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Predicaments of the Governance of "Choice of Law" in e-Commerce Consumer Transaction

Sheela Jayabalan, Daleleer Kaur Randawar and Hartini Saripan,
Faculty of Law, Universiti Teknologi Mara, 40450 Shah Alam, Selangor, Malaysia

Abstract: A mind shift in the concepts of private international law is in dire need of a change in Malaysia not only because of the borderless nature of the internet but for the evolution of a new way of life in the unfolding age of information and knowledge. Consumers are in dire need of protection to accord certainty and confidence of their rights and liabilities for any activities interplayed via the internet. The current law which is common law based is not feasible when consumers transacts via the internet because determining choice of law based on imputation of "close connection", "intention of the parties", "place of businesses" are all geographically based. Businesses set up in the WWW do not have any physical presence. Adapting doctrinal analysis, this study analyses the incomprehensiveness of the adherence to common law principles in resolving choice of law issues specifically in e-Commerce consumer contracts in Malaysia. In the arena of private international law, articulating consumer protection through legislative measures will give the order and degree of certainty for the consumer society to function. The researchers also ponder into harmonization of the private international law, specifically on choice of law especially at asean level as a means of strengthening consumer protection comparing the approach undertaken by the european union community. Even more so the fact that the internet is under the predomination that is "virtual" which encompass of mere networks. A paradigm shift in the mindset for determining choice of law based on physical presence is desired especially in Malaysia which is common law based and to be at pace with technological development such e-Commerce transactions.

Key words: Choice of law, common law, e-Commerce, paradigm, virtual

INTRODUCTION

Once the courts determine that it has jurisdiction to hear a proceeding, the next question to be decided is which substantive law should be applied to decide the merits of the dispute, i.e., the choice of law or also known as the proper law (Cheshire and North, 1974). The proper law of a contract is simply the legal system which regulates the contractual relationship between the parties to the contract as defined in amin Rasheed Shipping Corp v Kuwait Insurance Co. as "the substantive law of the country which the parties have chosen as that by which their mutually legally enforceable rights are to be ascertained" (Cheshire and North, 1974). Its origin is stated to be "the fidelity of the Victorian judges to the Benthamite dogma of Let's do it", i.e., freedom of contract". Cheshire and North (1974) English common law principles on choice of law as discussed above does not distinguish in approaching a contract with a consumer or non-consumer because the common law principles on determining the proper law goes back in time of the roman empire in 817 as noted in a book by Friedric K. Juenger describing the origins of the conflict of laws. Cheshire and North (1974) he stated that "when st. Agobar, archbishop of lyon, wrote to louis the pious, "it often happens that five men each under a different law may be found walking or sitting together" which promulgated the issues on conflict of laws because the five men of different legal system posed legal diversity which raised conflicts of laws questions. He questioned which law should govern the marriage of a Lombard with a Roman or the contracts of a Visigoth with a Hispano-Roman. Apparently, rules of considerable complexity were developed to deal with interpersonal choice of law problems. Eventually, however, imaginative legal minds found a more elegant solution. The professio uris, a declaration originally meant to evidence the partie's ethnicity could be employed in a fictitious manner. By professing to belong to a particular ethnic group, a party could in effect stipulate the law it wished to govern". In other words, the choice of law will be that of intended by the contracting parties. Judicial incantations of this doctrine to ascertain the choice of law can be inferred from the statements of the following two judges.

Corresponding Author: Daleleer Kaur Randawar, Faculty of Law, Universiti Teknologi Mara, 40450 Shah Alam, Selangor, Malaysia

- Willes J: "In such cases it is necessary to considerby what general law the parties intended that the transaction should be governed or rather to what general law it is just to presume that they have submitted themselves in the matter" (Dicey and Morris, 1949)

- Lord Wright: "It is now well settled that by english law the proper law of the contract is the law which the parties intended to apply"

Cheshire and North (1974) another theory of "what should be the proper law or choice of law" is the law of the country that the contract may be regarded as localized. Dicey and Morris stated that to decide on the proper law or choice of law to adjudicate a case is the system of law by which the parties intended the contract to be governed or where their intention is neither expressed nor to be inferred from the circumstances, the system of law with which the transaction has its closest most real connection. What they meant was "the choice of law should be that of the country in which its elements are most densely grouped will represent its natural seat and the law to which in consequence it belongs".

In Malaysia, the contracts Act 1950 does not lay down any ground rules to determine the "choice of law" in the event of a dispute in a contract. Thus by virtue of the civil law act 1956, English common law governing "proper law" or "choice of law" will be the law governing the choice of law or proper law in Malaysia which posits on freedom of contract. Therefore, the determining factors for choice of law or the proper law in the event of a dispute in a contract are the courts will enforce the party's express choice of law. Since 1796, it has been recognized that at the time of making the contract, the parties may expressly select the law by which it is to be governed Bonython v Commonwealth of Australia. They can do so by a simple statement that the contract shall be governed by the law of a particular country (Dicey, 1993) or if there is no express choice of law then the court will look into the contracting party's intention to imply the choice of law. If the choice of law is not expressed, the courts will deduce from all relevant circumstances the proper law or choice of law as illustrated in R v international trustee, lord Atkin stated that "In coming to its conclusion the court will be guided by rules which indicate that particular facts and conditions that lead to a prima facie inference in some cases an almost conclusive inference as to the intention of the parties to apply a particular law, e.g., the country where the contract is made, the country where the contract is to be performed if the contract relates to immovable property the country where they are situated, the country under whose flag the ship sails in which the goods are contracted to be carried. But all these rules serve to give prima facie indications of intention. They are all capable of being overcome by counter indications, however difficult it may be in some cases to find such or if the courts cannot determine the choice of law where there are no express provisions nor can it be implied then the courts will determine objectively the system of law which has the closest and most real connection to the transaction". Dicey and Morris very neatly drew the line between the second and the third test. This third test comes into application only if the second test fails to imply the intention of the contracting parties. In the second test, the surrounding circumstances were considered in order to ascertain the party's actual intention in the sense of what they would have said if asked at that time. In the third test, the surrounding circumstances were considered to determine, objectively and irrespective of the party's intention with which system of law the transaction had its closest and most real connection and that process involved the application of a rule of law not process of construction (Juenger, 2005). In all the three rules as stated above in determining the proper law, reliance is on the basis of what the contracting parties had expressly stated or that of inferred from the contract or conduct of the parties or as imputed from the intention of the contracting parties. In other words, the proper law is permeated on the notion of freedom of contract. It is the contracting parties who decide what the "proper law" is or the law they intend to adjudicate their contract in the event of a dispute. If the contract states the express choice of law, the court determining the dispute will be as per the express provisions in 1938. The courts will honour the choice of law chosen by the contracting parties provided, "the intention expressed is bona fide and legal and provided there is no reason for avoiding the choice on the ground of public policy as illustrated in the case of vita food products Inc. v Unus Shipping Co., Ltd." In the absence of an express choice, the courts will infer the proper law by construing the intention of the contracting parties based on the facts and the circumstances surrounding the negotiation of the contract (Dicey and Morris, 1949). The factors taken into consideration by the court to infer the implied choice of law are as follows; where the parties provide that any disputes should be submitted to adjudication or arbitration in a particular country which is an indication that the law of that country is the proper law by implication as illustrated in compagnie tunisienne de navigation SA v compagnie d' armement maritime SA, the language in which the contract is drafted; the place the contract is to be performed and the place payment is to be

made; the locations and places of business of the parties, the currency in which payment is to be made and the maturity of the legal principles in a particular legal system over the relative infancy of another. However, these factors are not conclusive. They are merely guiding factors for the courts to infer the proper law to the desirability of the contracting parties. In the absence of an express or implied choice of law, "the courts have to impute an intention or determine for the parties the proper law which as just and reasonable persons they ought to or would have intended if they had thought about the question when they made the contract" as illustrated in mount Albert borough council v Australasian Assurance Society Ltd. (Cheshire and North, 1974). The proper law in such a circumstance is "that with which the transaction has its closest and most real connection." In Amin Rahseed Shipping corp v Kuwait Insurance Co., (Cheshire and North, 1974) the requirement that the transaction should have its "closest and most real connection" is decided by weighing multitude of factors to impute the proper choice of law.

Dicey and Morris noted that search for the inferred intention (implied choice of law) and the search for the system of law with which the country has its closest and most real connection is "a fine one which is frequently blurred" (Juenger, 2005). Dicey and Morris (1949) observed that in practice, the courts often moved straight from the first stage to the third stage because "the test of inferred intention and close connection test merge into each other and because before the objective close connection test became fully established the test of inferred intention was in truth an objective test designed not to elicit actual intention but to impute an intention which had not been formed (Cheshire and North, 1974). Though in Jones v Metropolitan Life Insurance Co., (Cheshire and North, 1974) and Auten v Auten (Juenger, 2005) illustrates that the country in which its elements are most densely grouped will represent its natural seat and the law to which in consequence it belongs denoting the proper law for the contract. By condoning this practice, the courts implicitly recognised the principle of party autonomy. It is this party autonomy which is practiced under the notion of "freedom to contract" when parties enter into contracts which is in fact one of the continental maxims adopted in England on the topic of private international law, i.e., that of huber the most influential purveyor whose idea of selecting the law of the place the "parties had in mind" to govern a contract which Mansfield endorsed in Robinson v Bland still lingers on in the english "proper law" doctrine (Furmston and Brownsword, 2010). Thus, it is this common law principle that has been engulfed and practiced as the private international law in Malaysia which makes no mention of consumer protection or consumer welfarism.

UNSUITABILITY OF THE COMMON-LAW DOGMA ON CHOICE OF LAW

Furthermore, the epitome of contracting being the doctrine of freedom of contract was regarded as a fundamental right for parties to contract. This notion of freedom is actually a privilege to consumers because it advocates freedom to the parties to choose the proper law they wish to govern their contract in the circumstance of a dispute and the courts are to honour the contracting partie's desire. However, as noble as the law seems to be the doctrine of freedom of contract which gives the contracting parties the choice to determine the proper law in a dispute is not viable in the context of a consumer contract entered via the internet. Should the contracting parties be allowed to choose any law in the world however alien it may be to the factual character of the contract without any check and balance. This would be a very dangerous proposition in the context of consumer contracting via the Internet especially in a standard form contract because this freedom would encourage "forum shopping" which could be to the disadvantage of the consumer. In Malaysia, consumers contracting via the Internet are left in a state of conundrums not only as to where they might sue or be sued due to the muddled state of the law as discussed above but also the common law principles governing proper law or choice of law that they will be bound for the following reasons. Firstly, if for example, a consumer in Malaysia has agreed to an express choice of law of another country when contracting via the Internet, the consumer is agreeing to the legal system of another country which could be to the disadvantage of the consumer. A consumer who is presumed to be the weaker party would have to submit to the law of another country which may not be favourable to the consumer and that the consumer may have no knowledge whatsoever. Furthermore, the cost of litigation in another country, hiring a lawyer versatile of another country's legal system and being dragged to the court of another country adds on to the detriment and disadvantage of the consumer. Secondly, the guiding factors to determine implied choice of law as well the factors taken into consideration to determine the search for the system of law with which the country has its closest and most real connection cannot be left under a fitful light. The determination and ascertainment of the choice of law

cannot be left to the "implied intention of the contracting partie's or to the objective test of"closest and most real connection" especially in a consumer contracting via the Internet. There must be coherence in the law which provides congruent guidance with the interest and welfare of the consumers in mind. There must be a non-exhaustive list providing guiding factors to determine the proper law or choice of law with the welfare of the consumers in a B2C contract (Dicey, 1993).

YAHOO'S CASE: THE IMPORTANCE OF LEGISLATIVE INTEFERENCE

The Yahoo case demarcates that coherence and congruency of the law mandates the sovereign of a state to invoke and exercise its right and jurisdiction to protect its society in one's own geographical jurisdiction. In this case, UEJF et Licra v Yahoo Inc. et Yahoo France 26 where the French court ordered the US Internet portal Yahoo to block access to its United States (US) website (Anonymous, 1932) from France in order to prevent internet users in France from accessing auctions of items of Nazi memorabilia because French law prohibits the exhibit of objects with racists overtones. In the US, the US court considered the French judgment and held that the French court had no right to make an order affecting operation of a US website (Anonymous, 1932). However, the French contended that it was merely upholding the law of its own country which prohibits the exhibit of objects with racist's overtones as provided in Article R 645-1 of the French criminal code. Furthermore, the court ordered the removal of Yahoo's Nazi material from the French site and not from the US based site. The French court did not impose French law to the American but the French court's order was intended to help maintain a reasonable level of compliance with French law within France. Thus, the French contented that as the harm is suffered in France, the French court had competent jurisdiction over this matter pursuant to Article 46 of the new code of civil procedure (Humphrey, 1980).

DEVELOPMENT IN OTHER COUNTRIES THE ROME CONVENTION AND ROME REGULATION I, THE EUROPEAN UNION

The most significant rules which refers to contractual obligations in any situation involving a choice between the laws of different countries with consumer protection intact is the Rome convention. The Rome convention came into force in 19 June 1980 (hereinafter cited as Rome convention). This convention will be scrutinized as it has been implemented by all the member states of the european unionfor example in England the Rome convention has been implemented by the contracts (Applicable Law) Act 1990 and has the force of law since 1 April, 1991. The Rome convention will be scrutinized to assess the compatibility of its provisions to choice of laws and consumer protection and the suitability of the provisions when dealing with the choice of laws when contracting via the Internet to ascertain whether Malaysia should follow suit in enacting its own choice of laws act which would give significance to consumer protection. Only the relevant provisions pertaining to choice of law and consumer protection are scrutinized and summarized as follows.

Article 3 (freedom of choice): A contract shall be governed by the law chosen by the parties as expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of case to the whole or a part only of the contract. The parties may at any time agree to subject the contract to a law other than that which previously governed it. Even though the parties have chosen a foreign law, this does not prejudice the application of mandatory rules of the law of that country.

Article 4 (applicable law in the absence of choice): To the extent that the law applicable to the contract has not been chosen in accordance with Article 3, the contract shall be governed by the law of the country with which it is most closely connected. Subject to the provisions of paragraph 5 of this article, 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 unincorporated, its central administration. However, if the contract is entered into in the course of that party's trade or profession that country's european community convention on the law applicable to contractual obligations Rome Convention in 1980 shall be the country in which the principal place of business is situated or where under the terms of the contract the performance is to be effected through a place of business other than the principal place of business, the country in which that other place of business is situated.

Article 5 (certain consumer contracts): This article applies to a contract the object of which is the supply of goods or services to a person (the consumer) for a purpose which can be regarded as being outside his trade or profession or a contract for the provision of credit for that object. Notwithstanding the provisions of Article 3,

a choice of law made by the parties shall not have the result of depriving the consumer of the protection afforded to him by the mandatory rules of the law of the country in which he has his habitual residence: if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and he had taken in that country all the steps necessary on his part for the conclusion of the contract or if the other party or his agent received the consumer's order in that country or if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy (Collier, 1988)

Not with standing the provisions of Article 4, a contract to which this article applies shall in the absence of choice in accordance with Article 3 be governed by the law of the country in which the consumer has his habitual residence if it is entered into in the circumstances described in paragraph 2 of this article (Collier, 1988).

Analyzing the provisions of the convention, Article 3 of the Rome convention implements the common law doctrine of freedom of contract which provides that contracting parties have the privilege of expressing the choice of law. Otherwise the courts will imply the choice of law. Article 4 of the Rome convention promulgates the common law principle of the "close connection" test in the absence of express or implied choice of law in a contract. Thus, the Rome convention in actual fact merely integrates the common law principles on choice of law to its convention. However, in addition to the engulfing of the common law principles on choice of law into the convention, the convention is supplemented with provisions for consumer protection, whereby, firstly, consumers are free to choose the choice of law they desire. Secondly, the chosen express choice of law, does not defy any consumer protection laws which are known has the mandatory laws. Nor does Article 4 stated to have any effect to consumer contracts when a contract is entered into in the absence of choice of law as provided in Article 5 where by the mandatory protection laws are not perturbed and the choice of law will be governed by the law of the country in which the consumer has his habitual residence. However, this privileges are accorded subject to the qualification that Article 5(2), "if in that country the conclusion of the contract was preceded by a specific invitation addressed to him or by advertising and he had taken in that country all the steps necessary on his part for the conclusion of the contract or if the other party or his agent received the consumer's order in that country or if the contract is for the sale of goods and the consumer traveled from that country to another country and there gave his order, provided that the consumer's journey was arranged by the seller for the purpose of inducing the consumer to buy." Although, the wordings of Article 5 protect the consumer, however the wording of the provisions imputes physical presence of either the place of business or physical action by the self/trader or his agents. The Internet however works on the premonitions that "the net is structured logically and not geographically" and the fact that it is accessible from every where in the world, a web page though primarily intended for certain countries can be accessed nonetheless by anyone from anywhere. Thus, this characteristic would not tantamount to; specific invitation by the seller/trader to the consumer; advertising by the seller/trader to the consumer; the consumer has taken the steps necessary on his part for the conclusion of the contract which very much depends on whether the advertisement or specific invitation amounts to an offer or invitation to treat to ascertain where the contract is concluded. However, the provisions of the Rome convention became obsolete and did not take into account the rapid growth of contracts concluded by electronic. As such the Rome I regulation replaced the Rome convention 1980 in the EU member states and applies to all contracts concluded as from 17 December, 2009. To a large extent, Rome I replicate the provisions of the Rome convention. The provisions of the Rome I regulation concerning party's autonomy haven't been substantially modified. As in the Rome convention the main rule is preserved and as Article 3(1) stipulates, the contract must be governed by the law chosen by the parties. The Rome I regulation maintains the parties, rights to choose as lex causae the law of the country which has no objective connection with the relationship between the parties to make partial choices (depecage) (Article 5(1)) and to make choice of law at any time during the existence of contractual relation (Article 5(2)). The choice of law of the country which has no objective connection with the relationships of the parties is limited by the application of mandatory rules of the country which cannot be derogated from by the contract (the Rome I regulation Article 3(3) (Guterman, 1966). The special provisions restricting the freedom of choice apply to consumer contracts and contracts of employment and they are aimed at the protection of the weaker party. The protection is ensured by the application of mandatory rules of the law that would be applicable in the absence of choice (law of the country of the weaker party's place of habitual residence) (Articles 6 and 8) upon meeting one of

the specified conditions, inter alia if the contract is concluded with an entrepreneur in respect of his activities and the entrepreneur; carries out his business or profession in the consumer's habitual residence in any way directs his activities to that member state or several of these countries (Geoffrey *et al*., 1987). In particular, Rome I preserve the partie's right to choose the law that will govern their contract where this choice is expressly made or clearly demonstrated by the terms of the contract or the circumstances of the case (Article 3(1) (Geoffrey *et al*., 1987).

Harmonisation of the law: The model of governance suitable for the cyber arena would be the cyber international discourse. This model would require the state to harmonise its laws with other countries known as hard globalisation. In hard globalisation, "the principles globalised are mandatory even though gleaned from elsewhere". Juenger (2005) hard globalisation is stated to be problematic because the countries world over have to come to a consensus in applying the law. Fears of relinquishing the sovereignty of one's own country is the deterring factor in hard globalisation. Nonetheless, international comity, reciprocal arrangements, harmonization of the laws, code of practices should be perceived as the pragmatic savoir as between countries of the world. As Juenger wrote, "At a time where the cliche word "globalization" is in everyone's mouth, it seems preserve to lavish attention on purely domestic problems and to ground our discipline on outdated notions about state sovereignty. In view of the ever-increasing interdependence of nations we simply cannot afford to disregard what happens outside the united states. Moreover, the unprecedented mobility of persons, things and transactions engenders innumerable international conflicts problems that cannot be satisfactorily resolved if we eschew the comparative method (Juenger, 2005). Hence in view of the fact that consumer protection is a global concern, hard globalisation is foreseeable in the near future.

CONCLUSION

Consumers protection cannot be achieved by orthodox approaches premised on territorial borders and fossilized doctrines impractical to the modern world to resolve trans-border problems vis-a-vis the Internet specifically on choice of law in e-Commerce consumer transaction. The law deciding choice of law in Malaysia is premised on common law principles which does not give any significance to consumer protection. Preserving to archaic notions and doctrines would only result incoherence in the law. Certainty is needed in the area of private international law specifically on choice of law in e-Commerce consumer transaction. Therefore, the time is ripe and due in the current era of the internet for the rules of conflict of laws specifically choice of law in e-Commerce consumer transactions in Malaysia to respond to changes in the techniques of international trade, i.e., e-Commerce. Reformation of law is ecessitated not only to be in tandem with the development that has taken in technology but more so to protect the consumer society.

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