of The European Union Article 1, 2, and 3 annexed in the Treaty on European Union

Protocol on the position of Denmark, annexed to the Treaty on European Union and the Treaty establishing the European Community

Regulation (EU) No 1215/2012 of The European Parliament and of The Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast)

The Working Group on Rome I within the Max Planck Institute for Foreign Private and Private International Law, 'Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome 1)', (2007) 71 Rebels Bd.71 225, 316

Ghana

Bills of Exchange Act 55 of 1961

Ghana Investment Promotion Centre Act 865 of 2013

Succession Law 1985 (PNDC Law 111)

Indonesia

Law on Consumer Protection 1999

Singapore

Consumer Protection (Fair Trading) Act 2003

Unites States of America

Restatement (Second) of Conflict of Laws by American Law Institute 1971

The American Law Institute Restatement of the Law Third Conflict of Laws, Tentative Draft No 2 of 2021 submitted by the Council to the membership of the

American Law Institute for consideration at the 2021 Annual Meeting on May 17-18 and June 7-8 2021 xxi

The Consumer Legal Remedies Act (Civil Code §§ 1750-1784)

The Unfair Competition Law (Business and Professions Code § 17200)

Uniform Commercial Code 1952

United Kingdom

Consumer Protection Act 1987

Control of Misleading Advertising Regulations 1988

Fraudulent Mediums Act 1951

Trade Descriptions Act 1968

Conventions Treaties and Model Laws

International Chamber of Commerce "Incoterms 2020": International Rules for the Interpretation of Trade Terms

UNIDROIT Principles of International Commercial Contracts (2016)

Uniform Act on Cooperatives for the Organization for the Harmonization of Business Law in Africa 2010

United Nations Conference on Trade and Development. 'Manual on Consumer Protection

Internet Sources

International Bankers, *The State of California's Economy* https://internationalbanker.com/finance/the-state-of-californias-economy/ accessed 1 April 2020

Treaties Conventions & Model Law *Institute de Droit international, Resolution on the autonomy of parties in international contracts* https://www.idi-iil.org/app/uploads/2017/06/1991_bal_02_en.pdf accessed 25 May 2020

European Union https://ec.europa.eu/info/law/law-making-process/types-eu-law_en

accessed 14 June 2