Party Autonomy in International Property Law

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Introduction

Roel Westrik
*Jeroen van der Weide**

1. Party Autonomy in (International) Property Law: What Is Going On?

No fewer than twenty-two universities throughout Europe and even Japan and Africa were represented at the 'Party Autonomy in (International) Property Law' conference, held at the Erasmus School of Law on 27-28 May 2010. Although this number includes speakers at the conference – eminent lecturers highly specialised in Civil Law, European and Private International Law as well as in International Property Law – it is still a remarkable figure. It becomes even more striking when one takes into account the main theme of the conference, which seemingly concerned an uncomplicated and simple question: Can or should parties to an international transfer of property or an international assignment of claims for receivables be permitted to make a choice with regard to the applicable law?

It appears the answer is affirmative only with respect to the underlying contractual relationship between the parties: for instance, a sales contract or a contract to assign. Of course, parties can choose the law applicable to their contractual relationship; this party autonomy is in fact the main principle, not only in substantive contract law but also in international contract law. See, for instance, Article 3 paragraph 1 of the Rome I Regulation on the law applicable to contractual obligations (Regulation [EC] No. 593/2008, OJ L 177/6), which clearly states freedom of choice as the first and most important 'uniform rule' (conflict of laws rule):

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> 'UNIFORM RULES
> *Article 3*
> **Freedom of choice**
> 1. A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.'

Then we come to (International) Property Law. Traditionally, within this area of law, party autonomy is not allowed, not to say strongly rejected. Basically, legal systems have founded their Rules of Property Law and their conflict of laws rules within this field on the *lex situs* rules that is the law of the place where the goods are situated. This rule excludes – so it would appear – the mere idea of party autonomy.

Hence, what is going on when parties enter into a contract concerning cross-border transportation of movables, an international sale of (im) movables, or an assignment of claims for receivables? The following is what happens – and is why conference attendance on the part of twenty-two universities may not be too astonishing.

Let us take Rotterdam – one of the world's largest ports – as an example. More than 800 million tons of goods were transferred in 2008 and 2009, a period during which the credit crisis caused a severe 'dip' in economic activity. Goods continue to come into the port of Rotterdam from everywhere, and are then transported further all over the world. By the time the goods arrive, they have already crossed multiple borders, and subsequently will cross even more. The central legal question that arises has to do with what happens to the related property rights when borders are and will be crossed. Do we recognise a German retention of title or an American security interest? Can a French seller and a German buyer in a purchase agreement concerning movable or immovable property agree that Dutch Law will be applicable in matters of ownership? Is party autonomy or, more specifically, a choice of law possibility allowed, or should it be allowed, in other areas of (International) Property Law, such as the assignment of claims for receivables? Is there a need for harmonised European conflict of laws rules on the proprietary rights regime applying to goods, claims and securities?

At the conference, members approached these questions by concentrating on four central themes:

1. General Aspects of Party Autonomy, as seen from the Perspective of Continental Law as well as of Common Law;
2. Private International (Property) Law;
3. Developments and Prospects in Europe and in European Law Projects (e.g. European conflict of laws rules for Property Law?);
4. Assignment in Private International Law; Financial Instruments/the Collateral Directive; Insolvency Law.

The scope and aim of the conference was not only to take an inventory of the legal controversies in the field, which are many, but also to have the academic world put forward its views on the probability or the possibilities of allowing party autonomy within (International) Property Law, in Continental Law as well as in Common Law.

Thus, this volume may be approached in at least two ways. The first consists in the discussion of legal possibilities and impossibilities for party autonomy in national law systems with regard to functioning within the frame of – or even being – European and/or (Private) International Law. This area is described by making:

i. a comparison between German Law *(von Hein)*, Belgian/French Law *(Sagaert)*, and Dutch Law *(van der Weide)*;
ii. a comparison between the Continental and the Common Law systems *(Struycken, Stevens)*;
iii. a comparative investigation into more specific legal conceptions such as assignment, 'collateral' as security, and insolvency *(Verhagen, Flessner, Wibier, Veder)*.

The second approach to this book is to enjoy the diverse authors' thorough investigations into the more fundamental views – questions and ideas hidden beneath the legal reality – or to read about the developments and prospects in Europe and in European Law Projects concerning the subject of party autonomy in (International) Property Law. In particular, Professor Drobnig and Ms Van der Grinten have pursued these developments and prospects as a specific topic of research; Van der Grinten has in fact written on the making of a Regulation within the Brussels' administration.

Especially with respect to the fundamental questions, this book aims to be an invitation for further research, because one other remarkable phe-

nomenon occurs. It emerges that the assumptions and ideas on how legal questions *should be* answered or, even more appropriate in the area of (International) Property Law, how these questions should be answered *imperatively*, may often be questionable. One example of an answer that is still commonly believed to be highly imperative is the *lex situs* rule. Traditionally, this rule leads to a negative answer to the question of whether party autonomy can be allowed in the field of (International) Property Law. In each of the contributions to this book, doubt exists as to whether this – supposedly – decisive rule of the *lex situs* still holds. Some of the authors even describe legal routes that may replace the *lex situs* rule in a way that will or may better serve what is called the 'interest of judicial matters' (see for instance Stevens, Verhagen, Wibier). However, even this seemingly undisputable variable 'interest of judicial matters' looks different when the light of research is thrown upon it. In an article published in 2010, Flessner analyses – or even deconstructs – extensively the assumptions and arguments that so far have seemed to be undisputable in the field of party autonomy in International Property Law.[1] Because of the general significance of this article, and its being complementary to the research on and the study into the underlying arguments that have been posited in the contributions to this book, Flessner's article has been – in an English translation – included separately (see Chapter 1).

Within the Rotterdam School of Law, the topic of the conference is studied within the research programme 'Behavioural aspects of Tort and Contract Law: Reasons for Policymaking', headed by Professor Willem van Boom and Professor Michael Faure. The central focus of this programme is on the different forces, originating in any academic discipline or science, that may or do influence human – legal – behavior. Research is being done on the legal norms and legal standards as the underlying forces of – existing or preferred – legal rules, and on the influence these norms and standards may have on human behaviour or on that of commercial enterprises.

As regards the actual need for party autonomy in the area of (International) Property Law, a few observations may be instructive.

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1 A. *Flessner*, Rechtswahl im internationalen Sachenrecht – neue Anstösse aus Europa, in: Apathy et al. (eds.), Festschrift für Helmut Koziol, Wien 2010.

2. The growing significance of party autonomy in (International) Property Law

Why is it that parties involved in international trade have developed a need to choose by themselves the property law that is applicable to their transaction? This question of whether party autonomy or, more specifically, the possibility of making a choice of law is or should be allowed in Property Law is of growing significance in international trade practice, and for five reasons.

Firstly, the importance of international trade practice has grown enormously over the last few decades, and new patterns with respect to the traditional concept of rights *in rem* have emerged. The volume of trade, as previously mentioned, has grown to hitherto unknown proportions, and it is still increasing. Taking into account that legal systems have founded their (International) Property Law on the *lex situs* rule, the boundaries between countries currently form barriers in a sense that was previously unthought of as well. These are obstacles in a world that has become used to the *absence* of boundaries and that demands flexibility, not only in a technical but also in a legal sense.

Secondly, the questions of (International) Property Law as mentioned above are being answered differently in disparate legal systems, even though the *lex situs* rule is deeply established in the conflict of laws rules of countries throughout Europe and most parts of the world. The *lex situs* rule is thus becoming increasingly challenged.

Thirdly, the idea of party autonomy is gaining ground in national legislations as well as in European and international rulings. This provides a strong reason to reconsider the traditional rejection of party autonomy in (International) Property Law. An illustration of this actuality is the fact that in the drafting of the European Rome I Regulation, the dissenting opinions within the European Commission on the very subject of party autonomy (concerning Article 14 Rome I, the assignment of claims) were such that a sub-commission had to be installed. This sub-commission was expected to provide its report on the subject in June 2010, but the report was postponed because further study was necessary.[2]

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2 See the contributions in this book of *van der Grinten* (Chapter 7), *Verhagen* (Chapter 9) and *Flessner* (Chapter 10).

In the fourth instance, several and often conflicting interests lie beneath the main question as to whether party autonomy in (International) Property Law should be allowed. One important example is the idea of sovereignty of states. This notion implies that only state law can rule over legal issues, such as the question of whether foreign rights have to be acknowledged on the home territory. The idea has been the leading principle for states and legislators for a considerable time in Private International Law, and it still appears to be dominant: for example, in International Litigation Law. It needs no explanation that this principle of sovereignty of states must be overcome when cross-border trade needs to be facilitated. The tension even becomes enormous when (International) Property Law has to be made more flexible – see the aforementioned discussion on Article 14 Rome I. Another important example of an underlying interest is the principle that legal acts in (International) Property Law have an effect not only between the contracting parties but also against a third party. Many arguments that strongly reject the idea of party autonomy in (International) Property Law are based on this very principle, which can only be seen in context with – another important example – the *numerus clauses* principle.

In the fifth instance, it is doubtful whether traditional objections to the idea of party autonomy in (International) Property Law still hold. Society has changed and continues to do so rapidly; therefore, legal reality should change, or should have changed as well. However, the majority of rules and regulations have not yet been revised accordingly.

These five reasons may show why tension mounts rapidly as soon as the notion of party autonomy is brought up in matters of Property Law in international trade practice. They may explain the growing significance of questions of (International) Property Law when parties enter into a contract concerning cross-border transportation of movables, an international sale of immovables, or an assignment of claims for receivables. Nevertheless, it must be emphasised that – even before the globalisation of society and trade practice had begun to challenge the classical ideas and concepts within Private International Law – insiders in International Property Law had acknowledged that the subject of party autonomy was controversial.[3]

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[3] *Constantin Privat*, Der Einfluss der Rechtswahl auf die Rechtsgeschäftliche Mobiliarübereignung im internationalen Privatrecht, Ludwig Röhrscheid Verlag, Bonn, 1964; *Axel Flessner*, Fakultatives Kollisionsrecht, RabelsZ 34

3. Acknowledgments

The theme and the first organisational activities relating to the 'Party Autonomy in (International) Property Law' conference were raised in 2008, a year that developed into a period of economical setback. The mere fact that the conference – with its captivating lectures and fascinating set of contributions as assembled in this book – could be realised in May 2010 is due to the willingness and the genuine help of a few institutions and persons. We, Roel Westrik and Jeroen van der Weide, are deeply indebted to all the speakers and authors, to the Erasmus School of Law and its dean, Professor Maarten Kroeze, to Professor Willem van Boom and Professor Michael Faure, to the Vereniging Trustfonds Erasmus Universiteit Rotterdam, to Holla Advocaten, to Clifford Chance, to the Leiden Law School, to sellier. european law publishers, and to Jan Sramek Verlag for the kind consent to have the aforementioned article of Axel Flessner in the *Koziol Festschrift* translated. A special word of thanks for their significant help in several stages of the process is owed to Professor Axel Flessner, Professor Rick Verhagen, and Professor Xandra Kramer. The digital existence of the conference was made possible – with digital velocity – by Jolanda Bloem. The English text was being edited with the utmost care by our native speaker, Ms Donna Devine. Finally, without the crucial help of our secretaries, Gerda Albers, Maja Lucas, Sandra Klomp, Debbie Kneefel, and Margreet den Hond-Schol, there would not have been a conference or a book at all.

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(1970), 547-584; *Rolf H. Weber*, Parteiautonomie im internationalen Sachenrecht?, RabelsZ 44 (1980), 510-530.

A.
General Aspects of Party Autonomy, as seen from the Perspective of Continental Law as well as of Common Law

I.
Choice of Law in International Property Law – New Encouragement from Europe*

*Axel Flessner***

International property law invokes the law of the place where the asset is situated, the *lex rei sitae* or *lex situs*, to control the creation, content, exercising and transfer of property rights in the asset (rights *in rem*)[1], and the prevailing view says that this rule is 'mandatory'; in principle, the parties may not make their own, different choice of law.[2]

In the case of land, the rule invoking the law of the place where the property is situated is undisputed, whereas in the case of movable assets this is by no means self-evident in view of the great and still increasing international freedom of movement of property and people. The Swiss International Private Law Act (IPRG) of 1987 tried to take this into account by allowing the parties to subject the contractual acquisition of property rights in movable tangible assets to the law of the 'country of shipment', the 'country of destination' or the law 'to which the underlying contract is subject' (Article. 104). It stopped half way, however, establishing that the choice of law agreement 'cannot be used against third parties' (Article. 104(2)). In addition, there have been extensively developed proposals in the international academic literature to allow for

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* This article was published earlier as *Axel Flessner*, Rechtswahl im internationalen Sachenrecht – neue Anstösse aus Europa, in: Apathy et al. (eds.), Festschrift für Helmut Koziol, Wien 2010, p. 125-146.

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1 Section 31 of the Austrian International Private Law Act *[IPRG-Gesetz]*, Article 43 of the German Introductory Act to the Civil Code *[EGBGB]*.

2 *Verschraegen* in Rummel, Kommentar zum Allgemeinen bürgerlichen Gesetzbuch *[ABGB]* II, 3d ed. (2002) § 31 IPRG nr. 19; *Heldrich* in Palandt, Bürgerliches Gesetzbuch *[BGB]*, 67th ed. (2008) Article 43 EGBGB nr. 2.

disposals of movable property a choice of the applicable law by the parties to the transaction.[3]

In Germany, the further development of these ideas was cut off by the Reform Act of 21 May 1999, which, for property law, added Articles 43 to 46 to the Introductory Act to the Civil Code (EGBGB). These provisions codify the reference to the location of the asset as the basic rule, and they are regarded as mandatory by their authors and by the view that prevails in commentaries and textbooks, allowing no different choice of law by the parties themselves.[4] Even the new escape clause in Article 46 EGBGB is not regarded by the prevailing view to open a way for an agreed choice of a law other than the law where the property is situated.[5]

The national legislature may perhaps silence the academics in its own country, but it will not halt academic developments and legislation in other countries and in the European Union. The built-in tension between going along with the gravitational pull of the place where the property is situated, on the one hand, and the fact that property is free to move internationally, on the other, has in any case allowed the subject to remain virulent in the rest of Europe and has produced academic and legislative advances towards greater freedom of the parties in the choice of law. These advances will here be introduced (sections A to B), evaluated (section C) and developed (sections D to E); the deliberations will conclude with a

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3 *R. Weber*, Parteiautonomie im internationalen Sachenrecht? RabelsZ 44 (1980) 520; *Khairallah*, Les suretés mobilières en droit international privé (1984); *Stoll* in Staudinger, EGBGB 13th ed., Internationales Sachenrecht (1996) nr. 262, 282 et seq.; *von Wilmowsky*, Europäisches Kreditsicherungsrecht (1996) 94-152; *Stadler*, Gestaltungsfreiheit und Verkehrsschutz durch Abstraktion (1996) 673-680; *Einsele*, Rechtswahlfreiheit im internationalen Privatrecht, RabelsZ 60 (1996) 417, 435 et seq.; *Ritterhoff*, Parteiautonomie im internationalen Sachenrecht (1999).

4 *R. Wagner*, Der Regierungsentwurf eines Gesetzes zum Internationalen Privatrecht für außervertragliche Schuldverhältnisse und für Sachen, IPRax 1998, 429, 435; *Wendehorst* in MünchKomm, BGB X, EGBGB, 4th ed. (2006), Vor Article 46 nr. 11, Article 46 nr. 18-20; *Heldrich* in Palandt, BGB, 67th ed., Article 43 EGBGB nr. 2; *von Hoffmann/Thorn*, Internationales Privatrecht, 9th ed. (2007) § 12 nr. 10, 11.

5 *Heldrich* in Palandt, BGB 67th ed., Article 46 nr. 3; *Wendehorst* in MünchKomm, BGB X, EGBGB, 4th ed., Article 46 nr. 18-23; *von Hoffmann/Thorn*, IPR, 9th ed., § 12 nr. 12.