Rome I Regulation
Party Autonomy

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I. Party Autonomy: The Fundamental Principle in European PIL of Contracts

Party autonomy has been and will remain the fundamental principle in European private international law in matters of contractual obligations.\(^1\) It came without surprise when the Rome Convention of 1980 codified this principle in its art. 3.\(^2\) It is also no surprise that 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) restates the principle in very similar words.\(^3\) In fact art. 3 of Rome I is, to a large extent, a fair copy of art. 3 of the Rome Convention. Changes to the wording of the provision are mostly not intended to bring about a change of content. For example, the second sentence of art. 3 para. 1 of Rome I strengthens the English (as well as the German) wording of the second sentence of art. 3 para. 1 of the Rome Convention by requiring that an implicit choice must be “clearly demonstrated” and not just “demonstrated with reasonable certainty”.\(^4\) However, the change in wording is not intended to amend art. 3 para. 1 but to bring the English and German text in line with the French text of art. 3 para. 1 of the Rome Convention.\(^5\)

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3. See for example Leible/Lehmann, Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht („Rom I“), Recht der internationalen Wirtschaft 2008, 528, 532; see also Recital 11 of Rome I.


5. Lagarde/Tenenbaum (note 1) 736; Wagner R. (note 2) 379.
Moreover, contrary to art. 3 para. 3 of the Rome Convention, art. 3 para. 3 of Rome I does not mention the case in which choosing a foreign law is accompanied by the selection of a foreign forum. Nevertheless, Recital 15 of Rome I points out that no change in substance is intended and a selection of a foreign forum, therefore, does not make the contract international in a way that would present a free choice of law unrestricted by art. 3 para. 3 of Rome I. The only exception is art. 3 para. 4 of Rome I, which incorporates a new rule which did not exist under the Rome Convention.6

Hence, the parties are free to determine the law applicable to their contract by agreement.7 The choice can be exercised either by an explicit or a tacit agreement.8 When determining the existence of a tacit choice of law, Recital 12 of Rome I instructs the judge to pay appropriate attention to a forum selection clause granting courts of a Member State9 exclusive jurisdiction.10 It does not require any specific form. The choice may refer to any law without restrictions. In particular, no relationship and no proximity of the contract to the law chosen are required.11 In other words, the parties may agree on the application of an entirely “neutral” law.12 The only restriction which applies is, at least in proceedings before state courts, that the law chosen must be “law” in a technical sense and not just general principles or any other set of non-binding rules. Moreover, parties may submit different parts of the contract to different laws.13 They may agree on a choice of law clause even after the main contract has been concluded or executed as long as such an ex post choice does not interfere with the rights acquired by third parties.14 European conflict of laws even provides the choice for contracts which are, except for a choice in favour of another law, exclusively connected to one and the same

6 Lagarde/Tenenbaum (note 1) 735; as to art. 3 para. 4 Rome I see infra II.
7 See the first sentence of art. 3 para. 1 of Rome I and the first sentence of art. 3 para. 1 of the Rome Convention.
8 See the second sentence of art. 3 para. 1 of Rome I and the second sentence of art. 3 para. 1 of the Rome Convention.
9 See the convincing criticism as to the restriction to courts of “Member States” Leible/Lehmann (note 3) 533 concluding that forum selection clauses in favour of courts in third countries must be considered as an indicator for a tacit choice of law as well.
10 As to the impact of Recital 12 see Lagarde/Tenenbaum (note 1) 735; Wagner R. (note 2) 379; Mankowski (note 1) 3; Leible/Lehmann (note 3) 532; as to the relevance of a forum selection clause as an indication of a tacit choice of the lex fori under the Rome Convention see Heiss in Czernich/Heiss (eds.), EVÜ – Das Europäische Schuldvertragsübereinkommen, Wien 1999, art. 3 no 10.
11 See the comparison with US conflicts law by Solomon (note 1) 1723 et seq.
12 See Mankowski (note 1) 3 with a view to “neutral” Swiss law.
13 See the third sentence of art. 3 para. 1 of Rome I and the first sentence of art. 3 para. 1 of the Rome Convention.
14 See art. 3 para. 2 Rome I and art. 3 para. 2 of the Rome Convention.
country. However, in such cases the derogative effect of the choice is restricted to non-mandatory provisions of the law of the country to which the contract is exclusively connected.\textsuperscript{15} The validity of the choice of law agreement will be determined in accordance with the law chosen even if the choice should turn out to be invalid.\textsuperscript{16} This test will be done independent of the validity of the main contract (doctrine of separability\textsuperscript{17}).

Similarly, Rome I keeps restrictions and exceptions to the principle of free choice of law in place. Art. 6 restates and broadens consumer protection as granted to so-called passive consumers under art. 5 of the Rome Convention. Similarly, art. 8 restates and broadens the protection granted to employees under art. 6 of the Rome Convention. Moreover, art. 7 replaces to a large extent the conflict rules in the directives on insurance law concerning insurance contracts covering risks situated in Member States.\textsuperscript{18} This includes, in mass risk insurance, substituting the principle of free choice of law with a restricted list of possible choices, which can be extended by the national legislation of the Member State in which the risk is situated.\textsuperscript{19} Other conflict rules contained in the directives have not been integrated into Rome I, but have, instead, been kept in place by virtue of art. 23.\textsuperscript{20} This includes, not least, the restrictions to the choice of law in consumer contracts governed by directive law.\textsuperscript{21} Finally,

\begin{itemize}
\item See art. 3 para. 3 Rome I and art. 3 para. 3 of the Rome Convention.
\item See art. 3 para. 5 Rome I and art. 3 para. 4 of the Rome Convention.
\item See Heiss (note 10) art. 3 no 54 and 55.
\item As to the replacement of Directives law by art. 7 Rome I see Heiss, Insurance Contracts in “Rome I”: Another Recent Failure of the European Legislature, Yearbook of Private International Law, Volume 10 (2008) 261, 262.
\item See art. 7 para. 3 Rome I.
\item A critical view on art. 23 Rome I is taken by Garcimartín Alférez (note 2) I-5.
\end{itemize}
art. 9 allows a separate connection of (internationally) mandatory rules which take priority over the law chosen by the party. Art. 9 of Rome I is similar to art. 7 of the Rome Convention, even though its scope may be narrower. On the whole, the restrictions and exceptions to the principle of free choice of law have been kept in place. The only new provision is Art. 5 para. 2 subpara. 2 of Rome I, which gives an exhaustive list of choices to the parties of a contract for the carriage of passengers.

In summary, the major observation concerning art. 3 of Rome I is that it brings very little change. The major change, the introduction of art. 3 para. 4, will be discussed in the following section. Moreover, Rome II also calls for the application of the law chosen to connected tort claims. The effect of combining contractual and tort claims will briefly be analysed. At the same time, the restriction of party autonomy to a choice of “law” in a technical sense and the exclusion of a choice of general principles of law must be discussed with a view to the Common Frame of Reference of European Contract Law as well as the perspectives for the creation of an Optional Instrument.

II. New Art. 3 para. 4 of Rome I

I. The Rule

The major novelty which Rome I brings about as far as party autonomy is concerned is the introduction of the new art. 3 para. 4. With this rule, the European legislator has taken up a legislative proposal presented by Jürgen Basedow in 1994.23 It aims at protecting the application of mandatory Community law against a choice of the law of a third country in situations which are, in the absence of a choice and a possible selection of a forum in a third country, connected to Member States only.25 Clearly, art. 3 para. 4 of Rome I establishes a rule at Community level analogous to art. 3 para. 3 of Rome I at national level.26 The rationale behind the rules are the same as well: if mandatory rules of national law must not be substituted by the rules of a chosen law, mandatory Community rules must not be substituted by the chosen law of a third country.

22 See the probably narrower definition of mandatory rules in art. 9 para. 1 Rome I.
24 In the given context the term “mandatory” law refers to provisions which “cannot be derogated from by agreement” (see the wording of art. 3 para. 4) as opposed to (internationally) mandatory provisions within the meaning of art. 9 para. 1; see also Mankowski (note 1) 13.
25 See for example Lagarde/Tenenbaum (note 1) 737.
26 Solomon (note 1) 1729; Mankowski (note 1) 13.
In contrast to art. 3 para. 3 of Rome I, para. 4 must also deal with a peculiarity of Community law: mandatory Community law may not only be contained in immediately applicable regulations, but also in directives, which apply between the parties to a contract only upon their transposition by the national legislators. In fact, as far as the existing European contract law is concerned, an overwhelming majority of all Community law is contained in directives. Therefore, art. 3 para. 4 of Rome I provides for the application of mandatory Community law “where appropriate as implemented in the Member State of the forum”. This rule reflects, first of all, the fact that directives do not have to be transposed literally by national legislators, but rather only in a way which safeguards the achievement of the goals aimed at by the directives. More importantly, several directives in the area of consumer contract law have established minimum standard clauses allowing national legislators to introduce or maintain a higher level of consumer protection as long as such increased protection does not violate the EC Treaty, in particular the fundamental freedoms guaranteed by it. The wording of art. 3 para. 4 of Rome I indicates that the protection would include the level of protection established by the Member State of the forum.

Art. 3 para. 4 refers to the law of the forum. It thereby neglects the law applicable to the contract in the absence of a choice of law. This is surprising since contracts covered by art. 3 para. 4 of Rome I, because they are exclusively connected to Member States, will always be governed by the law of a Member State in the absence of a choice by the parties. Therefore, one may have expected art. 3 para. 4 of Rome I to refer to the applicable law, rather than the law of the Member State of the forum. There is no difference, of course, as far as immediately applicable Community law is concerned. With regard to contract law introduced by directives, it will make a difference because the law of the Member State which is applicable in the absence of a choice may very well have transposed the directive in a different manner than the lex fori. However, it seems that art. 3 para. 4 looks at national transpositions of directive law as being equivalent to each other and, therefore, calls for the application of the lex fori which is most easily applied by the judge.

27 See art. 249 para. 3 EC.
28 This method of minimum harmonisation seems to be outdated; the new directives on consumer credits and timesharing (note 21) do not contain minimum standard clauses any more. This approach is also followed by the Proposal for a Directive of the European Parliament and of the Council on consumer rights, COM (2008) 614 final.
29 See García Martín Alférez (note 2) I-4 et seq.
30 See also Mankowski (note 1) 13.
31 Similarly Leible/Lehmann (note 3) 534.
32 See Mankowski (note 1) 13.