

Identities in EU PIL – an outdated social model?

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“Changes and challenges in cross-border litigation: a post-referendum view from the UK”

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Abstract

Private international law as uniformed by EU legislation has fully subscribed to the notion of habitual residence as a connecting factor as well as the consumer/trader dichotomy. Both concepts provide descriptors of the acting parties and assigning identities to them as well creating a person centred basis for choice of law. This has replaced the traditional notion of 'the proper law of the contract' as practiced in English common law but also in traditional continental legal systems. This paper wants to discuss whether this person centred approach should have a place in a modern society and what different results an alternative transaction based concept could achieve. 2

Identities in EU PIL

- A shift away from the ‘proper law of the contract’
- towards the ‘proper law of the person’
- How was this achieved?

Identities in EU PIL

- Traditional: the closest connection rule
- Art. 4 (2) RC: ... it shall be presumed that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his **habitual residence**, or, in the case of a body corporate or unincorporate, its central administration.
- Art. 4 (2) Rome I Reg: the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his **habitual residence**.

Identities in EU PIL

- The Rome Convention
 - *Articles 3 and 4*
 - *the ‘weak’ and ‘strong’ presumption theories*
 - *room for discretion – confirmation in Case C-64/12 (Schlecker v Boedeker, 2013)*
 - *Scathing criticism by Prof Hartley in Trevor C Hartley, The European Union and the Systematic Dismantling of Common Law of Conflict of Laws, 54 ICLQ (4): 813 (2005)*

Why does it matter?

“Again ‘system’ prevails over practicality. Protecting the interest of States prevails over doing justice to individuals.

Thanks to the European Court, bad-faith litigants can now go about their business without fear of antisuit injunctions, at least as long as they do not stray beyond the confines of the European Union.”

[Trevor C Hartley, *The European Union and the Systematic Dismantling of Common Law of Conflict of Laws*, 54 ICLQ (4): 813 (2005), 822.]

Commenting on *Turner v Grovit* C-159/02, 27 April 2004 where Grovit sought to impede revelations about tax fraud allegedly committed by his company by seising a Spanish court, hoping to take advantage of the English claimant’s limited financial means and being unable to defend his case abroad. 6

Why does it matter?

- Jan Smits:

- “This disconnection of norms governing **people’s behaviour** and the law of the State finds its best-known application in the private international law. **Private actors**, such as citizens and firms, are increasingly able to choose the applicable law and court of their liking.[...] The result is that law becomes more and more a matter of choice, leading to different laws being applicable on the territory of one State.”

Jan Smits, A Radical View of Legal Pluralism, in Pluralism and European Private Law, Leone Niglia eds. (Oxford: Hart, 2013), 166-167.

- Brigitta Lurger:

- “This restriction of choice with respect to mandatory private law is **not the malicious gesture of a power-crazy State** but owes its existence to the political order of the States... **States and citizens** alike have a legitimate expectation to be **subject to the mandatory rules** in force in their **political systems.**” [Brigitta Lurger, A Radical View of Pluralism? Comments on Jan Smits, in Pluralism and European Private Law, Leone Niglia eds. (Oxford: Hart, 2013), 176.]

Identities in EU PIL

- The Rome Convention
 - *Article 6 (2)*
 - *Case C-64/12 (Schlecker v Boedeker, 2013)*
 - *shows that a transaction based model is still practiced*
- *see Art 6 (2) RC (next slide) and*
- *Art. 8 (3) Rome I Reg: “Where the law applicable cannot be determined pursuant to paragraph 2, the contract shall be governed by the law of the country where the place of business through which the employee was **engaged** is situated.”*

Art. 6 (2) RC

“Notwithstanding the provisions of Article 4, a contract of employment shall, in the absence of choice in accordance with Article 3, be governed:

- (a) by the law of the country in which the **employee habitually carries out his work in performance of the contract**, even if he is temporarily employed in another country; or
- (b) if the employee does not **habitually carry out his work** in any one country, by the law of the country in which the place of business through which he was engaged is situated;

unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.”

Identities in EU PIL

- *However, the identity centred approach spreads across other sectors of EU legislative activity*
- *Parts of this is relating to PIL, for instance*



European regulations and directives affecting PIL

- Brussels I (old) 2001 and new (2012)
 - Preamble, Recital 1 and Article 2
 - **uses the identity of**
 - consumer
 - **but defines contracts as consumer contracts, not the consumer as such (Art.15 (1))**
 - **The purpose of the contract is the defining factor in this definition.**

European regulations and directives affecting PIL

- Rome I 2008
 - Preamble, Recital 1 and Article 2
 - **uses the identities of**
 - consumer and
 - professional
 - **but defines contracts as consumer contracts, not the consumer as such in Art. 6 in the same way as Brussels I but with the addition of the professional as the counterpart.**
 - **The purpose of the contract is the defining factor in this definition but from the point of view of the consumer, the professional is just ‘acting’. His/her purpose is not defined.**

Two major historic approaches in Europe

- Subjective approach
 - identity based, the description of the acting person is the angle
 - Historically derived from a [privileged] class of persons within feudal society – ‘commercial men’, merchants
- Objective approach
 - ‘action’ based, description of commercial acts are the angle
 - Historically attributed to the emergence of Napoleon’s Code Civil of 1807, hence the post revolutionary, ‘republican’ approach

Based on this understanding

- what is the current prevailing approach taken by the EU legislature?

Examples of traditional merchant law in detail

- French Code de Commerce
 - Book I, titles I and II Articles L110 and L121
 - listing commercial acts and
 - defining traders

Examples of traditional merchant law in detail

- German Handelsgesetzbuch
 - §§ 1 and 2
 - these two provisions introduce a range of technical terms and their definitions
 - *Kaufmann, Gewerbe, Unternehmen, Handelsgewerbe* - Merchant, Trade, Undertaking and Commercial Trade
 - which have no direct counterpart in English or Scots law. My translation is therefore an approximation. The English legal language uses related terms in an informal and colloquial manner such as business, businessman, trade or commerce.

Examples of traditional merchant law in detail

- Austrian Unternehmensgesetzbuch
 - §§ 1, 2 and 4
 - This code has been reformed in 2007.
 - It has replaced the former *Handelsgesetzbuch* that was derived from the older German (Prussian and imperial) codifications sharing a lot of case law across borders since 1938
 - and took the opportunity to adjust its language to the new custom developed in EU legislature
 - the legal consequences of being classed as an ‘entrepreneur’ remain very similar, though. The term is defined and used as a technical term.

International commercial contract law

- Vienna Convention on the International Sale of Goods, 1980
 - Articles 1 and 2
 - Here, neither the identities nor the nature of the contract are taking centre stage, the provision is a **scope provision**.
 - This convention in my view contains the most elegant way of defining its sphere of application leaving enough room for the national legal systems to accommodate its scope.

International and European commercial contract law

- CESL – proposal for a Common European Sales Law 2011
 - Articles 1, 2 and 7 of the Regulation (the *Chapeau*)
 - These articles are scope provisions as well as defining the identities of the contractual parties.
 - CESL also refers to the contract in these provisions in order to define the scope.
 - The two corresponding identities created here are the ‘consumer’ and the ‘trader’. Traders are subdivided into traders and SMEs.

European regulations and directives affecting contracts

Directive 1999/44/EC of the European Parliament and of the Council of 25 May 1999 on certain aspects of the sale of consumer goods and associated guarantees

Official Journal L 171 , 07/07/1999 P. 0012 - 0016

Article 1

Scope and definitions

(a) consumer: shall mean any natural person who, in the contracts covered by this Directive, is acting for purposes which are not related to his trade, business or profession;

...

(c) seller: shall mean any natural or legal person who, under a contract, sells consumer goods in the course of his trade, business or profession;

European regulations and directives affecting contracts

- Package Travel Directive (old) 1990
 - Articles 2
 - **creates three identities:**
 - organizer
 - retailer
 - consumer
- Package Travel Directive (new, Proposal) 2013
 - Preamble, Recital 7 and Article 3
 - **creates four identities**
 - traveller - to include 'business travellers'
 - trader
 - organiser
 - retailer

European regulations and directives affecting contracts

- **Passengers Rights Regulation 2004**
 - Preamble, Recital 1 and Article 2
 - **creates one identity of**
 - passenger
 - **and four counterparts of**
 - air carrier
 - operating air carrier
 - community carrier
 - tour operator
 - **It also refers expressly to the ‘organiser’ and its meaning created in the Package Travel Directive 2009 (Art.2). It also refers to ‘consumer protection’ in a general way provided by the EU Treaties, Art. 169 TFEU. (Preamble)**

European regulations and directives affecting contracts

- Time Share Directive 1994 (old)
 - Preamble, Recital 1 and Article 2
 - **creates two identities of**
 - vendor and
 - purchaser
- Time Share Directive 2009 (new)
 - Articles 1 and 2
 - **create two identities of**
 - consumer and
 - trader
 - defined in Art. 2
 - **it also defines types of contract where the consumer as one of the parties is part of the definition.**

Implementation of EU ‘identities’ into national law – A new ‘European’ dichotomy?

- German Civil Code, Book I, Title one,
 - pragmatic list of implemented EU law
 - §§ 13 and 14 create and define the identities of consumer and entrepreneur [this is the literal translation. ‘Trader’ seems to reflect more the German *Gewerbetreibender* and therefore another technical term that is extensively defined in the HGB and trade tax and trade licencing codes (*Gewerbeordnung, Gewerbesteuer*).
- Is the use of language randomly chosen given the large range of terms used in EU texts? Does the definition correspond to source texts?
- Does this lower the threshold of responsibilities compared to the mdefinition of merchant? Is there a *de minimis* rule as in merchant law?
- Is not rather the **purpose** of the contract the centre of attention?

Other uses of ‘entrepreneur’ or ‘enterprise’ / undertaking in German and European law

- The term ‘undertaking’ denotes an identity in EU competition law after Art. 101 TFEU.
- The term ‘entrepreneur’ receives its own definition in taxation law, corporate and income tax act. It defines the applicability of VAT and income tax according to the source of income identified relying upon this definition.
- For this reason the term must have a legally defined technical meaning.
- It clearly differs throughout the legal system and all four uses of this term stand alone and unrelated to each other.
- Can this be tolerated on the long term?

The connection with tax law

- DTCs are the PIL of taxation
- The system of allocation relies predominantly on the physical presence of the person or its nationality
- it is person centred
- But there are exceptions, eg
 - real estate
 - VAT
 - employment contracts
- Following the **sources** method

Habitual residence

- The connecting factor in the identity based system is effectively the habitual residence.
- An impression is created that the term has an agreed meaning
- It is rather a hybrid expression
- Combined and derived from national concepts of residency used to define the basis mainly for taxation and other public systems and core areas of state acting
 - such as ordinary residence
 - and domicile
- The aim is to offer an informal EU wide term without a definition possibly to respect subsidiarity

CESL (COM(2011) 635 final) – Article 4

Cross-border contracts

1. The Common European Sales Law may be used for cross-border contracts.
2. For the purposes of this Regulation, a contract between traders is a cross-border contract if the parties have their **habitual residence** in different countries of which at least one is a Member State.
3. For the purposes of this Regulation, a contract between a trader and a consumer is a cross-border contract if:
 - (a) either the address indicated by the consumer, the delivery address for goods or the billing address are located in a country other than the country of the trader's **habitual residence**; and
 - (b) at least one of these countries is a Member State.
4. For the purposes of this Regulation, the **habitual residence** of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a trader who is a natural person shall be that person's principal place of business.
5. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment of a trader, the place where the branch, agency or any other establishment is located shall be treated as the place of the trader's **habitual residence**.
6. For the purpose of determining whether a contract is a cross-border contract the relevant point in time is the time of the agreement on the use of the Common European Sales Law.

Concepts of residence in taxation

- Could not differ more among EU states and beyond
- Are further complicated by the concepts used in DTCs
- For instance:
 - residence for tax purposes in Germany is established simply and technically by having a **'permanent home available to him'** there (apartment, holiday home, hotel room, camper van etc)
 - residence for tax purposes in the UK is established by a **number of circumstances** measurable by amount of time spent in the country
 - residence under the German-British DTC is subject to specially designed rules there which may not match the national rules but only meant to split income, not establish tax liability.
 - A third way of establishing tax liability is by **nationality** as in the USA.

Text DTC between UK and Germany (2010)

- Article 4 Resident
- 1) For the purposes of this Convention, the term "resident of a Contracting State" means any person who, under the laws of that State, is liable to tax therein by reason of his **domicile, residence, place of management, place of incorporation or any other criterion of a similar nature**, and also includes that State and any political subdivision or local authority of a "Land" or a Contracting State. This term, however, does not include any person who is liable to tax in that Contracting State only if he derives income or capital gains from sources therein or capital situated therein.
- 2) Where by reason of the provisions of paragraph 1 an individual is a resident of both Contracting States, then his status shall be determined as follows:
 - a) he shall be deemed to be a resident only of the Contracting State in which he has a permanent home available to him; if he has a **permanent home available to him** in both Contracting States, he shall be deemed to be a resident only of the Contracting State with which his personal and economic relations are closer (centre of vital interests);
 - b) if the Contracting State in which he has his centre of vital interests cannot be determined, or if he does not have a permanent home available to him in either Contracting State, he shall be deemed to be a resident only of the Contracting State in which he has an habitual abode;
 - c) if he has an habitual abode in both Contracting States or in neither of them, he shall be deemed to be a resident only of the Contracting State of which he is a national;
 - d) if he is a national of both Contracting States or of neither of them, the competent authorities of the Contracting States shall settle the question by mutual agreement.- 11 -
- 3) Where by reason of the provisions of paragraph 1 a person other than an individual is a resident of both Contracting States, then it shall be deemed to be a resident only of the State in which its place of effective management is situated.
- 4) If the place of effective management of a shipping enterprise is aboard a ship, then it shall be deemed to be

Back to the ‘Napoleonic’ approach?

- In view of the excessive confusion caused by the case by case creation of identities.
- would not the ‘purpose’ of the contract – the objective approach – be a more promising starting point for the distinction between commercial and non-commercial contracts?
- This can be mirrored by the ‘source’ method in taxation.

CISG as a counterpart to EU consumer protection legislation

- The scope provision of CISG describes its applicability to international commercial contracts
- The scope provisions of CESL describe its applicability to international (albeit EU) ‘consumer contracts’ which could be seen as a counterpart to commercial contracts. These could be renamed ‘private contracts’.

Article

Maren Heidemann,

“Identities in Contract – Merchant Law in Europe and the Future of European Contract Law”

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