Rationale of the Exclusion of Choice of Law by the Parties in Articles 6(4) and 8(3) of Rome II Regulation

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ABSTRACT
This paper analyses the reasons why Rome II restricts party autonomy in Articles 6 and 8.

Key words
Non-contractual obligations, party autonomy, unfair competition, free competition, intellectual property rights

1. INTRODUCTION
The question I was asked to answer is the following: why is party autonomy – as recognised by Article 14 of the Rome II Regulation when it comes to choosing the law applicable to non-contractual obligations – ruled out under Article 6 and Article 8 of said Regulation?1

In order to answer this in a sensible way, a preliminary question must first be addressed: how come Article 14 grants autonomy to the parties regarding the choice of the law governing their tort relationship? As a matter of fact, such a solution is rather unusual in comparative private international law since the notion of party autonomy is most often related with contracts, not torts. In order to answer this question correctly, one needs to understand what it means for the parties to be granted autonomy as to the law applicable to the liability of one of them vis-à-vis the other (and, consequently, as to the law applicable to the right of the victim to claim damages against the tortfeasor and get compensated for the loss).

My view is that each time a lawmaker grants such autonomy to the parties, it simply means that the choice-of-law rule enacted for torts by the legislature is only intended to

1. The paper adheres to the style of the oral presentation as employed on the occasion of the Oslo Symposium.
apply in cases where the parties did not agree upon a particular solution regarding the choice-of-law issue arising out of the tort. To put it differently: the lawmaker (and especially the EU lawmaker with Article 14 of the Rome II Regulation) does not stick to the connecting factor he has enacted for torts (eg locus damni, for ordinary delicts covered by Article 4(1)) to the point that he makes it mandatory to the parties.2

Insofar as the parties are consequently granted autonomy by the legislature enacting a non-mandatory choice-of-law rule, the issue arises of the interest for the parties to resort to a choice-of-law clause as to non-contractual obligation; well, the answer is most likely that an agreed choice-of-law solution provides for predictability and certainty regarding the country the law of which will be applicable.3 Nevertheless, this benefit is immediately counterbalanced by the risk for a potential victim to agree upon the applicability of a lesser protective law (than the one applicable under the default choice-of-law rule), at a time when liability of the other party is rather an abstract possibility – since it is merely potential. Hence the restriction found in Article 14(1)(a): as a matter of principle and subject to the commercial exception,4 only an ‘agreement entered into after the event giving rise to the damage occurred’ is enforceable.

Once we know what party autonomy means in the field of choice-of-law regarding non-contractual obligations, we can understand more easily why Articles 6 and 8 of the Rome II Regulation frankly rule out this autonomy, both provisions being non-waivable by the parties (Article 6(4); Article 8(3)).

2. ARTICLE 6

2.1 Introduction

Article 6 deals with the choice of the law governing unfair competition and acts restricting free competition. The choice-of-law rule is slightly different depending on whether the issue at stake deals with unfair competition or free competition.

2.2 Unfair Competition

Basically, regarding the conflict of laws in cases involving unfair competition, the European connecting factor is the place where ‘competitive relations or the collective interests of consumers are (or are likely to be) affected’ (Article 6(1)), except where the act of unfair competition exclusively affects the interests of a specific competitor – in which case Article 4 applies (with possible contractual waiver of the law that is selected under this provision, as provided by Article 14).5


4. Rome II (n 3) Art 14(1)(b).

With the exception of this last particular case, in any action brought before an EU Member State court by a victim in order to get compensated for the loss that ensues from an act of unfair competition, the connecting factor is mandatory (Article 6(4)).

2.3 Free Competition
The basic\(^6\) connecting factor used by the choice-of-law rule that covers a suit where compensation is sought for loss occurring in the wake of an act restricting free competition is the place ‘where the market is, or is likely to be, affected’ (Article 6(3)(a)). This connecting factor is also made mandatory by the EU lawmaker (Article 6(4)).

2.4 Mandatory Nature Of The Connecting Factors
How can we explain that these connecting factors are mandatory to the parties? The usual answer is that the rules at stake here qualify as a body of overriding mandatory provisions.\(^7\) Generally speaking (the solution is actually not proper to overriding mandatory provisions in the field of competition), the connecting factor used by a localising provision in order to determine the applicability of rules belonging to this category is, by its very nature, mandatory. Because these rules are mandatory for the kind of cases they cover as selected by the localising provision, and this mandatory enforceability overrides the enforceability of any possible conflicting rules from other countries, parties are not entitled to vary the connecting factor, even by common will.

Is it a convincing reason for denying choice-of-law autonomy to the parties where an act restricting free competition or an act of unfair competition is at stake? We shall discuss the point with respect to an act restricting competition only, since the reasoning extends quite easily to an act of unfair competition,\(^8\) subject to what has been said about the acts that affect ‘exclusively the interests of a specific competitor’.

To a certain extent, there are good reasons why the parties should be denied choice-of-law autonomy in a case where compensation is sought for the loss suffered by one of them following an act restricting free competition perpetrated by the other: in such a lawsuit, the plaintiff is often seen as a ‘private attorney general’ and, as such, is part of a more general mechanism set up in order to achieve the full enforcement of the competition law.\(^9\)

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6. The Rome II Regulation (n 3) provides for an additional connecting factor where the restriction of competition affects, or is likely to affect, the market in more than one country (see Art 6(3)(b)).
7. See Valérie Pironon, ‘Concurrence déloyale et actes restreignant la libre concurrence’ in Sabine Corneloup and Natalie Joubert (eds), Le règlement communautaire ‘Rome II’ sur la loi applicable aux obligations non contractuelles (Litec 2008) 111, para 119.
8. Probably because of the ‘convergence des méthodes employées pour localiser l’obligation engendrée par la commission d’un acte déloyal ou anticoncurrentiel’ (‘convergence of the methodologies used in order to localize the obligation stemming from the commission of an act of unfair competition or restricting free competition’ – translation is ours), as this convergence was relevantly pointed out, Pironon (n 7) para 121.
Denying competitors that are involved in a lawsuit for a wrongful act related with competition law the right to choose the law governing this lawsuit – and especially denying them the right to evade the law of the place where the market is affected – is undoubtedly a way to increase the chances of enforcement for the competition law that legitimately governs this market.

However, to a certain extent there are good reasons why choice-of-law autonomy should be granted to the parties in the case of an act restricting free competition: we only refer here to a civil action, where a party seeks redress after a tort was committed and negatively impacted its personal interests. The mere fact that the tort stems from a breach of competition law does not change any of this. It is hence private interests that are mainly at stake in the lawsuit on liability and, here as elsewhere, insofar as private interests are on the forefront, a law other than the local law may better fit with parties’ expectations.

A possible way to combine both viewpoints would be, in the field of competition law, to limit party autonomy to the choice of the law only regarding ‘follow-on actions’ where private enforcement aspects fade away and liability issues are the only ones left.

3. ARTICLE 8

Article 8 deals with infringements of intellectual property rights (IP rights). Under Article 8 of the Rome II Regulation, in cases where, in an international setting, a wrongful act was committed that allegedly infringes IP rights, and a loss ensues for the owner of these rights, the claim for compensation is deemed to be relevantly connected with the country ‘for which protection is claimed’. Recital 26 of the Rome II Regulation Preamble underscores that this connection stems from the ‘universally acknowledged principle’ known as the lex loci protectionis, as enacted by the Berne Convention (1886) for the Protection of Literary and Artistic Works – which indeed is in force in just under 180 countries – and by the Paris Convention (1883) for the Protection of Industrial Property – which is in force in nearly 180 countries too. If the commentators usually concur on the fact that these conventions provide for a choice-of-law rule as to the intellectual property title, their views are divergent on the issue of whether or not these choice-of-law rules extend their scope to include the liability for infringement of IP rights. Nevertheless, the Rome II Regulation did enshrine

10. On this distinction under Rome II Regulation (n 3), see Martin Illmer, ‘Article 6’ in Peter Huber (ed), Rome II Regulation, Pocket Commentary (Seller 2011) 142, 186.
13. See Vincente (n 12) para 161; Nerina Boschiero, ‘Infringement of Intellectual Property Rights. A Commentary on Article 8 of the Rome II Regulation’ 9 Yearbook of PIL (2007) 87, 92 <https://doi.org/10.1515/9783866537200.1.87> accessed 20 January 2019. In a case about an infringement of an IP right, Case C-28/04 Tod’s SpA, Tod’s France SARL c. Heyraud SA, en présence de: Technisynthèse [2005] ECR I-05781, the CJEU ruled that ‘As is apparent from Article 5(1) of the Berne Convention, the purpose of that convention is not to determine the applicable law on the protection of literary and artistic works, but to establish, as a general rule, a system of national treatment of the rights appertaining to such works.’
this extension in its Article 8(1). A relevant reason for doing so is practical and has been pointed out by Professor Moura Vincente: diverging connecting factors for intellectual property title and non-contractual obligation in case of an IP right infringement result in the increasing complexity of the choice-of-law process due to dépeçage and incidental questions ensuing, with their necessarily unsatisfactory responses.\(^\text{14}\)

As to whether or not the connecting factor used by the choice-of-law rule laid down by Article 8(1) is mandatory to the parties so that a contractual choice of law ought to be devoid of any effect, the answer brought about by Article 8(3) is that: ‘The law applicable under this Article may not be derogated from by an agreement pursuant to Article 14.’ It seems that such an answer derives from the same idea: that the choice-of-law rule regarding torts related with an infringement of IP rights ought to be the same as the one applicable to the intellectual property title issues. Since the international conventions in force in the field of IP rights do not provide for party autonomy as to the law governing the intellectual property title, it became consequential for the EU legislature that the regulation had to deny autonomy to the parties as to the choice of the law applicable to non-contractual obligations arising out of an infringement of IP rights. This nevertheless remains questionable since ‘Les intérêts publics ne sont pas directement en jeu quand il s’agit de la réparation des dommages découlant de l’atteinte’.\(^\text{15}\) It would have then been possible and even sensible to leave it up to the parties to choose the law applicable to the tort issues arising out of an IP right infringement.

\(^{14}\) See Vincente (n 12) para 161.

\(^{15}\) ‘Public interests are not directly at stake when it comes to compensation of the loss arising out of the infringement.’ – translation is ours; see Vincente (n 12) No 162; compare Edouard Treppo, ‘La lex loci protectionis et l’article 8 du règlement Rome II’ (2009) 24 Recueil Dalloz 1643, 1646 ; contra : Dickinson (n 5) 469, 470.