María Campo Comba

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Contents

Chapter 1
Introduction

Private international law (PIL)[1] involves the question of which law applies to a legal relationship in cases that have connections with more than one legal order. For example, how is it determined which is the law applicable to a consumer contract with cross-border elements? The two main methods that have been used over the years to answer this type of question are the unilateral method and the multilateral method.[2] The former involves determining the spatial reach of a rule to determine its applicability, having as a starting point the norm itself. The multilateral method entails designating the applicable law, having as a starting point the legal relationship and assigning it to a particular legal order through objective connecting factors, regardless of whether the legal order designated is the law of the forum or a foreign law. The multilateral method has gained popularity in Europe since the late nineteenth century.[3] Nowadays, the conflict of laws system is characterised by the existence of a plurality of methods since after the 1960s, the exclusivity of the multilateral method was questioned, and the need for flexibility and adaptation to the social and legal reality of the time was demanded.[4] Still, the current conflict of laws

[1]The discipline of private international law is generally referred to as conflict of laws within common law jurisdictions (e.g. US, England etc.). While both terms are often used indistinctively, when the author refers along this book to 'conflict of laws rules' or 'conflict rules' she is specifically referring to the rules determining the applicable law.

[2]Siehr (2017) and Basedow (2017).

[3]The multilateral method had almost completely displaced the unilateral approach by the beginning of the twentieth century in Europe. It is shown, for example, in the deliberations of The Hague Conference on Private international law, which between 1893 and 1904 adopted seven international Conventions. During the preparatory works of the first sessions, the adoption and predominance of Savigny's conflict of laws multilateral approach became obvious (HCCH Publications, *Actes et documents de la Première à la Septième sesión (1952)). Doctrine, case law and codifications of PIL in Europe followed in its majority the multilateral method since the end of the nineteenth and beginning of the twentieth century.* Gutzwiller (1923, 1929), and Nolde (1936).

[4]González Campos (1996), pp. 5239–5242; Mayer (1985), p. 129; Audit (1984), p. 219.

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system is mainly based on the multilateral approach, and it also includes the principle of freedom of choice of law by the parties, the doctrine of overriding mandatory rules and special conflict rules that provide special connecting factors for weaker contracting parties and protect them to a certain point from the risks of party autonomy.[5]

After the Treaty of Amsterdam (1999) and the Treaty of Lisbon (2009), Europeanisation of PIL has enormously intensified, and the numerous legislative acts enacted prove the importance acquired by PIL in the last two decades in the European Union (EU), contrasting with the opposite situation of the previous years. Regarding conflict of laws in contractual obligations, the first instrument unifying them was the 1980 Rome Convention on the law applicable to contractual obligations,[6] then replaced by the Rome I Regulation on the law applicable to contractual obligations,[7] which is now in force. However, while conflict of laws in contractual obligations is already regulated by the Rome I Regulation, including some special rules for consumer and employment contracts, some EU directives dealing with substantive matters include some rules that have implications for PIL and have a unilateral conflict of laws basis. The different approaches taken by the different conflict rules in these areas make the system incoherent. Should the EU directives provide for their own criteria of applicability in a unilateral manner, or are the current conflict rules sufficient and adequate?

In the context of the EU, there are intra-EU situations, within the Member States, and extra-EU cases, which involve elements from one or more non-Member States. EU law is concerned with whether rules might impose a restriction or disadvantages on the internal market, while PIL traditionally serves international legal transactions in a wider manner and not just in the intra-EU context.[8] The multilateral conflict of laws system was originally based on the equality of all legal systems.[9] It makes sense that when different legal systems share common legal values, or even common standards, like in the case of the EU Member States, conflict of laws rules should promote equality between these different national legal systems.[10] However, when legal systems do not share similar legal values and important interests are at stake, such as consumer or employee protection, the situation is different. In this context, the case where a French consumer contracts with a German business (intra-EU situation) can be considered different from a French consumer contracting with a Puerto Rican principal (extra-EU situation) as the latter situation faces the risk of

[5]Ten Wolde and Henckel (2012), pp. 12–26.

[6]Convention on the Law Applicable to Contractual Obligations of the 19 June 1980 [1980] OJ L266/1, consolidated version [1998] OJ C27/34.

[7]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] OJ L177/6.

[8]However, since the entry into force of the Treaty of Amsterdam, which gave the EU the legislative competence regarding PIL, EU PIL also serves the EU purposes, and does not necessarily have to follow the same logic than traditional national PIL rules. González Beilfuss (2004), p. 118.

[9]Boele-Woelki et al. (1998), p. 205.

[10]See the 'scale of Ten Wolde' in Ten Wolde (2013), pp. 574–576.

non-application of European standards that normally—in its own market—would be applicable to a consumer in this case. Thus, conflict rules, when regulating these type of situations, should be consistent and alive to the different risks for the protected weaker parties and the correct functioning of the internal market. They should have as a purpose legal certainty and predictability of connection, respect the legitimate expectations of the parties, as well as find the appropriate solution to the particular situation.[11]

In this context, this book aims at analysing the coherence between EU PIL, in particular the Rome I Regulation on the law applicable to contractual obligations, and EU secondary law instruments harmonising conditions regarding consumer, employment and other weaker parties' contracts.

1.1 Research Questions

The primary focus of this book concerns the interaction between EU private international law (EU PIL)—specifically conflict of laws rules—and EU secondary law regarding weaker contracting parties. In the last years, the relationship between private international law (PIL) and European Union law (EU law) has received a significant amount of attention from scholars.[12] The rationale behind these two areas of law differs: while EU law is concerned with maintaining and developing an area of freedom, security and justice, for which the proper and effective functioning of the internal market is essential, PIL is, in principle, not concerned with EU law objectives or substantive aims.[13] Under the traditional PIL system in Europe, conflict rules generally focus on the centre of the legal relationship and, in the case of contractual relationships, generally designate the law most closely connected to the contract. That is, conflict rules will point to that law without giving decisive importance to the fact that it is the law of the forum, the law of a Member State or a foreign law.[14] Despite the different rationales, in order to achieve the EU objectives, EU PIL and EU law should be in harmony.

[11]Stone (2014), pp. 289, 290; Plender and Wilderspin (2015), p. 35; De Miguel Asensio (2005), pp. 82, 83.

[12]For example: Remien (2001), Francq (2005), Basedow (2006), Kuipers (2012), Kramer (2015) and Mathieu (2015).

[13]Kuipers (2012), pp. 10, 11. Title V of the TFEU is devoted to the area of freedom, security and justice, of which judicial cooperation in civil matters (article 81 TFEU) is an essential part.

[14]The traditional multilateral PIL approach is characterised by the neutral and rigid multilateral conflict rule that relates the abstract legal relationship to the law more closely connected. However, during the last third of the twentieth century, new adjustments in relation with material objectives—such as the protection of weaker contracting parties, among others—were included in order to adapt the traditional approach to the new needs and interests of the society and the state. Arenas García (2008), p. 88.

On the one hand, weaker party protection is essential for the EU internal market at both social and economic levels. The EU has enacted numerous secondary law instruments, principally directives, providing for substantive rules regarding consumer and employment contracts, as well as regarding other contracts involving weaker parties (insurance, agency etc.). On the other hand, conflict rules determine the law applicable to a legal relationship in a cross-border situation; in this case, they would determine the law applicable to a cross-border consumer contract or cross-border employment contract. If as a result of the operation of the conflict rules a non-EU law is applicable, the substantive protective rules of the EU directives are not applied. Therefore, both areas of law must be coordinated.

Thus, the main question of this research is whether EU conflict rules and EU secondary law are well coordinated regarding the protection of weaker contracting parties and, if not, how they could be in harmony with each other. As a result of this main enquiry, several other questions arise.

1. How Do Traditional Principles of Conflict of Laws Relate to the Requirements of the Internal Market for the Realisation of the EU Objectives Regarding the Protection of Weaker Parties Such as Employees, Consumers Etc.?

The modern European PIL system is mainly based on the Savignian multilateral conflict of laws approach, which consists in designating the applicable law through objective connecting factors based on the legal relationship, regardless of whether it is the law of the forum or a foreign law. The original Savignian model has been revised, methodological purity has been rejected and numerous criteria and principles have been added, such as the weaker party protection principle or the doctrine of overriding mandatory rules, but it is still the basis of our conflicts method in Europe.[15] The Rome I Regulation on the law applicable to contractual obligations, which is the unified EU PIL instrument containing conflict rules to determine the law applicable to contracts, is mainly based on the multilateral conflict of laws approach.

The influence of the Europeanisation process on PIL is relevant. With the Treaty of Amsterdam in 1999, the European Community acquired a comprehensive competence in the area of judicial cooperation in civil matters, including the adoption of several measures in order to promote compatibility of the rules applicable in the Member States in relation to conflict of laws and jurisdiction. A step further was taken with the Treaty of Lisbon, which in its Title IV, with the heading 'Area of Freedom, Security and Justice', allows the EU to act in the area of judicial cooperation in civil measures, *in particular, when necessary for the functioning of the internal market* (article 81 TFEU). EU PIL cannot be seen anymore as an area outside the European legal system, and regardless of the former tension between PIL and EU law, they should be in accordance with the same objectives, that is towards

[15]Ten Wolde and Henckel (2012), pp. 9–11.

market integration. The reason underlying the use of the current PIL method and its adequacy for both intra-EU and extra-EU situations shall be studied.[16]

Essential for the purposes of this book is the party autonomy principle in PIL, or freedom of choice of law. The principle of party autonomy is uncontested in the area of contractual obligations and is one of the cornerstones of the Rome I Regulation (recital 11 Rome I), but it is also acknowledged that the freedom of choice of law requires regulation, especially when it works to the detriment of one of the parties to the contract, like a consumer or an employee.[17] EU directives concerning contracts involving weaker parties mainly aim at protecting private interests; however, it is arguable that, in some cases and up to certain extent, public interests are also at stake (e.g. ensuring undistorted competition). The Rome I Regulation ensures the application of overriding mandatory provisions, which are those aimed at protecting public interests, regardless of the law applicable to the contract. This is the existent unilateral inroad in the multilateral system of the Rome I Regulation and the biggest limit to party autonomy. However, there is a large debate as to whether rules protecting weaker parties—including those deriving from EU directives—can fall under the definition of overriding mandatory rules, threatening the principle of party autonomy.[18]

2. When and How Should PIL Ensure the Applicability of EU Directives on Weaker Party Protection?

The introduction of a new body of law such as EU law brings back basic PIL questions, such as when an EU consumer or employment directive should be applicable in an international situation or whether the existent multilateral conflict rules are adequate to determine its applicability. Directives are not directly applicable but need to be implemented into the national law of the Member States. In the majority of the cases, directives are minimum harmonising directives, which means that they set minimum standards that Member States can choose to improve when implementing them into their national law. As a result, there is a minimum EU common standard set by the directive that all Member States respect, and still different standards among Member States, since they can improve the minimum. From an EU point of view, we can find intra-EU situations, where the situation is only connected with Member States, and extra-EU situations, where the situation is connected not only with the EU but also with some third country or countries.[19] It is in the latter situation where it should be determined when and how PIL should

[16]This topic is discussed in several occasions during this study, such as in Sect. 4.2 and Chap. 3, or Sect. 5.2, leading to a general discussion and conclusion in Chap. 7.

[17]Recital 11 Rome I recognises that '(t)he parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations'. Regarding party autonomy in the Rome I Regulation: Heiss (2009), Symeonides (2010), Maultzsch (2016) and Mills (2018).

[18]This topic will be object of discussion during this book, and it is specifically addressed in Sect. 3.3.1.

[19]Ten Wolde (2013), pp. 577–579; Kuipers (2012), p. 222.

ensure the international applicability of a specific directive. It is in this specific regard where EU law and PIL seem to not have reached an understanding. On the one hand, according to our current PIL understanding, the Rome I Regulation determines the law applicable to a contract in a cross-border situation; if this law is the law of a Member State, the protection of the relevant directive is applicable as implemented by the law of that Member State. On the other hand, some EU directives—specially the second generation of EU consumer directives—include a so-called scope rule that interferes with PIL. Scope rules generally provide for the application of the protection provided by the directive when the situation is closely connected with the EU. The technique used by these rules affects PIL because they seem to adhere to a unilateral PIL approach to determine the applicability of the directive by determining the applicability of the instrument without referring to foreign law, clashing with the multilateral nature of the Rome I Regulation. In addition, the existence of scope rules spread around directives disrupts the aim of unifying conflict of laws of the different Member States regarding contractual obligations in one instrument—the Rome I Regulation. Moreover, these rules refer to the application of the directive and not national law, but Member States have to implement these rules into their national legislation; the broad drafting of scope rules gives place to different interpretations when implementing these rules among the national laws of the Member States, adding more uncertainty to the situation.[20] Finally, not all directives contain scope rules, but some are silent about their applicability and others refer to the Rome I Regulation. While many PIL scholars defend the point of view that the application of the directives should depend on the operation of the Rome I Regulation, the fact that certain directives intend to cover a broader scope of application should be taken into account in considering whether the current drafting of the existent conflict rules needs to be more EU focused.

3. Are the Current EU PIL Conflict of Laws Rules and PIL Method Adequate to Ensure the EU Objectives Regarding Weaker Contracting Parties, or Is There a Call for a Different PIL Method?

Under a PIL multilateral approach, a consumer contract between a Dutch consumer and a German professional is not different from a consumer contract between a Dutch consumer and a Brazilian professional. However, from the point of view of EU law, the situations completely differ from each other: while in the first case the application of the EU standards is generally ensured, in the second case there is the possibility that the EU standards are not applied when the EU intended those standards to be applicable, thereby disrupting the smooth functioning of the internal market. The Rome I Regulation provides for mechanisms on weaker party protection, especially regarding consumer and employment contracts, which are governed by special provisions. However, they are considered insufficient in some cases to ensure the applicability of EU mandatory provisions contained in directives. While the doctrine of overriding mandatory rules has been defended for those cases, it is

[20]The problematic around the existence of scope rules in directives is discussed in detail in the context of EU consumer directives in Sect. 4.1.

questionable and dangerous to generalise the use of overriding mandatory rules as a mechanism to ensure the application of provisions deriving from EU directives protecting weaker parties. Such general use would jeopardise the current PIL system. A balance and mutual understanding between all the interests and principles involved, both from PIL and EU law, is necessary, taking into account the PIL values, the need of protection of weaker contracting parties and the special needs of the internal market. In this regard, it has to be pointed out that regarding the PIL method, methodological purity (i.e. purely multilateral method or unilateral method) is not realistic nor desirable; no contemporary PIL system is purely multilateral or purely unilateral.[21]

1.2 Structure of the Book

In order to answer the aforementioned questions, this book is divided into seven chapters.

The first chapter, which is the current chapter, introduces the research topic and research questions, addressing the objective and importance of this research.

The second chapter includes an analysis of the rationale behind weaker party protection in EU PIL. First, it is necessary to identify which are those referred to as 'weaker contracting parties' in the context of PIL and then explain why they need special protection in substantive law and PIL. Special focus is put on consumers and employees as the traditional structural weaker contracting parties both in this chapter and in the rest of the book. While EU PIL also contains special rules for insurance policyholders and, to a certain extent, passengers, these parties will be mentioned within the category of 'other weaker parties in a contract', together with other possible weaker parties (agents, franchisees etc.). Both consumers and employees are paradigmatic weaker parties in a contract, are protected by similar conflict rules and have a similar interaction with EU directives. In the meantime, insurance policyholders are not always a weaker party in an insurance contract, and the conflict rules that were previously scattered among the insurance directives are now superseded by one provision in the Rome I Regulation on the law applicable to contractual obligations. There is also a new provision protecting passengers based on the wish to protect them as consumers, but the position of the commercial carrier is respected and plays a big role in it, limiting its protective effect. Thus, although these other weaker parties will be mentioned throughout the book and analysed in Chap. 6, the main focus of the book is on consumer and employment laws, which are essential areas for the EU and its internal market, at both economic and social levels.

Chapter 2 will also contain a discussion regarding why ordinary traditional conflict rules do not respond to the specialities of consumer contracts and individual employment contracts. In this regard, the importance of the principle of party

[21] Symeonides (2005), pp. 433–434.

autonomy will be highlighted, as well as the need to limit such a principle in order to prevent a possible abuse by 'stronger' counterparties. The need for special connecting factors in conflict rules dealing with these special contracts is also explained. In addition, a comparison of the existing possible mechanisms of protection of weaker parties in PIL is conducted, discussing the different manners legal systems have in order to deal with party autonomy and special connecting factors regarding weaker contracting parties. Finally, the role of the EU regarding consumer and employee protection is studied to the extent that it affects the current EU PIL rules.

The third chapter focuses on the Rome I Regulation on the law applicable to contractual obligations and its mechanisms of protection of consumers and employees. The provisions that determine the law applicable to consumer contracts (article 6 Rome I) and employment contracts (article 8 Rome I) are objects of analysis, as well as the relevant case law. Moreover, the mechanism of overriding mandatory rules (article 9 Rome I) is examined. Relevant questions such as whether overriding mandatory rules can be used as a mechanism of protection of weaker contracting parties or whether, as a result, the rules deriving from the EU consumer and employment directives can be considered as having overriding mandatory character will be analysed. In addition, art. 3(4) Rome I, which ensures the application of EU mandatory law when all the relevant elements of the situation are located within the EU and parties have chosen a non-EU law as applicable, will also be object of study.

The fourth chapter deals with the relationship and coordination between the EU consumer directives and the Rome I Regulation. In order to do that, the existent inconsistencies and gaps regarding the interaction between EU consumer directives and the Rome I Regulation are described. Then intra-EU conflicts of laws between Member States in relation to the implementation of the EU consumer directives are discussed, to later focus on EU consumer directives and extra-EU conflicts of law, especially referring to the international scope of the EU consumer directives in PIL terms. This chapter aims at answering how to achieve better consumer protection in the EU while respecting PIL values. The available PIL methods and their convenience are discussed.

Similarly, the fifth chapter focuses on the relationship and coordination between the EU employment directives and the Rome I Regulation. A similar analysis to the previous chapter regarding the scope of application of the directives in the context of the current EU PIL is conducted. This chapter will focus on the Acquired Rights Directive, which contains a 'scope rule' similarly to some of the EU consumer directives. In addition, it will deal with the law applicable to employment contracts in the context of a temporary posting of workers. The Posted Workers Directive will be analysed, in relation to which overriding mandatory provisions play an important role. Again, the available PIL methods and their convenience are discussed.

The sixth chapter examines what the situation is regarding other weaker contracting parties and the Rome I Regulation. To a lesser extent than with regard to consumers and employees, EU PIL, and specifically the Rome I Regulation, extends the protection to passengers and some insurance policyholders. In addition,

other contractual parties can often have a weaker contracting position in their contract (such as franchisees, distributors or commercial agents). This chapter aims to analyse the interaction between special (and less protective) conflict rules and general conflict rules of the Rome I Regulation with the EU secondary law instruments that contain mandatory provisions protecting weaker parties other than consumers and employees.

Finally, the seventh chapter includes the reflexions and conclusions resulting from this research.

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Chapter 2
The Rationale Behind the Protection of Weaker Contracting Parties in EU PIL

Modern PIL instruments generally contain a special regulatory regime applying to weaker contracting parties, specifically for consumers and employees, which are generally seen as the typical structural weaker parties in a contract. These special PIL rules are more favourable to the interests of consumers and employees than to those of their counterparties.

The history of weaker party protection in PIL can be described as short and easy in comparison with the lengthy and complicated history of PIL in general. In fact, the special PIL rules are a reflection of the existing legal framework in national substantive law that has been adapted to ensure that any advantage of the contracting party with the strong position in the contract will remain without effect.[1] Substantive national laws only started to introduce special weaker party rules in the last century.[2] The state started to increasingly intervene in certain areas limiting party autonomy based on several reasons. The main reason, although not the only one, consisted in correcting the imbalance of contracts containing weaker parties.[3] Since most of the special substantive law on weaker party protection constitutes mandatory law, PIL rules also need to be adjusted in order to avoid their circumvention. But who are these weaker parties in need of such a special protection? Why are they considered to be in a weaker position than their contractual counterparty?

[1] Rühl (2011), Grusic (2015), pp. 17–55.

[2] After the Second World War and the subsequent economic growth, the necessity of protection of the consumer started to become evident. Companies were growing in length and complexity, together with the offer of goods and services to consumers. The speech of President Kennedy on 15 March 1962, where he actually points out the need for the protection of consumers in the market, is iconic in this regard. This consumer protection ideology would have its reflection in Europe in the 1970s. Arenas García (1996), p. 41.

[3] The intervention of the state in private relationships between individuals is based on a plurality of reasons or criteria and economic or political interests, going beyond the solely protection of the weaker party. Pocar (1984), p. 352, 353.

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Both national law of the Member States and EU law provide for mandatory rules on weaker party protection. In addition to the substantive national law regarding consumer and employment contracts that Member States have developed since the twentieth century, the EU has enacted numerous legal instruments in that regard. Thus, the EU has developed its own consumer and employment policy, which is implemented into the legal framework of the Member States.[4] Consumer contract law, at both the domestic and EU levels, has been developed in an incremental manner, until the point that it has become an increasingly dense and intricate body of law in which cross-border consumer contracts are the more complex part. In the area of EU PIL, the fundamental problem of inconsistency of the EU consumer acquis with the conflict rules of the Rome I Regulation remains to be solved. The European Commission has made numerous efforts to make the European consumer acquis more coherent. Specifically, the European Commission has been especially active regarding the harmonisation of consumer law: there are over 90 EU directives dealing with consumer protection matters. Since the majority of the directives are of a minimum harmonising nature, several calls of the European Parliament in favour of a European Civil Code incited an animated academic debate. The discussion over unification or full harmonisation of EU contract law or, in other cases, of EU consumer law has been intense, and the literature over it is extensive.[5] The role of PIL would be seriously reduced if unification of substantive law would happen. However, apart from the unlikeliness of this situation, PIL would still be necessary in extra-EU situations. In fact, it will be argued in this chapter that EU PIL rules are at least as adequate as unified substantive law is in order to regulate cross-border consumer contracts in the EU.

The situation regarding employment law differs in the sense that Member States are more reluctant to confer legislative freedom on the EU because of the wide diversity of regulatory techniques and objectives relating to employment issues in the different countries.[6] Thus, some important areas of employment are left to domestic law, such as protection against unfair dismissal, and other areas are directly outside the competence of the EU, such as payment, right of association or right to strike.[7] Leaving aside the areas of fundamental rights, fundamental freedoms and

[4]The legal basis of EU consumer policy is found in Articles 4(2)(f), 12, 114 and 169 of the Treaty on the Functioning of the European Union (TFEU) and Article 38 of the Charter of Fundamental Rights of the European Union. Article 114 TFEU is the legal basis for harmonisation measures aimed at establishing the internal market. Regarding EU social and employment policy, the legal basis is found in Article 3 of the Treaty on European Union (TEU) and Articles 9, 10, 19, 45–48, 145–150 and 151–161 of the Treaty on the Functioning of the European Union (TFEU).

[5]For example: Collins (2008), Micklitz (2009), Boele-Woelki (2010), Twigg-Flesner (2012), Weatherill (2013), Halson and Campbell (2013), Twigg-Flesner (2016).

[6]The existent legal diversity is due to the unique social, political economic and cultural roots of the Member States. For example, while in the Nordic countries most of the important areas are regulated by collective bargaining, France or Spain have comprehensive regulations regarding employment issues, besides collective bargaining. Grusic (2015), p. 3, 4.

[7]Riesenhuber (2012), p. 26, 27.

equality, EU employment law is mostly laid down in secondary legislation, especially in directives, which, besides having a minimum harmonisation approach, do not cover all areas of employment law. Still, overall, EU employment law is considered as a 'coherent whole' since it does cover large areas of regulatory employment law.[8]

EU PIL needs to respond to the necessities of both these weaker parties and the EU internal market in that regard. Are ordinary traditional conflict rules able to respond to the specialities of contracts involving weaker parties? Party autonomy is one of the cornerstones of EU PIL regarding contractual obligations.[9] As the stronger party, a company or an employer would be able to introduce in the consumer contract or individual employment contract a choice of law clause unilaterally. This clause might indicate a law with a low standard of protection for consumers or employees. Weaker contracting parties need some mechanism of protection against the threats that party autonomy brings.[10] The law applicable in the absence of choice should neither be determined by the general connecting factors, but adequate and protective connecting factors need to be designated. Around the globe, we find different PIL mechanisms that offer protection to weaker contracting parties, ranging from a complete prohibition of party autonomy to a more flexible approach, like providing for a more protective law, as well as a variety of connecting factors in the absence of choice of law. Which mechanism seems to respond better to the necessities of these special contracts?

In this context, this chapter will, first, identify which are the contracting parties that are considered weaker in EU PIL. It will be analysed why consumers and employees are in need of special protection in substantive law and PIL. A definition of what is understood by consumers and employees in need of special protection in EU PIL will be given. Also, other weaker parties and other possible weaker parties are identified and defined.

Second, it will be argued why ordinary traditional conflict rules do not respond to the specialities of consumer contracts or individual employment contracts. Party autonomy is a well-established principle in EU PIL according to which parties are free to choose the law applicable to their contract. Freedom of choice of law brings numerous advantages to the contractual relationship. However, when one of the parties to the contract is in a clear weaker contracting position, such as consumers and employees, party autonomy needs to be limited. In addition, it will also be explained that when parties have not chosen the law applicable to their contractual relationship, the regular connecting factors are not completely adequate in relation to consumer and employment contracts.

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[8] Ibid., p. 26.

[9] Recital 11 Rome I Regulation states that '[t]he parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations'.

[10] On the limits to party autonomy in choice of law: Mills (2018), pp. 455–490. Also, regarding the specific limits to party autonomy for the protection of weaker contracting parties in the Rome I Regulation, see Chap. 3 of this Book.

Third, the role of the EU regarding consumer and employee protection will be analysed to the extent that it affects the EU PIL rules. An overview of the EU policies and strategies concerning consumer and employee protection will be given, as well as a summary of the development of the EU legislation and competences in that respect. The specialty of EU PIL rules on consumer and employment contracts lies in the fact that, besides ensuring compliance with certain mandatory rules of the Member State in question, they also need to adapt to the EU necessities. Most EU legislation on consumer and employment contracts is laid down in EU directives that have a minimum harmonising nature, which means that Member States have to transpose the minimum protection standard required by the specific directive but can also improve that standard. As a result, the rules and the protection standard differ from one Member State to another. At the same time, there is a minimum EU protection standard versus a potentially lower standard by a third country. Therefore, EU PIL rules need to be aware of the EU consumer and employment strategies and substantive legislation. On the other hand, this chapter will also make reference to the debate regarding the unification of EU contract law and will defend unified and coherent EU PIL rules as a better alternative.

Finally, this chapter will analyse the different mechanisms for the protection of consumers and employees in PIL existent in different jurisdictions around the world. That is, it has been submitted that party autonomy needs to be limited, but how and to which extent? Not all jurisdictions use the same mechanism. In the same way, the different existing protective conflict rules dealing with the law applicable in the absence of choice of law in consumer and employment contracts will also be the object of analysis. The advantages and disadvantages of the existing mechanisms will be described in order to ascertain which ones can be considered more adequate for the protection of weaker contracting parties in PIL.

2.1 Identification of Weaker Contracting Parties in EU PIL

The EU PIL instruments relating to contracts in civil and commercial matters (i.e. Brussels I bis Regulation,[11] regarding jurisdiction and recognition and enforcement, and Rome I Regulation,[12] regarding the applicable law) provide for specific rules for special categories of contracts involving presumably weaker parties. Section 4 (Articles 17–19) of the Brussels I Regulation, regarding jurisdiction and enforcement, and Article 6 Rome I Regulation, regarding the law applicable, contain special rules concerning consumer contracts, having as a principal objective the

[11]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 (OJ L 351/1).

[12]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 177/6).

protection of the consumer in cross-border situations. In the same manner, Section 5 Brussels I bis Regulation (Articles 20–23) and Article 8 Rome I Regulation contain specific rules referring to individual employment contracts, with the main aim of protecting the employee as the weaker party of the contract.

Consumers and employees are regarded as the paradigmatic example of a weaker party in a contract. The information asymmetries between the parties to the contract and the economic or social dependence of the weaker party towards his or her counterparty are the characteristic reasons that justify the mandatory character of the substantive consumer and employment law of the Member States and also at EU level. EU PIL ensures that the application of mandatory consumer or employment law is not circumvented due to the stronger contractual position of the professional or the employer.

EU PIL instruments also contain special rules regarding insurance contracts and contracts of carriage. The protection is extended to passengers and some insurance policyholders, although to a lesser extent. Moreover, it is also possible to identify some contracting parties that could be regarded in some cases as having a weaker bargaining position in a contract but do not enjoy special protection under the EU PIL rules. This can be the case of franchisees, distributors, commercial agents and even some small businesses.[13] However, this study is principally focused on consumer and individual employment contracts since consumers and employees are evident weaker parties in need of substantive and PIL rules ensuring their rights.

Below, an overview of the rationale behind the need for protection of consumers and employees will be given, as well as a general definition of consumer and employee in EU PIL terms and a reference to other possible weaker parties.

2.1.1 The Necessity of Protection of Consumers

2.1.1.1 Rationale Behind Consumer Protection

Consumer protection policies and consumer rights are nowadays established in most of the contract law of countries around the world. The concept of consumer protection became generalised in the second half of the twentieth century as a necessary limit to freedom of contract, and it was recognised in the majority of national laws. In the majority of Western and Nordic European countries, the concept of 'welfare state' became popular in the 1960s and 1970s and led to an interventionist approach concerning consumer protection. The interests of

[13]Generally, commercial parties are more reluctant to be considered as having a weaker position in the market because of the fact of being commercial, and often lack special legal protection. A paradigmatic example is, in the context of carriage of goods by sea, the existence of obvious bargaining disparities between ship owners and carriers, which have the majority of bargaining power, and, on the other hand, cargo owners and receivers, which are in need of special protection despite being commercial parties. In this regard: Salmerón Hernríquez (2016).

consumers were considered as necessary to achieve satisfactory market conditions.[14] In general, consumers are seen as vulnerable market participants that need to be protected against the market forces, and although this approach might differ between European countries (e.g. France traditionally with a more paternalistic approach vs. the Netherlands with a more free market approach), they all agree on the necessity of consumer protection and the need to correct the imbalance between professionals and consumers in the market.[15] For example, the former different treatment of protection from standard contract terms in consumer contracts among Member States illustrates the very different approaches existent before the drafting of a uniform EU legislation (Unfair Contract Terms Directive).[16] This is also a paradigmatic example of the need for consumer protection. When the European countries started to recognise the need for consumer protection and the necessity of controlling standard contract terms in the 1970s, legislation and practices differed very much among them.[17] Besides different legislative techniques, one of the main discussions concerned the scope of application of the control over unfair contract terms: in general, some countries deemed that all contracts between consumers and professionals should be the object of control, while others considered that all the contracts containing standard contract terms should be the object of control.[18] While the first ones focused on the concept of consumer, the second ones had to focus on the concept of standard contract terms.[19] The debate consisted on which scope of application is adequate to the legislative control. The control of standard contract terms or potential unfair contract terms constitutes a limitation to freedom of contract, which is essential, and thus the legislative control has to be proportionate and justifiable.[20] Freedom of contract is based on free and voluntary consent. If a contract clause is standard and not negotiated, the consumer is not freely giving its

[14]For example, in Germany, the reform in 1965 of the UWG (German Unfair Competition Act) already introduced the right to bring an action to court to consumer organisations, becoming the pillar of German consumer law together with the AGBG (Standard Contract Terms Act) of 1976. The Netherlands, from the 1970s onwards, actively enacted several laws and regulations aiming at consumer protection, such as the introduction of misleading advertisement in the Dutch Civil Code, and by the 1980s most rules on consumer rights (e.g. consumer sales, standard contract terms, consumer credit etc.) were recognised in the Dutch legislation. Since the end of the 1980s, it would be European legislation that would promote the adoption of consumer legislation in the different Member States as transposition of EC directives. For an explanation on the early national developments of consumer law in Western Europe, see Cseres (2005), pp. 158–170; Haupt (2004).

[15]Cseres (2005), p. 170.

[16]Council Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ 1993 L 95/29).

[17]A comparative analysis of the different pieces of legislation and the practices of the Member States and several other European states before the implementation of the Unfair Contract Terms Directive is found in Hondius (1987).

[18]Águila-Real (1998), p. 54.

[19]Ibid., p. 54.

[20]Ibid., p. 56.

consent. Voluntary consent is a necessary part of freedom of contract. A consumer is not expected to read the small letter of the contract.[21]

In consumer law, the national legislator seeks to protect consumers from an abuse of the freedom of contract resulting from the inequality in bargaining power between the consumer and the professional. In order to do that, substantive consumer rights are reflected in mandatory consumer contract regulations. Consumer law consists of mandatory rules that guarantee that the contracting parties will not circumvent the legislative rules to the detriment of the consumer, the obligation of information disclosure, measures regarding the safety and quality controls of goods and services, indebtedness, dispute resolution etc.[22] In a cross-border situation, those consumer rights also need to be protected, and that is why the concept of consumer protection is also present in PIL.

Why are consumers considered 'weaker' than their counterparty? Traditionally, a weaker position is explained by the lesser bargaining power of the consumer, who is in an inferior position to defend his or her interests against the professional. The disparities are found in the relationship between the consumer and professional when it comes to bargaining power, knowledge/information and resources.[23] Consumers know less about contracts and about the products and their quality than the professionals do, and therefore they find themselves in a weaker bargaining position. Information asymmetries consist of the impossibility or difficulty of acquiring relevant information for the transaction, and in the case of consumers, difficulty to assess the conditions and quality of the products or services before the conclusion of the contract. In addition, consumers do not have the economic capacity to individually asses every contract they enter into.[24]

Moreover, when talking about cross-border transactions, the consumer might be in more need of protection than in domestic cases since the language, the other party or the rules might be foreign to the consumer.[25] Regarding the latter, there are costs related to the legal fragmentation in international transactions, that is costs associated to the fact that different legal systems are involved. While entering into transactions in an international market brings many benefits and possibilities to consumers in comparison with their national market, being able to have more opportunities to find the most satisfactory options for themselves, it also brings 'risks of internationality', as Garcimartín refers to (*riesgos de internacionalidad*).[26] A party to an international

[21]Besides that, even in the case contract terms were negotiated individually, it does not guarantee that the consumer has the sufficient knowledge of the market and of the possible terms. This is, individual negotiation of a contract would not ensure consumer protection neither, but only a transparent market would. Thus, the consumer does not need protection only against unfair terms, but also against other possible inequalities. Ibid., p. 58, 59.

[22]Cseres (2005), p. 156.

[23]United Nations Conference on Trade and Development (UNCTAD) (2016) Manual on Consumer Protection, p. 2.

[24]Rühl (2011), pp. 572–573.

[25]Devenney and Kenny (2012), p. 239.

[26]Garcimartín Alférez (2002), p. 128, 131.

transaction does not have the security that the rights deriving from its own legal system are the same as the ones deriving from other foreign legal systems or the security that the rights derived from a legal system can be recognised and implemented in others. The risks involve having to go to a foreign country to start legal proceedings, to obtain evidence, to ask for the recognition or enforcement of a decision or to gather information and adapt the conduct to a foreign law. These risks have to be assumed by one of the parties to a cross-border contract.[27] PIL normally allocates the costs derived from these risks to one of the parties. In the case of consumer contracts, when the risks of internationality are created by a foreign professional when approaching the consumer in the consumer's country, those risks and costs should be borne by the professional.[28]

In order to achieve economic efficiency in the market, professionals should engage in fair competition, provide consumers with information about the products, ensure quality and safety standards and offer compensation to consumers if problems arise. At the same time, consumers should act reasonably and acquire products with the quality required and at the best price, be well informed about those products or services and be aware of the remedies available.[29] Nevertheless, this is not the case in practice. On the professional's side, they will do what is better for their business, even though sometimes that requires some abuse toward their weaker counterparty. On the consumer's side, although it is normally expected that the consumer has given preferences and makes rational choices, it is not expected that a consumer will review standard contract terms or fully understand them. Moreover, consumer behaviour is complex, and while the traditional approach is the rational choice model, on which economics and law have based their theories on consumer protection for many years, a more psychological-based approach has been introduced in the last years which deviates from the standard economic theory and introduces the notions of bounded rationality, bounded willpower and bounded self-interest.[30] In general, the rational choice model presumes that individuals act in a manner that benefits and maximises their own welfare, and therefore they compare the costs and benefits of an action before taking a decision, they look for the necessary information, they are able to process and understand such information and, finally, they have stable preferences.[31] However, it has been shown in several studies that consumers' behaviour is often not rational and factors such as emotions, overconfidence or the context itself might have an influence and make the behaviour of the consumer 'irrational'.[32] Therefore, it is argued that consumers are in need of protection not only because of their lack of information but also because there are cases in which

[27]Ibid., pp. 131–133.

[28]Ibid., p. 144, 147.

[29]United Nations Conference on Trade and Development (UNCTAD) (2016) Manual on Consumer Protection, pp. 2–4.

[30]Schüller (2012), pp. 129–142.

[31]Rühl (2011), p. 582.

[32]Schüller (2012), pp. 129–142.

they do not act rationally, and it would be irrational to act rationally (e.g. reading the terms and conditions before every purchase).

In addition to the objective of economic efficiency in the market, consumer protection measures, when achieving bargaining equality between consumers and professionals, contribute to social justice. In a contemporary society, consumer rights are part of the social rights that individuals are entitled to.[33]

Regarding consumer transactions in PIL, the weaker position of the consumer is evidenced in view of the law applicable to the consumer contract. While professionals are normally aware of which law will benefit them, consumers do not know which law the professional wishes to apply. Professionals will invest in gathering information regarding the expected benefits of the application of certain law, while consumers will know about the quality of the law only after the problems occur, after the conclusion of the contract.[34] It might be of little use protecting the consumer with national (or EU) substantive law if a professional can, by inserting a jurisdiction or choice of law clause, escape the application of such protective provisions of the consumer's law.

The traditional PIL method, the multilateral method proposed by Savigny, rests on value-free connecting factors: the conflict rule designates the law of a particular country where the legal relationship should be localised through objective (value-free) connecting factors, regardless of the interests of the parties, the difference in power balance of the parties or the substantive value of the law designated.[35] This method, contrarily to the situation in Europe, was never a complete success in the US.[36] In the US, since the 1950s, promoting justice and defending substantive

[33]United Nations Conference on Trade and Development (UNCTAD) (2016) Manual on Consumer Protection, p. 2, 3.

[34]Rühl (2011), p. 574.

[35]Friedrich Carl von Savigny played a definitive role in the development of private international law in the European continent. The German jurist made his great contribution to the subject in the eighth and last volume of *System des heutigen Römischen Rechts* (System of Modern Roman Law) in 1849 (von Savigny 1849). The eighth volume (Berlin, 1849) of *System des Heutigen Römischen Rechts* constitutes a treatise on the conflict of laws in itself. An English translation is found in von Savigny (1869).

[36]From the nineteenth to the mid-twentieth centuries, the theoretical foundations of the conflict of laws system in the US were principally laid down by the conflict of laws theories of Joseph Story (1779–1845) and Joseph H. Beale (1861–1943). As a really general overview, Joseph Story followed Ulrich Huber's axioms and the notion of comity, although he also accepted alternative conflict methods (Story 1846). On the other hand, Joseph Beale rejected the notion of comity and substituted it with the vested rights theory (Beale 1935). It has to be noticed that while Story laid down the broad basis of the traditional American conflict of laws, it was Beale who created an actual conflict of laws system. Beale considered that conflict of laws should be founded in two principles: territoriality and vested rights. He claimed that all laws were territorial and admitted very few exceptions to that, and to justify the application of foreign law, he defended that the forum would acknowledge the fact that a right was created by foreign law and then recognise that right under the forum law. The main criticisms of this theory were that it gave no discretion at all to the judge to refuse the application of foreign law, while with Story's theory the opposite happened, and it sometimes led to the application of a law of a state that had a really vague contact with the case.

policies have become the aim of conflict rules. The so-called conflict of laws revolution changed the previous approach in the US.[37] However, it did not contain specific reference to consumer protection as such. They were the European countries that took the lead in considering consumer protection in PIL.[38] Although there was no clear event such as conflict of laws revolution in Europe, the growth of the consumer society and the development of the protection of human rights after the war had also its reflection in PIL. Since the 1960s, the law has started to pay special attention to regulating and protecting the rights of the consumer, and gradually consumer law became a separate area from other areas of commercial law, which led to having separate PIL rules for this area as well.[39] The first EU PIL instrument, the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters,[40] did not originally contain any special jurisdiction rule concerning consumer contracts. In the first version of the Convention in 1968, Section 4 referred to 'jurisdiction in matters related to instalment sales and loans'. It was not until the reform of the Convention in 1978[41] when Section 4 became 'Jurisdiction over consumer contracts' and introduced special jurisdiction rules for consumer contracts. Thus, it can be seen that by the time the Brussels Convention was drafted, countries did not yet conceive special jurisdiction rules for consumer

Besides the criticisms that these systems received, the First Restatement in 1933, which took Beale's rationalisation, was further criticised as rigid, and eventually not only authors but even judges departed from the traditional system, giving place to the movement known as the American conflict of laws revolution. Symeonides (2016), pp. 54–57, 94, 95; Juenger (1993), pp. 29–31; Nadelmann (1961).

[37]One of the main authors of the modern American conflict of laws approaches was Professor Brainerd Currie (1913–1965) and his governmental interest analysis (Currie 1963). He considered that a conflict of laws should be solved on the basis of whether the states involved would have an interest in applying their law to the dispute or, in other words, whether these states have a 'governmental interest' in the outcome of the case. In order to ascertain that interest, it would be necessary to examine the content of the substantive law and then determine whether, according to the purpose of the rules, there is a wish for that law to be applicable. Currie proposed a modern version of the unilateral method in which he determined the applicable law by defining the spatial reach of the substantive laws, like the statutists, but unlike them, he considered that this should be done through an ad hoc judicial interpretation of the purposes and policies underlying these rules to discern the interest in its applicability, rather than classifying the laws as personal or real. The concept of state interests became popular among most of the modern conflict of laws theories in the US, and both doctrine and judicial authorities recognised this notion. As a result, most of the approaches developed in the US followed, at least in part, a unilateral approach (although note that the Restatement (Second) of Conflict of Laws (1971) contains a combination of both multilateral and unilateral approaches). Symeonides (2015).

[38]Tang (2009), p. 5.

[39]Ibid., p. 5.

[40]1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters [OJ (1972) L 299/32].

[41]Council Convention on the accession of the Kingdom of Denmark, Ireland and the United Kingdom of Great Britain and Northern Ireland to the Convention on jurisdiction and the enforcement of judgments in civil and commercial matters and to the Protocol on its interpretation by the Court of Justice (Signed on 9 October 1978) (78/884/EEC).