The Choice of Law Contract

Maria Hook

OXFORD AND PORTLAND, OREGON
2016

Hart Publishing
An imprint of Bloomsbury Publishing plc

Hart Publishing Ltd
Kemp House
Chawley Park
Cumnor Hill
Oxford OX2 9PH
UK

Bloomsbury Publishing Plc
50 Bedford Square
London
WC1B 3DP
UK

www.hartpub.co.uk
www.bloomsbury.com

Published in North America (US and Canada) by
Hart Publishing
c/o International Specialized Book Services
920 NE 58th Avenue, Suite 300
Portland, OR 97213-3786
USA

www.isbs.com

First published 2016

British Library Cataloguing-in-Publication Data
A catalogue record for this book is available from the British Library.

ISBN: HB: 978-1-84946-764-3
ePDF: 978-1-50990-101-2
ePub: 978-1-50990-102-9

Library of Congress Cataloging-in-Publication Data

Names: Hook, Maria (Law teacher), author.

Title: The choice of law contract / Maria Hook.

Description: Oxford ; Portland, Oregon : Hart Publishing, an imprint of Bloomsbury Publishing Plc, 2016. | Series: Studies in private international law ; v. 18 | Based on author's thesis (doctoral - Victoria University of Wellington, 2014). | Includes bibliographical references and index.

Identifiers: LCCN 2016012641 (print) | LCCN 2016013057 (ebook) | ISBN 9781849467643 (hardback : alk. paper) | ISBN 9781509901029 (Epub)

Subjects: LCSH: Conflict of laws. | Liberty of contract.

Classification: LCC K7068 .H66 2016 (print) | LCC K7068 (ebook) | DDC 340.9—dc23

LC record available at http://lccn.loc.gov/2016012641

Series: Studies in Private International Law, volume 18

Typeset by Compuscript Ltd, Shannon
Printed and bound in Great Britain by
CPI Group (UK) Ltd, Croydon CR0 4YY

1

Introduction

I. The Contractualisation of Choice of Law

A manufacturer of model trains, whose business is located in Germany, orders screws from a multinational company incorporated in Canada. Due to a design fault, the screws damage the manufacturer's machinery. He brings proceedings in negligence in a German court. These proceedings are governed by the law of Texas, based on a choice of law clause in the parties' contract that submits contractual and non-contractual claims to the law of Texas. The effect of this choice of law is that the court will not hold the supplier liable for the damage.

A New Zealand consumer places a large order for model trains through the manufacturer's website. On delivery, he discovers that the trains do not work properly because they have been built with the Canadian company's faulty screws. He wants his money back and brings proceedings for breach of contract in the New Zealand court. The manufacturer argues successfully that his terms and conditions evidence an implied choice of German law, because they refer to German legislation. The New Zealand plaintiff cannot afford to plead and prove his claim pursuant to German law and discontinues the proceedings.

The manufacturer declares insolvency because he has no funds to repair his expensive machinery. This prompts the manufacturer's wife to bring matrimonial property proceedings in Switzerland, where she lives separated from her husband. The manufacturer is a citizen of Germany, and the wife is a citizen of Kenya; but before the parties separated they lived together in Switzerland. The parties chose to submit their matrimonial property relationship to the law of Kenya, where they got married. As a result of this choice, the wife's legal position is less favourable than it would be under Swiss (or German) law.

Each of these scenarios is an example of the rule of party autonomy—the power enjoyed by litigants to choose the law applicable to their cross-border legal relationship. By selecting the applicable law, parties are able to opt out of the objective choice of law rules of the forum—those choice of law rules that would apply in default of their choice—and submit their relationship to the chosen legal system. Typically, the parties' choice is subject only to overriding mandatory rules or the

public policy of the forum.[1] Party autonomy is becoming more and more popular. It is firmly established in the area of contract, and has spread to other matters such as divorce, maintenance, matrimonial property and tort.

This book provides an account of the contractual nature of the party autonomy rule. It argues that the rise of party autonomy—the growing contractualisation of choice of law—has been unduly divorced from the principles and the law of contract. Parties are given the power to opt out of choice of law rules by agreeing on the applicable law. But unlike conventional contracts, the choice of law agreement sits in a regulatory twilight zone. It is a creature of the law of contract, placed in the service of the conflict of laws, fulfilling the unique contractual function of identifying the applicable law: it is a choice of law contract. Current approaches to regulating party autonomy are often out of tune with this unique contractual function. For example, a New Zealand court may infer that the German manufacturer and the New Zealand consumer made a choice of German law even if, according to the law of contract, there was no implied choice of law agreement.

It is submitted that a better, more principled approach would be to confront the dual nature of the party autonomy rule head-on. The party autonomy rule operates through a choice of law contract. Thus, it requires an integrated approach to regulation that merges the laws and policies of choice of law and contract. This book adopts such an integrated approach. It uses the existing infrastructure of the conflict of laws—in particular, the law governing the choice of law agreement, and contractual rules of the conflict of laws, so-called modal choice of law rules, that regulate the choice of law agreement directly and specifically; and it uses these tools to give effect to the unique function of the choice of law contract.

A. Extent of the Contractualisation of Choice of Law

Because party autonomy is a global phenomenon, the work draws on sources from a range of jurisdictions, which may be split into four groups: common law jurisdictions (England, Australia and New Zealand); civil law jurisdictions (France, Germany and Switzerland); the United States; and international instruments (European Regulations on choice of law and the work of the Hague Conference on Private International Law). The conflict of laws has long relied on the comparative method as a natural ally.[2] The purpose of choice of law rules is to respond to foreign elements in international private relationships and, where possible, to achieve uniform outcomes across borders. It is important, therefore, that the party

[1] See, eg, Arts 9 and 21, Reg (EC) 593/2008 on the law applicable to contractual obligations [2008] OJ L177/6 (Rome I).

[2] See B Fauvarque-Cosson, 'Comparative Law and Conflict of Laws: Allies or Enemies? New Perspectives on an Old Couple' (2001) 49 *American Journal of Comparative Law* 407; AT von Mehren, 'The Contribution of Comparative Law to the Theory and Practice of Private International Law' (1977–1978) 26 *American Journal of Comparative Law (Supplement)* 31.

autonomy rule is not developed in isolation from foreign norms and practices, or in a way that will increase the risk of inconsistent choice of law outcomes.

The international scope of this work goes hand in hand with the topical breadth of its inquiry. The central theme is the bilateral exercise of the power to choose the applicable law—that is, the choice of law agreement—whether it applies to contractual, non-contractual or family relationships.[3] Unilateral party autonomy (such as the power to choose the law applicable to one's will) and forum selection agreements fall outside of the scope of the work, which is not to say that it would be wrong to draw parallels between these different areas of the conflict of laws.

i. Common Law Jurisdictions

In England, Australia and New Zealand, courts have been giving effect to party autonomy when determining the proper law of an international contract. In *Vita Food Products Inc v Unus Shipping Co Ltd*, Lord Wright held that the parties' intention to select the applicable law was enforceable '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'.[4] While, in England, this rule has been largely superseded by European instruments, the common law approach continues to be applicable in Australia and New Zealand. Despite recommendations by the Australian Law Reform Commission on the reform of party autonomy in contract,[5] no attempts have been made to codify the rule in Australia.

In some areas, overriding mandatory rules have been enacted to exclude the party autonomy rule from certain contracts. The Credit Contracts and Consumer Finance Act 2003 (NZ), for example, provides that the Act applies to a credit contract, guarantee, lease or buy-back transaction if it 'would be governed by the law of New Zealand but for a choice of law provision';[6] and the Competition and Consumer Act 2010 (Aust) provides that, if the proper law of a consumer contract for the supply of goods or services 'would be the law of any part of Australia but for a term of the contract that provides otherwise', then the consumer guarantees provisions of the Australian Consumer Law apply despite that term.[7]

Common law has also recognised the party autonomy rule in relation to matrimonial property contracts and, it seems, in relation to the effect of marriage on property more generally.[8] However, in England and Australia, matrimonial

[3] Previous works on party autonomy have typically focused on party autonomy in contracts: see, eg, P Nygh, *Autonomy in International Contracts* (Oxford, Oxford University Press, 1999); J-M Jacquet, *Principe d'autonomie et contrats internationaux* (Paris, Economica, 1983); J Püls, *Parteiautonomie* (Berlin, Duncker & Humblot, 1995).

[4] *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 277 (PC) 290.

[5] Australian Law Reform Commission, *Choice of Law* (Report 58, 1992) ch 8.

[6] Credit Contracts and Consumer Finance Act 2003 (NZ), s 137(b).

[7] Competition and Consumer Act 2010 (Aust), sch 2, s 67.

[8] L Collins (ed), *Dicey, Morris and Collins on the Conflict of Laws* 15th edn (London, Sweet & Maxwell, 2012) paras 28R-031 and 28-020; see *Re Egerton's Will Trusts* [1956] Ch 593.

matters that fall under the Matrimonial Causes Act 1973 and the Family Law Act 1975, respectively, are now largely governed by the law of the forum.[9] In New Zealand, on the other hand, section 7A of the Property (Relationships) Act 1976 provides that the Act applies in any case where the spouses or partners agree that it is to apply, and that it does not apply to any relationship property if the spouses or partners have agreed that the law of a country other than New Zealand is to apply.

None of these three jurisdictions has paid much attention to the legal nature of the parties' intention to choose the applicable law. This may be because, under the common law concept of the proper law, a contract becomes 'embedded' in, or 'naturalised' by, the agreed proper law:[10] it becomes one with the choice of law agreement.

ii. Civil Law Jurisdictions

As in England, much of the German and French law on choice of law is now contained in European instruments. Although German courts had already been giving effect to party autonomy in relation to contracts for several decades,[11] the rule was not codified until 1986, as part of a wider reform of private international law.[12] Articles 14 and 15 of the German Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB) also provide for the freedom to choose the law governing the general effects of marriage and matrimonial property, but the parties' choice is limited to a number of pre-selected connecting factors. In 1999, lawmakers introduced limited party autonomy for non-contractual obligations, which allowed parties to choose the applicable law after the event giving rise to the dispute had occurred.[13] The parties' agreement on the applicable law is commonly referred to as a choice of law contract.[14]

In France, on the other hand, scholars have been critical of the concept of a choice of law contract. One author even suggested that the choice of law contract has been the victim of a 'triple conspiracy':[15] it was incompatible with *la thèse de l'incorporation*, popular at the beginning of the twentieth century, which allowed parties simply to incorporate applicable laws into their contract by converting them into contractual stipulations; with Batiffol's theory of localisation, which provided that the parties' intentions were relevant only to the localisation

[9] See ch 3, s II.B.iii for more detail.

[10] FA Mann, 'The Proper Law in the Conflict of Laws' (1987) 36 *ICLQ* 437, 448.

[11] U Magnus (ed), *Staudingers Kommentar zum Bürgerlichen Gesetzbuch: Rom I-VO Art 3* (Berlin, Sellier, 2011) para 27, citing RGZ 120, 70 (1928); BGHZ 52, 239 (1969); BGHZ 73, 391 (1979).

[12] Gesetz zur Neuregelung des Internationalen Privatrechts (IPRNG) (BGBl 1986 I 1142); Einführungsgesetz zum Bürgerlichen Gesetzbuch (EGBGB), Art 27.

[13] Gesetz zum IPR für außervertragliche Schuldverhältnisse und für Sachen (BGBl 1999 I 1026); EGBGB, Art 42.

[14] Magnus (n 11) para 36.

[15] J Foyer, 'Le Contrat d'Electio Juris à la Lumière de la Convention de Rome du 19 Juin 1980' in *L'Internationalisation du Droit: Mélanges en l'Honneur de Yvon Loussouarn* (Paris, Dalloz, 1994) 169, 169.

of the contract;[16] and with the *méthode unilatérale*, which sought to identify the law to which the parties had voluntarily submitted.[17] More generally, the choice of law contract has been criticised as an artificial construct, a *faux problème*.[18] Nevertheless, French courts have long given effect to party autonomy both in the areas of contract[19] and matrimonial property.[20] In 1979, France ratified the Hague Convention on the Law Applicable to Matrimonial Property Regimes (Hague Convention 1978), which came into effect in 1992.[21]

Switzerland has a strong tradition of party autonomy. Now codified in the Bundesgesetz über das Internationale Privatrecht (IPRG),[22] Swiss courts started giving effect to party choice in international contracts in the nineteenth century;[23] and they have developed a comparatively sophisticated understanding of the choice of law contract.[24] Consumer contracts are excluded from the rule;[25] but employment contracts are open to a choice of law (though the choice is limited to the law of the place of the employee's habitual residence and the laws of the employer's place of business, domicile or habitual residence).[26] The IPRG also provides for party autonomy in relation to matrimonial property (with a choice between the law of common domicile or the law of nationality of either spouse),[27] movable property (with a choice between the law of the place of departure, the law of the place of destination, or the law of the underlying transaction),[28] and civil delicts (with the choice being limited to the law of the forum, after the event causing the damage occurred).[29]

iii. United States

US courts have also given effect to the party autonomy rule since the nineteenth century;[30] yet the first Restatement of Conflict of Laws was critical of the rule

[16] H Batiffol, *Les conflits de lois en matière de contrats: Etude de droit international privé comparé* (Paris, Recueil Sirey, 1938) 41, as cited by Foyer (n 15) 170.

[17] P Gothot, 'La méthode unilatéraliste face au droit international privé des contrats' (1975–1977) *Travaux du Comité Français de Droit International Privé* 201.

[18] Batiffol (n 16) 46; see also V Heuzé, *La réglementation française des contrats internationaux* (Paris, Joly éditions, 1990) paras 275ff.

[19] Cass civ, 5 December 1910, Sirey 1911.1.129 (*American Trading Co v Quebec Steamship Co*).

[20] Based initially on the spouses' presumed intention, as developed by C Dumoulin in his *Consultation aux époux de Ganay* in 1525: see D Bureau and H Muir Watt, *Droit international privé* 2nd edn (Paris, Presses Universitaires de France, 2010) vol 2, 202–05.

[21] Hague Convention on the Law Applicable to Matrimonial Property Regimes (1977) 16 ILM 14 (opened for signature 14 March 1978, entered into force 1 September 1992).

[22] Bundesgesetz über das Internationale Privatrecht (IPRG), Art 116.

[23] See H Honsell et al (eds), *Basler Kommentar* 3rd edn (Basel, Helbing Lichtenhahn, 2013) Art 116, para 3.

[24] See ibid, 994–95.

[25] IPRG, Art 120.

[26] IPRG, Art 121.

[27] IPRG, Art 52.

[28] IPRG, Art 104.

[29] IPRG, Art 132.

[30] See, eg, *Arnold v Potter* 22 Iowa 194 (1867).

and did not adopt it.[31] It now finds expression principally in section 187(2) of the Restatement (Second) of Conflict of Laws and section 1-301 of the Uniform Commercial Code (UCC).[32] Both these provisions deal with choice of law for contracts.

Section 187(2) confers party autonomy subject to two conditions. First, the chosen state must have a 'substantial relationship' to the parties or the transaction, or there must be another 'reasonable basis' for the choice.[33] Second, application of the chosen law cannot be 'contrary to a fundamental policy' of the *lex causae* that would otherwise be applicable, provided the state of the *lex causae* has a 'materially greater interest than the chosen state in the determination of the particular issue'.[34] This safeguard is wider than the traditional public policy (or ordre public) exception.[35] Section 187 is used in almost all US states.[36] It has even been applied to surrogacy contracts.[37]

The UCC has allowed party autonomy since 1952. Section 1-301(a) provides that parties may select a law that bears a 'reasonable relation' to the transaction, but it is subject to a number of exceptions for specified transactions.[38] The section applies to contracts that fall within the scope of the UCC. The American Law Institute introduced significant changes to the rule in 2001. In particular, it abolished the 'reasonable relation' requirement and placed restrictions on party autonomy in consumer contracts. But when states refused to adopt the 2001 version of the rule, the American Law Institute re-introduced the old approach in section 1-301.

The Restatement (Second) does not address the question of party autonomy in relation to non-contractual obligations. However, in a 'sizeable number' of cases US courts have held that the parties intended to encompass tort claims in their choice of law agreements, treating the question 'as a matter of contractual *intent* (rather than contractual *power*)'.[39] The Restatement also seems to provide for party autonomy in relation to matrimonial property (or at least matrimonial property contracts).[40]

iv. International Instruments

On the international plane, the party autonomy rule has received particularly strong support in the European Union's regulations on choice of law and in the instruments of the Hague Conference on Private International Law.

[31] American Law Institute, *Restatement of Conflict of Laws* (1934).

[32] American Law Institute, *Restatement (Second) of Conflict of Laws* (1971); American Law Institute, *Uniform Commercial Code* (2008).

[33] s 187(2)(a).

[34] s 187(2)(b).

[35] s 187, cmnt (g).

[36] P Hay, P Borchers and S Symeonides, *Conflict of Laws* 5th edn (St Paul, West Academic Publishing, 2010) 1088.

[37] See ibid, 1127–28.

[38] s 1-301(c).

[39] Symeon C Symeonides, *Codifying Choice of Law Around the World* (New York, Oxford University Press, 2014) 101; Hay, Borchers and Symeonides (n 36) 1141–46.

[40] *Restatement (Second)* (n 32) Art 258 and see Hay, Borchers and Symeonides, ibid 684.

a. European Union

In the European Union, large areas of choice of law have been unified (or 'communitarised') in the name of removing obstacles to 'the proper functioning of the internal market' and creating an 'area of freedom, security and justice'.[41] There are currently four European regulations on choice of law that give effect to (bilateral) party autonomy.

Regulation (EC) 593/2008 on the law applicable to contractual obligations (Rome I) applies to 'contractual obligations in civil and commercial matters' and provides, in Article 3, that a contract shall be governed by the law chosen by the parties.[42] Rome I replaced the Rome Convention on the law applicable to contractual obligations (Rome Convention),[43] which entered into force in 1991. Consumer and employment contracts are not excluded from Article 3, but certain consumer and employment contracts are subject to the 'principle of the more favourable law', which disapplies rules of the chosen law if these deprive the weaker party 'of the protection afforded to him by provisions that cannot be derogated from by agreement' under the objective law.[44]

Regulation (EC) 864/2007 on the law applicable to non-contractual obligations (Rome II) applies to 'non-contractual obligations in civil and commercial matters',[45] including tort or delict, unjust enrichment, *negotiorum gestio* and *culpa in contrahendo*. Article 14 provides that parties may agree to submit non-contractual obligations to the law of their choice once the event giving rise to the damage has occurred, unless all the parties are pursuing a commercial activity. In that latter case, the parties may choose the applicable law 'by an agreement freely negotiated before the event giving rise to the damage occurred'.

Article 5 of Regulation (EU) 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation (Rome III) provides that spouses may agree to designate the law applicable to divorce and legal separation, provided that it accords with one of a number of pre-selected connecting factors.[46] The Regulation applies to Germany and France, but not the United Kingdom.[47]

Regulation (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations (Maintenance Regulation) provides,[48] in Article 15, that the law applicable

[41] See Recital 1 of, eg, Rome I (n 1).

[42] Rome I (n 1).

[43] Convention 80/934/ECC on the law applicable to contractual obligations [1980] OJ L266/1 (opened for signature 19 June 1980, entered into force 1 April 1991) (Rome Convention).

[44] Rome I, Arts 6(2) and 8(1).

[45] Reg (EC) 864/2007 on the law applicable to non-contractual obligations [2007] OJ L199/40 (Rome II).

[46] Reg (EU) 1259/2010 implementing enhanced cooperation in the area of the law applicable to divorce and legal separation [2010] OJ L343/10 (Rome III).

[47] ibid, Recital 6.

[48] Reg (EC) 4/2009 on jurisdiction, applicable law, recognition and enforcement of decisions and cooperation in matters relating to maintenance obligations [2009] OJ L7/1 (Maintenance Reg).

to maintenance obligations shall be determined in accordance with the Hague Protocol on the Law Applicable to Maintenance Obligations (Hague Maintenance Protocol) in the Member States that are bound by the Protocol.[49] The Protocol has been ratified by the European Union, but the United Kingdom is not bound by the ratification. Article 7 of the Protocol provides for party choice of the law of the forum 'for the purpose of a particular proceeding', and Article 8 provides for a choice of law in accordance with one of a number of pre-selected connecting factors.

Article 16 of the Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (Proposal for a Regulation on matrimonial property) allows spouses to choose the law applicable to their matrimonial property, provided that the choice accords with one of a number of pre-selected connecting factors.[50] Conversely, parties to registered partnerships did not receive the power to select the applicable law in the parallel Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships;[51] but the new compromise text of the Proposal provides for party choice in accordance with pre-selected connecting factors in Article 15-03.[52] The Council of the European Union has been unable to reach a unanimous political agreement on the Proposals.[53]

Finally, Regulation (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession (Succession Regulation) provides for party autonomy in relation to succession agreements.[54] Parties may choose the law(s) of nationality of the person 'whose estate is involved';[55] and the choice applies

[49] Hague Protocol on the Law Applicable to Maintenance Obligations (opened for signature 23 November 2007, entered into force 1 August 2013) (Hague Maintenance Protocol). The European Community declared the Protocol to be provisionally applicable from 18 June 2011 pursuant to Art 24 of the Protocol: see Council Decision 2009/941/EC on the conclusion by the European Community of the Hague Protocol of 23 November 2007 on the Law Applicable to Maintenance Obligations [2009] OJ L331/17.

[50] Proposal for a Council Reg on jurisdiction, applicable law and the recognition and enforcement of decisions in matters of matrimonial property regimes (COM 2011, 126, 16 March 2011) (Proposal for a Reg on Matrimonial Property).

[51] Proposal for a Council Reg on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships (COM 2011, 127, 16 March 2011).

[52] The compromise text is annexed to Council of the European Union, 'Proposal for a Council Regulation on jurisdiction, applicable law and the recognition and enforcement of decisions regarding the property consequences of registered partnerships—Political agreement' (Note, 14652/15, Brussels, 26 November 2015).

[53] Council of the European Union, Justice and Home Affairs, Meeting No 3433, 2/4 December 2015.

[54] Reg (EU) No 650/2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession [2012] OJ L201/107, Art 25(3). cp Art 11, Hague Convention on the Law Applicable to Succession to the Estates of Deceased Persons (opened for signature 1 August 1989, not yet in force).

[55] Arts 25(3) and 22.

to the admissibility, substantive validity and 'binding effects' of the succession agreement.

b. Hague Conference on Private International Law

The principal instruments by the Hague Conference on Private International Law to grant party autonomy in choice of law are the Hague Maintenance Protocol, which has already been referred to,[56] the Principles on Choice of Law in International Commercial Contracts (Hague Principles)[57] and the Hague Convention 1978.[58]

The Hague Principles, which are intended to serve as a model for national, regional, supranational or international instruments, affirm the party autonomy rule for international contracts 'where each party is acting in the exercise of its trade or profession'.[59] They are a non-binding instrument. Their primary purpose is to promote the party autonomy rule in international commercial contracts, and they do not provide for choice of law rules in the absence of choice.

The Hague Convention 1978, which entered into force in 1992, provides that matrimonial property is governed by the internal law designated by the spouses.[60] However, the parties' choice is limited to a number of pre-selected connecting factors. Of the jurisdictions discussed in this book, France is the only state to have entered into this Convention.

B. Contractualisation—But Divorced from the Law of Contract

Because it is based on an agreement to choose the applicable law, the party autonomy rule has had the effect of 'contractualising' choice of law rules in those areas where it is applicable. The applicable law is no longer derived from objective factors but selected by the parties by consent. The problem is that this contractualisation of choice of law has been unduly divorced from the principles and the law of contract. Although the choice of law agreement sits at the junction of the law of contract and choice of law, the two areas of law do not always work in harmony.

i. Closed Approach to Party Autonomy and its Consequences

A fundamental manifestation of this problem is the failure, in legal scholarship and practice, to engage with the contractual nature of the parties' agreement on choice

[56] See text at n 49.

[57] Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts* (approved on 19 March 2015).

[58] Hague Convention on the Law Applicable to Matrimonial Property Regimes (n 21).

[59] Art 1(1).

[60] Arts 3 and 6.

of law. This is particularly true of common law jurisdictions. While the choice of law agreement has been variously characterised as a 'factual' agreement,[61] a 'true contract',[62] a bargain,[63] a promise,[64] and a 'declaratory' act,[65] little effort has been made to justify these labels on a principled basis, or to evaluate the implications that would arise from these respective characterisations for the operation of the party autonomy rule. Rather, discussion of the choice of law agreement is typically framed by a narrow focus on its scope and effect as a connecting factor.[66]

This normatively closed approach to party autonomy has had a number of consequences. The first is that there has been no principled approach to the granting of party autonomy—that is, the question whether party autonomy ought to be available in relation to a particular claim or issue (for example, should parties like the German manufacturer and the Canadian company be free to choose the law applicable to their non-contractual obligations?). It is often assumed that party autonomy ought to be linked to the degree of freedom that the parties enjoy at a substantive level in the ordering of their relations. But there is no basis for this view in the law of contract. In fact, it seems to misunderstand the contractual effect of the party autonomy rule. The effect of the party autonomy rule is *not* to contract out of the *lex causae* (ie tort law), but to contract out of the choice of law rules that would otherwise be applicable.

The second consequence of the closed approach to party autonomy is that courts rarely consider whether there is a proper agreement on the applicable law, based on the governing law of contract, before applying the chosen law.[67] Courts either fail to apply the governing rules of contract law, or they apply these rules in a manner that misconstrues the function of the choice of law agreement. For example, courts often give effect to the choice of law agreement on a putative basis—they apply the 'chosen law' to determine the existence of a contract even if the grounds of challenge logically extend to the agreement on the applicable law. The German manufacturer may argue that he is not bound by the Canadian company's terms and conditions, including the choice of Texas law, because they were not incorporated into the sales contract; and the court, if it relies on putative reasoning, would apply the law of Texas to determine whether the terms and conditions formed part of the contract, without determining first whether the clause came into existence as a matter of contract.

[61] AE Anton, *Private International Law: a Treatise from the Standpoint of Scots law* (Edinburgh, Green, 1967) 189.

[62] E Rabel, *The Conflict of Laws* 2nd edn (Ann Arbor, University of Michigan Law School, 1960) 368–69.

[63] *Akai Pty Ltd v People's Insurance Co Ltd* [1998] 1 Lloyd's Rep 90 (QB) 100.

[64] A Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, Oxford University Press, 2008) para 11.43.

[65] *Ace Insurance Ltd v Moose Enterprise Ltd* [2009] NSWSC 724, 15 ANZ Ins Cas 61-818 [47].

[66] See, eg, the current edition of *Dicey, Morris and Collins* (n 8), which dedicates two paragraphs to the existence and validity of the parties' consent as to choice of law (paras 32-066–32-067).

[67] cp, from a US perspective, W Woodward, 'Finding the Contract in Contracts for Law, Forum and Arbitration' (2006) 2 *Hastings Business Law Journal* 1.

Where courts give effect to the choice of law agreement on a putative basis, the agreement becomes virtually irrelevant.[68] This lack of interest in the existence and validity of the choice of law agreement is matched by an equal appetite for pragmatism in legal scholarship, which recently culminated in renewed support for a 'factual' approach to party autonomy.[69] Thus, while choice of law agreements have been described as an 'elaborate exercise of personal autonomy' that promote the increasing 'contractualization of the conflict of laws',[70] they have also been described as constituting mere 'data' for the purposes of the party autonomy rule.[71]

Thirdly, there has been limited engagement with the role of modal choice of law—as opposed to the law of contract—in regulating the existence and validity of choice of law agreements. Modal choice of law rules are rules of the conflict of laws that, instead of identifying the applicable law, regulate elements of choice of law rules. They may define the meaning of a choice of law element, or they may place conditions on its operation. That modal choice of law rules do play a role in the regulation of choice of law agreements is free from doubt. For example, the rule that a choice of law agreement need not be express in order to be valid is a modal choice of law rule. However, it seems that lawmakers do not fully appreciate the contractual function of such modal choice of law rules, or their interrelationship with the law of contract.

One way in which this lack of engagement manifests itself is that modal choice of law often appears to be lagging behind modern policies of contract law. For example, there is currently no modal choice of law rule in New Zealand that would require choice of law agreements in consumer contracts to be express and in writing, or to be written in a way that is accessible to consumers. A New Zealand court would uphold a German choice of law clause in the German manufacturer's terms and conditions in the same way that it would uphold a choice of law clause in a commercial contract between professionals.

ii. Freedom of Contract at all Costs?

It is difficult to avoid the impression that the party autonomy rule has been developed in accordance with a 'contractarian' approach—a 'single-minded pursuit of individualism'[72] that leaves little scope for a normative assessment of the choice

[68] eg *Compania Naviera Micro SA v Shipley International Inc (The Parouth)* [1982] 2 Lloyd's Rep 351 (CA) 353; see ch 4. cp jurisdiction and arbitration agreements: *Fiona Trust Holding Corp v Privalov* [2007] UKHL 40, [2008] 1 Lloyd's Rep 254 [17] (Lord Hoffmann); *Deutsche Bank AG v Asia Pacific Broadband Wireless Communications Inc* [2008] EWCA Civ 1091, [2008] 2 Lloyd's Rep 619 [24]–[25].

[69] eg R Plender and M Wilderspin, *European Private International Law of Obligations* 3rd edn (London, Sweet & Maxwell, 2009) paras 29-011–29-014; but cp R Plender and M Wilderspin, *European Private International Law of Obligations* 4th edn (London, Sweet & Maxwell, 2015) paras 29-010–29-013; see ch 2, s II.

[70] Briggs (n 64) paras 13.27 and 1.05.

[71] Anton (n 61) 189; ibid, paras 13.26 and 1.23.

[72] J Braucher, 'Contract versus Contractarianism: The Regulatory Role of Contract Law' (1990) 47 *Washington and Lee Law Review* 697, 699.

of law agreement. One author has thus noted that 'it is often forgotten amidst the euphoria generated by eloquent rhetoric about individual and contractual freedom, and other majestic generalities' that 'party autonomy presupposes the *free will of both parties freely expressed*'.[73] This seems to have several (over-lapping) causes: mischaracterisation of the functions of the choice of law agreement; a historic (and out-dated) attachment to laissez-faire policies, which no doubt shaped the rise of the party autonomy rule in the nineteenth and early twentieth century; and conflation of objective choice of law rules, and choice of law rules based on presumed intent, with party autonomy, resulting from a failure to treat the choice of law agreement as 'institutive' of the parties' choice of applicable law.[74]

The problem with such a contractarian approach to the contractualisation of relationships is that it takes an unduly one-sided (or even fictional) view of the law of contract.[75] A contract is both a tool and a subject of regulation. Championing freedom of contract, or free choice, without also considering the attendant normative questions that must define the purpose, the meaning and the limits of that freedom ignores the regulatory role of the law of contract. Choice of law agreements ought not to replace, but ought to serve the aims and policies of choice of law, in a way that satisfies the normative standards considered necessary for such agreements. This requires a shift in focus, from party autonomy as an almost self-validating rule, to party autonomy as a power-conferring rule that fuses the law of choice of law and contract.

II. A New Perspective: The Choice of Law Contract

This book analyses the party autonomy rule within a contractual framework. It argues that the party autonomy rule does, in fact, rest on a contract to choose the applicable law—albeit a peculiar contract (see chapter two). The primary function of the choice of law agreement is to bind the parties to a choice of applicable law and to dispense with the applicable objective choice of law rule. This characterisation of party autonomy has implications for the way in which it ought to be regulated: because the party autonomy rule is based on a contract, it ought to be shaped by a framework that fuses principles of choice of law and contract. This proposed framework builds on existing choice of law processes, which include the application of the law governing the choice of law agreement, and the application of modal choice of law rules. But it uses these processes in a manner that reflects the unique nature of the choice of law contract (see section A below), giving effect

[73] S Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 *American Journal of Comparative Law* 873, 878.

[74] On contract as an '*institution*' as opposed to a 'legal *response* to particular events', see D Nolan, 'The Classical Legacy and Modern English Contract Law' (1996) 59 *MLR* 603, 604.

[75] Braucher (n 72); see H Collins, *Regulating Contracts* (Oxford, Oxford University Press, 1999) ch 4.

to the idea that the choice of law contract—just like any other contract—ought to be subject to adequate regulation (see section B below).

The framework covers three fundamental questions. First, when should parties be granted the freedom to choose the applicable law (see chapter three)? Second, what is the interrelationship between the choice of law contract and any substantive contract that it purports to govern (see chapter four)? Third, what sources should determine the existence and validity of choice of law contracts, and what is the role of modal choice of law (see chapter five)? The answers to these questions, which are often surprising, provide a set of principles to evaluate—and, where necessary, reform—existing rules on the existence and validity of choice of law contracts (see chapters six to eight).

A. Understanding the Choice of Law Contract

The choice of law contract is not an ordinary contract. Rather than binding parties to a future course of conduct, its effect is limited to the operation of the forum's choice of law rules. As will be explained in chapter two, the characterisation of the choice of law agreement as a contract does not necessarily conform with conventional definitions of contract but follows logically if the purpose of the party autonomy rule is to be upheld: the party autonomy rule is triggered where the parties had a mutual intention as to the applicable law, but only a legally binding agreement—or contract—is able to give direct effect to a mutual intention to choose the applicable law.

It follows that the choice of law contract is not only a connecting factor, because it designates the law applicable pursuant to the party autonomy rule, but also an object of connection, because it is itself an international contract whose existence and validity must be determined (see subsection i below). It is independent from any underlying relationship to which the chosen law is applied, because the sole function of the choice of law contract is to opt out of the applicable objective choice of law rule and select the law governing the underlying relationship (see subsection ii below). As an independent contract, the choice of law contract must have its own applicable law (see subsection iii below); but in addition, it must be regulated by rules that are specific to the choice of law contract—by 'modal choice of law rules' (see subsection iv below).

i. An International Contract …

The party autonomy rule forms part of the forum's choice of law rules. The choice of law contract, unlike a substantive contract governed by foreign law, is given effect pursuant to a choice of law rule of the forum. It is the law of choice of law that is responsible for its enforcement. Nevertheless, the choice of law contract clearly has an international element. Like all choice of law rules, the party autonomy rule is charged with the regulation of cross-border relationships. The choice of law

contract is an international contract. Consequently, the question arises which rules should apply to determine its existence and validity.

ii. … that is Independent of the Parties' Underlying Relationship …

Because the determination of the parties' choice is a logically anterior step to the application of the chosen law to the dispute, the choice of law contract must operate as an independent contract.[76] It sits apart from the relationship that the chosen law is intended to govern, as a contract whose sole function is to deselect the applicable choice of law rule and to allocate a new applicable law in substitution. This is not generally appreciated, which has consequences for the determination of choice of law contracts.

The conclusion that choice of law agreements are contractually independent necessarily requires that the choice of law contract not be given effect—that is, that the chosen law not be applied to the underlying relationship—before the existence and validity of the choice of law contract have been established. In other words, the independence of the choice of law contract requires the rejection of putative reasoning: the chosen law cannot be applied on the assumption that the choice of law contract is valid. This means that there is no necessary synchronisation between the existence and validity of the choice of law contract and the existence and validity of any underlying contract. Even where the choice of law contract is physically included in the underlying contract, it is a legally separate agreement.

iii. … and whose Existence and Validity is Determined by the Law Applicable to the Choice of Law Contract …

The choice of law contract requires its own applicable law. In most jurisdictions, the choice of law contract is submitted to the putative chosen law—the law that was allegedly chosen.[77] The reason why the putative chosen law is applicable is not that the parties intended the law to be applicable, because the parties' agreement on the applicable law is precisely what is in dispute. It is that, due to its subject-matter, there is no other law that could more appropriately be applied to the choice of law contract. The effect of the putative chosen law is to ensure that the choice of law contract is enforced only if it is valid under its own chosen law. So while application of the putative chosen law to the underlying relationship, under the guise of the party autonomy rule, must be rejected, there is no reason in principle why the putative chosen law ought not to be applicable to the choice of law contract. More specifically, it is the law of contract of the putative chosen law that is needed to establish the existence and validity of the choice of law contract.

[76] See ch 4.
[77] eg Rome I (n 1) Art 3(5); see ch 5, s III.C.

Because choice of law contracts are independent agreements, they should not be treated as if they were implied terms of other contracts; and they should not be inferred on the basis of putative jurisdiction or arbitration agreements. Courts often infer choice of law clauses as if they were implied terms, failing to appreciate that choice of law agreements are contractually independent contracts and that the gap-filling rationale that informs the law on implied terms does not, therefore, apply to choice of law agreements. For example, a New Zealand court might well impute to the German manufacturer and the New Zealand consumer an implied intention to select the law of Germany, on the basis of the references to German legislation in the manufacturer's terms and conditions, even though a joint imputed intention would not be enough to found a contract.

Choice of law contracts also should not, like ordinary contracts, be submitted to rules of contract that are concerned with the content of parties' rights and obligations. For example, the New Zealand consumer might rely on the German law of contract to argue that the choice of law agreement is 'unfair' or 'unreasonable' in substance. But such contractual rules control the parties' rights and obligations—the fairness of the parties' bargain. They can have no application to choice of law agreements, which fail to give rise to *inter partes* rights or obligations. Choice of law contracts are concerned exclusively with the determination of the applicable law. More generally, the particular nature of the choice of law contract means that the law of contract is not always an effective or sufficient source of regulation; and that it is also necessary, therefore, to rely on contractual rules that are specific to the choice of law contract.

iv. … as well as by Modal Choice of Law Rules

These rules are described as modal choice of law rules, because they prescribe *how* a particular choice of law rule is to be applied.[78] Not all rules that form part of the system of choice of law are choice of law rules—that is, rules that, like the party autonomy rule, identify the applicable law by reference to a particular connecting factor and produce a choice-of-law effect. In determining what is the law that is designated by a particular connecting factor, it may also be necessary to rely on additional rules that define the meaning of the connecting factor. Thus, rules that define the meaning of, for example, 'domicile'[79] or 'habitual residence'[80] or 'characteristic performance of the contract'[81] do not directly result in the application of a particular law but simply regulate the way in which choice of law rules based on domicile, habitual residence or the place of characteristic performance are to be applied. These rules may be judge-made or created by legislation.

[78] M Hook, 'The Concept of Modal Choice of Law Rules' (2015) 11 *Journal of Private International Law* 185; cp P Stankewitsch, *Entscheidungsnormen im IPR als Wirksamkeitsvoraussetzungen der Rechtswahl* (Frankfurt, Peter Lang, 2003); see ch 5, s IV.

[79] eg Domicile Act 1976 (NZ).

[80] Rome I (n 1) Art 19.

[81] See *Print Concept GmbH v GEW (EC) Ltd* [2001] EWCA Civ 352, [2002] CLC 352 [3]–[6].

Modal choice of law rules are particularly relevant to the operation of the party autonomy rule, because here they function as contractual rules. They are needed to regulate any matters that are specific to the choice of law contract—for example, whether the choice of law contract needs to be in writing; or whether spouses, when choosing the law governing their matrimonial property relationship, are required to obtain legal advice. The drafting of modal choice of law rules requires careful consideration of their interrelationship with the law of contract, conflicts policies and the international context within which they operate (see chapter five).

B. Regulating Freedom of Contract

The party autonomy rule operates through a choice of law contract; and contracts require regulation. It is not sufficient to grant freedom of contract without a body of rules and principles to define the meaning and the limits of that freedom. The choice of law contract should be no exception to this. To achieve normative consistency between the law of contract and choice of law, the party autonomy rule should be regulated in a way that reflects the modern law of contract. This goes beyond submission of the choice of law agreement to the general law of contract. We should also rely on principles of contract to shape the scope of party autonomy, and to shape the content of modal choice of law for party autonomy. What is needed, in other words, is a fusion of the law of contract and choice of law to regulate the freedom to choose the applicable law.

i. The Law of Contract as a Tool of Regulation

There is no unitary theory of contract that runs through the modern law of contract—whether within the jurisdictions that are examined here, or across their legal systems.[82] Nevertheless, the position may, very generally, be stated as follows: the law of contract defines the meaning of contract and facilitates the process of contracting; and while freedom of contract remains the starting point for the regulation of private relationships, the law of contract delimits freedom of contract by public policies aimed at the protection of the parties, of third parties, or of society and the legal order as a whole.[83] There has been a move away from the classic theory of contract, which viewed the role of the law of contract as largely facilitative and treated the parties as 'sovereign',[84] towards a 'materialisation' of the law of contract, which recognises that contracting parties do not always make

[82] Collins (n 75) 32. On pluralism in contract law more generally, see L Trakman, 'Pluralism in Contract Law' (2010) 58 *Buffalo Law Review* 1031.

[83] See H Kötz and A Flessner, *European Contract Law* (Oxford, Clarendon Press, 1997) 11–13; J Beatson and D Friedman, 'Introduction: From "Classical" to Modern Contract Law' in J Beatson and D Friedman (eds), *Good Faith and Fault in Contract Law* (Oxford, Clarendon Press, 1995) 3.

[84] M Chen-Wishart, *Contract Law* (Oxford, Oxford University Press, 2007) 12.

free, rational and informed decisions; and that their decisions sometimes give rise to externalities.[85] The modern law of contract, whose sources range beyond the general law of contract, is a system of competing values.

ii. Regulating the Freedom to Choose the Applicable Law

Party autonomy must be shaped by these competing values. Choice of law agreements, just like other contracts, should depend on external standards of contracting; and the conflict of laws should lend its power of enforcement to only those agreements that do not undermine personal autonomy or harm the public good. There are three principal steps that must be taken to achieve this.

First, the availability of party autonomy ought to depend on the policies of choice of law, in the same manner that freedom of contract more generally depends on the area of law that is the subject of the contract. In particular, it is the role of objective choice of law that must be evaluated, because the function of the party autonomy rule is to contract out of the applicable objective choice of law rule. The question that ought to be asked is this: should the parties be free, by entering into a choice of law agreement, to contract out of the choice of law rule that would otherwise be applicable? Should the German manufacturer and the Canadian company be free to displace the objective choice of law rule on product liability, or does the rule serve a 'mandatory' purpose? Should the Kenyan wife and the German manufacturer be free to displace the law of their common habitual residence?

Second, choice of law contracts ought to be submitted to the general law of contract, in a manner that recognises their peculiar function; and choice of law contracts will not properly benefit from the law of contract unless courts recognise their independent nature.

Third, modal choice of law ought to provide contractual rules specific to the choice of law contract where the general law of contract is not a sufficient or appropriate source of regulation. By way of analogy, modal choice of law rules are to choice of law contracts what consumer, employment and family law are to matrimonial property, employment and consumer contracts. It is necessary to do for choice of law contracts what has already been done for those contracts: to supplement the general law of contract with a specialist regime applicable only to the choice of law contract. For example, New Zealand modal choice of law could require that choice of law agreements in consumer contracts be expressed clearly and in writing, to reflect a more general concern of the law of contract with consumer protection. The flipside of this argument is that modal choice of law should not *replace* the law of contract without substituting adequate regulation.

[85] See generally PS Atiyah, *The Rise and Fall of Freedom of Contract* (Oxford, Clarendon Press, 1979); V Ranouil, 'L'Autonomie de la Volonté: Naissance et Évolution d'un Concept' (Paris, Presses Universitaires de France, 1980) 33.

iii. Fusing the Law of Contract and Choice of Law

The proposed framework differs from scholarship on the party autonomy rule that has sought to adopt a more ideological methodology for its evaluation, based, for example, on economic theory, or on political liberalism. It has been argued that party autonomy can be justified on grounds of efficiency and general economic analysis;[86] or that it is an expression of the forum's more limited state power over private cross-border disputes;[87] or that it is simply a human right.[88] The proposed framework, on the other hand, seeks to ground the party autonomy rule in the law of contract. While efficiency, political liberalism and human rights may all form part of the ideological make-up of the law of contract (or, for that matter, of choice of law), they offer only a narrow snapshot of the kinds of regulatory questions that, from a properly contractual perspective, ought to be raised about the party autonomy rule.

[86] G Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' in E Gottschalk et al (eds), *Conflict of Laws in a Globalized World* (Cambridge, Cambridge University Press, 2007) 153.

[87] J Basedow, 'Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts' (2011) 75 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 32; JA Pontier, 'The Justification of Choice of Law: A Liberal-Political Theory as a Critical and Explanatory Model, and the Field of International Consumer Transactions as an Example' (1998) 45 *Netherlands International Law Review* 388.

[88] E Jayme, 'L'autonomie de la volonté des parties dans les contrats internationaux entre personnes privées' (1991) 64-I *Annuaire de l'Institut de Droit International* 7, 147.