The relevance of party autonomy with respect to international online B2B contracts – A European and US perspective
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Parties to international contracts require predictability and legal certainty. In order to assess legal and economic risks, it is important that questions of jurisdiction and applicable law can be clearly answered. In the on-line context, the importance of party autonomy increases because on-line businesses can be confronted with potential customers from all over the world. Forum selection clauses and choice of law clauses are an outstanding means of providing the necessary clarity by contractually determining the competent forum and the applicable law for possible conflicts. Moreover, by using a choice of law clause, contracting parties can choose the law most suitable for their contract(s). Especially, with a relatively new phenomenon such as on-line contracts it is important that parties can choose a law, which is specifically tailored to on-line contracts, i.e. legally recognizes on-line contracts. Thus, any uncertainty concerning the formal or material validity of on-line contracts can be avoided.

Furthermore, forum selection and choice of law clauses provide legal certainty from a private international law perspective. The result of rules of private international law cannot always be predicted very well, which makes it difficult for contracting parties to assess any risks in this respect. US courts have, for instance, struggled to place novel, Internet-related activities in the traditional personal jurisdiction doctrine. The result of which is that diverging, not always very fortunately chosen approaches emerged to determine personal jurisdiction with respect to Internet cases. These approaches presently co-exist, which makes it difficult for parties to assess where jurisdiction can actually be found. A worst-case scenario would provide personal jurisdiction in every physical location where customers of on-line businesses are located. /Likewise, US choice of law lacks clear rules and consists of several different, co-existing approaches. Although the most significant relationship approach can be identified as the most relevant approach for international contractual conflicts, this approach provides nothing more than general guidelines and leaves much room for judges to decide the question of applicable law. To put my last remark in perspective, it is, however, important to mention that the applicable law may often depend on the jurisdictional result, since US courts have an inclination to apply *lex fori*. Therefore, the applicable law may be more predictable than would seem at first sight. Nevertheless, a clear line in US choice of law is still lacking.

In contrast to US conflict of laws, European regulations, i.e. the Rome Convention on Applicable Law for Contracts and the EU Regulation on International Jurisdiction, provide (clearer) rules that give contracting parties a better prediction of which court has jurisdiction and which law applies with respect to international (on-line) contracts. Although contracting parties can, thus, better assess the jurisdictional and applicable law risks, forum selection and choice of law clauses are still important means to control these risks.

Assuming the relevance of party autonomy, the use of forum selection and choice of law clauses should not be unnecessarily restricted and (highly) necessary restriction must be clear and cognizable. Although, the EU Regulation on International Jurisdiction has liberalized the writing requirement for forum selection clauses by also allowing them to be agreed upon or imposed electronically, it is still somewhat indistinct under what precise conditions such e-clauses are valid (see, e.g., the *Galeries Segoura* case). The regulation is, however, more flexible with respect to the use of these clauses in B2B contracts, when a common practice or internationally recognized custom exists. US law, e.g., consists of material

restrictions on the use of forum selection clauses, such as unenforceability of these clauses on grounds of *forum non conveniens*, unconscionability or fundamental public policy. In addition, forum selection clauses are not (yet) recognized in all US states and, in some instances, specific conditions for these clauses are stipulated in state law.

Even though the restrictions on forum selection clauses in both EU and US law will not rapidly lead to the exclusion of these clauses especially with respect to international on-line B2B contracts, the diversity of conditions and rules concerning the validity and enforceability of forum selection clauses brings about legal uncertainty. Therefore, it is important that conditions and restrictions are judged on necessity and brought into line internationally.

Neither the Rome Convention on Applicable Law for Contracts nor US choice of law puts formal restrictions on choice of law clauses. Under the Rome Convention, the chosen law determines the material validity of these clauses; under US law it is either the chosen law or the *lex fori*, which determines the material validity of choice of law clauses. Predictability would be increased for contracting parties when the procedure would be equalized internationally and the validity of these clauses would be dependent upon the chosen law. Thus, unity of approach is guaranteed and the contracting parties have the applicable law result in their own hands.

Another point of attention in this respect is an unfortunate restriction of the freedom to choose the applicable law under US choice of law: the chosen law must have a substantial relationship with the parties or the on-line contract, or there should be an otherwise reasonable basis for choosing a particular law. This requirement flies in the face of legal certainty and predictability and contradicts international trade practice. For those reasons, it should be abandoned.

The requirement of a substantial relationship aims at expressly confining a contractual choice of law to interstate and international transactions. The requirement of internationality is generally stipulated with respect to choice of law clauses, although in the United States it has become an even more restrictive effect as a result of the substantial relationship requirement. With reference to the plea for abandoning the substantial relationship requirement, a broad interpretation of the internationality requirement in the on-line context would be reasonable as well. This broad interpretation would – in principle – involve that transactions are deemed international in character, even though geographical contacts all point to one country and unless the surrounding circumstances do not explicitly prove otherwise. The ratio behind this approach is in the importance of party autonomy in the on-line context as well as in the lack of geographic notice and identification of parties, which occurs in certain on-line contracts, such as those concluded within anonymous transaction models. It is undesirable for contracting parties to find out only after a contract was concluded that a choice of law clause is invalid or unenforceable because of a lack of internationality. Legal certainty *ex ante* should be guaranteed as much as possible.