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LL.M. Program

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TITLE

THE SCOPE OF PARTY AUTONOMY UNDER PRIVATE INTERNATIONAL LAW IN ARMENIA

Whether parties can choose and enforce foreign law as an applicable law to a contract in the Armenian courts upon the absence of foreign element as per RA Civil Code Article 1253?

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LIST OF ABBRIVATIONS

ALI	American Law Institute
CC/Civil Code	Civil Code of the Republic of Armenia (1998)
EU	European Union
FE	Foreign Element
FR	American Restatement (First) of the Conflict of Laws (1934)
PA	Party Autonomy
PIL	Private International Law
Rome I	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)
SR	American Restatement (Second) of the Conflict of Laws (1969)
UCC	US Uniform Commercial Code (1968)

INTRODUCTION

> *"The PA is the entitlement of parties to select the law under which their contractual terms will be interpreted (governed), and the jurisdiction in which those terms will, in the event of a dispute, be enforced.[1]"*

The word **"autonomy"** has its roots in two Greek words: **"auto"**- (self) and **"nomos"**- (law)[2]. When the parties exercise freedom of contract to choose law or the legal system to govern their transaction it is called party autonomy (PA).

The PA is a form of freedom of contract as accepted by English philosophical jurisprudence in the 19th century[3]. However, this institution was first established in the 16th century by a French scholar, **Charles Dumoulin**. The latter claimed that "**The will of the parties, express or implied, should be the determining factor of the governing law of a contract."** Nevertheless, Dumoulin admitted that the PA could not be absolute. He divided legal norms into two types. The first type "deals with what depends on the will of the parties, or what can be changed by them". The second type of rule is devoted to the fact that "depends only on the power of the law."

Notwithstanding those mentioned above, the present form of PA was founded by **Pasquale Mancini**, in 1851. As his previous collogues, he admitted that autonomy must be exercised within the bounds of law because he believed that "the principle of PA should yield to territorial sovereignty only concerning matters concerning public policy, sovereignty, and rights in real estate[4]." However, Mancini failed to provide a logical and theoretical basis for PA, as he did not strictly distinguish between freedom of contract in substantive law and freedom of choice-of-law in PIL.

PA was first recognized in the Italian statute as early as 1865 and codified in **"Codice Civile" (1942)**, and then the formal adoption of this institute was followed by several other states. Although many legal systems adopted this institute, their approach was never the same. In particular, courts in England, Germany, and France generally were inclined in favor of PA.

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[1] *See* Johns F., Performing Party Autonomy, (2008), p. 249. *See also* Ehrenzweig A., Jayme E,, Private International Law,A Comparative Treatise on American International Conflicts Law, Including the Law of Admiralty, Vol 3 (1977), p.253;

[2] ***via*** ***Web Source***;

[3] *See* Atiyah P.S., The Classical Law of Contract (1988) p. 33;

[4] *See* Nishitani Y., Mancini Und Die Parteiautonomie Im Internationalen Privatrecht (2000), pp. 220-222, 246;

Meanwhile other European courts were divided in their attitudes towards freedom of choice: **courts which were in favor of the application of PA, and those which were against[5].**

Indeed, PA has never been indisputably accepted. In theory, two controversial viewpoints regarding the recognition of PA has always been debating. The one which claims that parties should not be allowed to choose a law that governs their relation, and others which argue that a choice-of-law is like any other clause or term in the contract which should be left for the parties to decide. The arguments are respectively tagged as **"anti-autonomy"** and **"pro-autonomy"** viewpoints.

The main argument of the anti-autonomists is that "recognizing PA makes a legislative body of any two persons who choose to get together and contract[6]." According to well-known anti-autonomists, **Pillet[7]** and **Niboyet[8],** "the sovereign nature of a state prevents parties from choosing an extra-territorial law". This view suggests that contracts are born into a specific law and that if parties cannot modify this law in a domestic sphere, they cannot do so by an agreement. Furthermore, anti-autonomists assert that it is impossible to predict how the court will view the intention of the parties on their choice-of-law. Reflecting on these arguments, it is safe to conclude that anti-autonomy arguments suggest that it is the law which regulates human conduct, **and not vice-versa**.

On the contrary, pro-autonomists argue that, notwithstanding the law of the place of a contract or its performance, the parties should be allowed to choose a different law to govern their contract[9]. These scholars see the will of the parties as a decisive factor of the contractual relations. According to them: "The intention of the parties is sovereign in the sphere of contracts: it is capable, by its strength, of finding a solution to the conflict of laws and of establishing the governing law[10]." However, they acknowledge that the forum law may set some limits. In sum, pro-autonomists think that parties should be autonomous in choosing a law that governs their contract. These arguments reflect a liberal theory of contract which

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[5] *See* Ruhl G., Party Aautonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency (Research Report No. 4/2007), (2007), p. 5;

[6] *See* Beale J.H., A Treaties on the Conflict of Laws, Vol 2, (1935), pp.1079-1080.

[7] *See* PilletA., Principes de Droit International Privé (1903), p.430; *See also* Antoine Pillet, Traite Pratique de Droit International Privé, Vol 2 (1924), p. 261;

[8] *See* Niboyet J.P., La théorie de I'autonomie de la volonté (1927);

[9] *See* Savigny F., A Treatise on the Conflict of Laws, 2nd Ed, (1869), p. 354; *See also* Huber U., De Conflictu Legum, (1947), pp.165-166; Story J., Commentary on the Conflicts of Laws, Foreign and Domestic: In Regard to Contracts, Rights, and Remedies, and Especially in Regard to Marriages, Divorces, Wills, Succession, and Judgment, (1834), p. 280;

[10] *See* Szaszy D. S., The Choice of Law by the Parties to a Contract with Principal Reference to English and American Law, (1934), p. 172;

"recognizes and respects the power of individuals to effect changes in their legal relations inter-se[11]."

[11] *See* Gutmann T., Theories of Contract and the Concept of Autonomy, (2013), p. 3;

CHAPTER 1: PARTY AUTONOMY IN COMMON LAW

Compared to the continental law jurisdictions, the PA doctrine's acceptance in common law countries was a slower business. At first, the common law opposed the application of PA, mainly because the idea that the parties should be permitted to choose the law to govern their agreement was "alien" to the common law tradition[12]. Particularly, **Oseph H. Beale**, the most eminent opponent of the PA concept, argued that the Anglo-American legal system should never embrace PA. According to him, the PA was inconsistent with the conflict-of-laws' vested rights theory. This theory posited that all legal rights vested in a specific time and place and after that traveled with the plaintiff wherever he went[13]. Therefore, the initial hostile attitude towards the concept of PA relatively complicated the adoption of PA. However, through the time PA gained a principal role in the contract law of common law countries.

1.1. GENERAL PERCEPTION OF PA IN COMMON LAW

The philosophy of common law is built on the statement that **"where there is a remedy, there is a right".** More precisely, in common law jurisdictions everything was allowed unless there was an established regulation permitting an intervention. A similar treatment was established and developed in connection to "freedom of contract" and the PA.

Generally, the common law jurisdictions place great weight on freedom of contract and the will of parties. The starting point is the principle of "freedom of contract". The prevailing attitude towards the contractual relations and freedom of contract in common law is expressed in the **Photo Production Ltd v Securicor Transport Ltd**. Within this case, **Lord Diplock** very clearly placed the autonomy of the parties to the fore: "A basic principle of the common law of contract ... is that parties to a contract are free to determine for themselves what primary obligations they will accept. They may state these in express words in the contract itself and, where they do, the statement is determinative (...) (and, turning to the common law's default rules, he continued) if the parties wish to reject or modify (those default) obligations which would otherwise be so incorporated, they are fully at liberty to do so by express words [14]."

[12] *See* Beale J.H., What Law Governs the Validity of a Contract, (1909), p.1;
[13] *See* Beale J.H., Cases on the Conflict of Laws, (1901) p. 517;
[14] *See* Photo Production Ltd v Securicor Transport Ltd (1980);

Meanwhile, the very first judicial authority upon which the doctrine of PA was first recognized in common law is the **Robinson v Bland (1760)** [15]. This case is considered to be the origin of a PA case law. The court stated that "a particular law which would otherwise be applicable may be excluded if parties at the time of making the contract had the **law of "another kingdom" in mind"**. Nevertheless, this case neither provide the means of knowing when parties have a view to a different law, nor the respective limits of such choice. It leaves room for scholars and further cases to develop the doctrine, drawing influences from their ccontinental law contemporaries.

Overall, the courts in common law jurisdictions

(a) accept that parties are free to select the law governing matters of substance, as well as matters of validity, to the extent not qualified by (c) and (d) below;

(b) consider that the choice-of-law must be fair and legal[16];

(c) refuse to renounce ultimate control over matters they find within their domain as the forum for dispute resolution, including "procedure" remedies (to some extent) and choice-of-law rules;

(d) maintain that, in any event, neither they, nor parties can derogate from the mandatory law and general public policies of the forum, and in the absence of express pronouncements by legislatures take upon themselves to determine which laws fit within these categories[17];

(e) give priority over the **"substantially connected law"** principle: parties can choose only the legal jurisdiction with which the legal relationship is connected[18].

1.2. REGULATIONS IN COMMON LAW STATES: ENGLAND & US LAW

Typically to common law states, the regulatory framework of PA in Anglo-American law is mainly based on case law. In the manner of the regulation mechanism, American law chose the path of codification, while the English law's attitude remains consistent[19]. Indeed, the

[15] *See* Robinson v. Bland (1755);

[16] *See* Vita Food Products Inc v. Unus Shipping Co. Ltd, (1939);

[17] *See* Richardson M., Garnett R., Choice of Law and Forum in International Commercial Contracts: Trends in Common Law Jurisdictions (A Non- European Perspective), *University of Melbourne,* p. 1-2; ***via*** ***Web source***;

[18] *See* Allstate Insurance Co. v. Hague, (1981);

[19] ***Until very recent times, PA has been codified in the United Kingdom in the Contracts (Applicable) Act (1990) through the application of the Rome I. This regulation has mostly replaced the doctrine of the proper law of contract by implementing. However, under the light of recent events (Brexit), we can argue that further Rome I Regulation does not apply to the UK anymore.***

development of English law regarding PA did purely rely on the theory of PA and contributions from the scholars and later was developed by court assessments. Based on these sources, the English law adopted the approach of the free application of PA. By evolving the primary position, the common law regulated the issue of implementation of PA on a case by case bases, thereby, sculpturing the scope of PA in practice.

As mentioned earlier, the English contract law is wholly based on the principle of autonomy of will. **James Atkin** in the case **Rex v. International Trustee (1937)** stated that "The intent stipulated in the contract is considered decisive[20]."

The basic case law which provided the whole essence of English law's approach is **Vita Food Products v. Unus Shipping (1939)**. The court held that "where there is an express statement by the parties of their intention to select the law of the contract, it is difficult to see what qualifications are possible, provided the intention expressed **is bona fide and legal (proper choice) [21]."**

At first glance, it can be assumed that the English law provides an unlimited opportunity for the contracting parties to choose any law as governing law. However, the English law, in respect to its liberal attitude of regulating contractual obligations, requires some connection between the chosen law and the existing relations of the parties. This is called **"substantial connection doctrine"**, which is decisive of PA in Anglo-American law[22]. For the forum to recognize the law chosen by the parties, it must have a "substantial connection" or "substantial set of connections" to the contractual relations of the parties[23]. Therefore, besides the made "proper choice", the court also examines the merits of each case to find any "substantial connection" to the chosen law. This is called a "substantial connection test". Only after satisfying all of its requirements, the law chosen by the parties will be enforced accordingly.

The main logic and nature of the US law approach are the same as the English law. However, the development of the PA regulations and the permissible scope of its application differs.

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[20] *See* Rex v. International Trustee (1937);

[21] ***It has always been questioned whether these requirements for a "bona fide" and "legal" choice imposes some type of restriction on a choice-of-law. In practice, it is not clear what this criterion could mean, except that the choice-of-law agreement must be valid. That is, a genuine agreement not obtained through, for example, fraud or coercion. Nevertheless, the requirement of the choice to be "bona fide" and "legal" (proper choice) doesn't refer to the restriction of PA's content/substance.*** *See* Mills A., Party Autonomy in Private International Law, (2018), p. 368; ***via Web source;***

[22] *See* Graveson R.H., The Proper Law of Commercial Contracts as Developed in the English Legal System, (1949), p. 33;

[23] *E.g.* ***Performance of the contract, place of conclusion of the contract, place of business of the parties, the domicile or place of registration, etc.***

One of the first attempts of recognizing the PA institute was back then, in **1825 - the US Supreme Court case Wayman v. Southard**. In this case, the court stated that "universal law [recognizes] the principle that, in every forum, a contract is governed by the law with a view to which it was made [24]." That's right, even though the expressed choice-of-law clauses were still mostly unknown and unacceptable at this time, the idea that the courts should take into account the implied intention of the parties in deciding which law to apply, was not[25].

The regulation of PA in American law passed through two different stages of the regulatory framework. The very first attempt to regulate the PA is the **First Restatement** - developed by ALI and published in 1934[26]. It contained no provision permitting the parties to stipulate the law that would govern their agreement. In so doing, it implicitly rejected the concept of PA. FR took the position that a contract should be governed only by the law of the place of performance or the place where it was made.

The FR was affected by the views of the first regulators, who were extremely against the concept of PA. One of them was **Beale**, who successfully convicted the American judiciary and scholars exclude the PA from FR. The fundamental objection to this in point of Beale's theory is that it involves permission to the parties to do a legislative act. It practically creates a legislative body from any two persons who choose to get together and contract[27].

Even though initially PA was rejected by the uniform codification of US law, certain courts in different states started enforcing the applicable law provisions through exercising PA. The major step towards the "uniform" acceptance of PA was the enactment of the **UCC in 1952** - drafted with the support of the ALI. It was immediately followed by the adoption of **Second Restatement in 1969**. The SR discarded the position taken by the FR and expressly established the general concept of PA.

With respect to default rules, the SR took the position that the parties could choose the law of any state without limitation on the theory that they could have simply written the rule into their contract[28]. Particularly, **Section 105-1 of UCC** and **Section 187 of RS** established the doctrine of PA with some qualifications. Since then, the US courts applied these statutes together within their qualifications. One of those qualifications were the condition of **"substantially**

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[24] *See* Wayman v. Southard (1825); *See also* Morris J. Levin, Party Autonomy: Choice-of-Law Clauses in Commercial Contracts, (1957) p. 269;

[25] *See* Carnegie v. Morrison, (1841);

[26] *See* Coyle J.F., A Short History of the Choice-of-law Clause, (2020) p. 5;

[27] *Supra note* 6, pp.1079-1080;

[28] RS **§ 187(1)**;

connected law" [29]. In addition, since the US law consists of both federal law and state law, each state may individually impose stricter qualifications or provide exceptions from those qualifications (will be further discussed).

It is also worth mentioning that unlike English law, American law demonstrates a more liberal attitude towards the "substantial connection test". Notably, by the time the US courts have lowered the requirements for finding a substantial relationship to the chosen law. Namely, a sufficient substantial relationship for US court might be, inter alia, the law of the state where the contract was made, where the performance of the contract shall be taken place, where one of the parties is domiciled[30], where one of the parties is incorporated[31], or where one of the parties has its principal place of business[32]. Any other relationship to a foreign state, even small, will also suffice[33].

1.3. THE SCOPE OF PA APPLICATION: RESTRICTIONS IN COMMON LAW

Even though the common law adopts the principle of the absolutism of the parties' will, it still imposes some fundamental restrictions on PA. Generally, the PA is restricted by:

- Applying universally accepted and recognized limitations (public policy, mandatory application of imperative norms);
- Excluding individual contracts, in whole or in part. Such as contracts conveying real rights in immovable property, consumer contracts, employment contracts, insurance contracts, and other contracts involving presumptively weak parties;
- Excluding specific contractual issues, such as capacity, consent, and form;
- Confining PA to contractual, as opposed to non-contractual, issues; or by
- Limiting otherwise what "law" the parties may choose.

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[29] *See* Friedrich K Juenger, A Page of History, (1984), p. 431; *See more* Seeman v. Philadelphia Warehouse Co (1927) ***"The contract must bear reasonable relation to the United State".***;

[30] RS **§ 187**, *See more* Ticknor v. Choice Hotels Int'l Inc. (2001); Johnson v. Ventra Group, Inc. (1999); International Business Machines Corporation v. Bajorek (1999);

[31] *E.g.* Ciena Corporation v. Jarrard (2000); Dopp v. Teachers Insurance and Annuity Association (1993); Nedlloyd Lines B.V. v. Superior Court (1992);

[32] RS **§ 187**, *See more* A.G. Edwards & Sons. Inc. v. Smith (1989); Long v. Holland American Law Westours, Inc. (2001);

[33] See Apple Computer Corps v. Apple Computer Inc (2004); ***"All circumstances of the case can be taken into account "without identifying any limit to the categories of circumstances which could be taken into account: E.g. the language of the contract, its currency, place of performance, location of the contracting parties' places of business, the negotiations and etc."***

Respectively, English law imposes restrictions such as:

(a) **The choice to be "bona fide" and "legal",**

(b) **Public policy,**

(c) **Prohibition to evade from mandatory rules of closely connected law,**

(d) **Substantial connection,**

(e) **Exclusion of adherent contracts,**

(f) **The capacity of the parties,**

(g) **Form of the contract.**[34]

Since these two requirements, **"bona fide"** and **"legality"** have already been discussed, it's worth examining the adoption of the "public policy" institute under common law. The application of "public policy" differs from state to state, and even within the same state from time to time[35].

The English doctrine supports the public policy restriction doctrine by stating that "in each legal system, there are certain norms which the forum should not dispense with in favor of divergent foreign law [36]."

Moreover, the doctrine of public policy will be applied if in the result of application of foreign law appears some fundamental principles of justice, prevailing conceptions of good morals, deep-rooted traditions of commonwealth will be violated, or "if it appears pernicious or detestable[37]." Furthermore, as justice could be managed only in accordance with the sense of forum's policy, "the feelings of the local community could not be disregarded altogether [38]."

At the same time, the English law **"public policy"** doctrine shows a differentiated treatment towards the local and international transactions. It is recognized that the local public policy element, should not be allowed to operate to the same extent on international contracts, over which the forum does not **have "an exclusive claim of control as it does over purely local transactions"**, as for domestic contracts[39]. Accordingly, the domestic transaction, which doesn't include any FE shall be subject to stricter restrictions by forum's state public policy doctrine, than those including FE (international transactions). As for the application of

[34] *See* Kesava R. V., Lex Voluntatis as Law Governing Charterparty (Cochin University Law Review, Vol. XV), (1991) pp. 379-399;

[35] *See* Ashley C. D., Should There Be Freedom of Contract, (1904), p. 423;

[36] *See* Nussbaum A., Public Policy and the Political Crisis in the Conflict of Law, (1939-40), p. 1027;

[37] *See* Paulson M. C., Sovern M. I., Public Policy in the Conflict of Laws, (1956), p. 969;

[38] *See* Lorenzen E. G., Territoriality, Public Policy and Conflict of Laws, (1923-24), p. 736;

[39] "Commercial Security and Uniformity Through Express Stipulations in Contracts as to Governing Law", Vol 62 Harvard Law Review, (1949). p 647;

imperative norms, the English law finds that the application of norms, in respect of mandatory rules, of the connected (chosen by the parties) law.

In sum, if the outcome of any dispute resolved through the application of the law chosen by the parties violates the strongest moral beliefs and mandatory rules, or is deeply unjustified in court, the law chosen by the parties should not be applied.

Further, the **"substantial connection"** is the fundamental qualification of PA under English law. Particularly, the qualification was insisted by **Geoffrey Cheshire**, who argued that the chosen law must have some genuine connection with the contract: **judicial demand that the circumstances of the contract to have a substantial connection with the chosen law.**

Additionally, the English law imposes a restriction on PA regarding the adhesion contracts[40]. The express choice cannot be given effect to these contracts, as they are not the product of equal bargaining. Both parties shall choose the applicable law of the contract. Otherwise, the party, who is strong enough, may choose the most advantageous law for him/her/it, thereby excluding the protections that might have been available to the other party under some other law.

Finally, under English law, PA is not applicable to the issues of the contract's formal validity, as well as for the matters connected with the capacity of the parties to enter into a contract. The other conflict-of-law rules and principles are regulating these issues.

There is a slightly different approach to PA restrictions in American legislation. The US courts do recognize that PA is subject to restrictions/qualifications. They took the position that the parties could not use a choice-of-law clause to evade from the **mandatory law** of the forum jurisdiction. In addition, US courts also stated that applicable law provisions were unenforceable when they contradict the "**public policy"** of the forum. Furthermore, according to **RS § 187 (2) (a) and UCC § 1-105 (1)**:

"(…) the law of the state chosen by the parties will only be applied if the chosen state has a ***substantial relationship*** *to the parties or the transaction.* ***A choice-of-law clause****, thus,* ***will not be enforced against the mandatory provisions of the law otherwise applicable if there is a lack of a substantial relationship between the contract and the chosen law***[41]*."*

[40] *See* Piscar S., Soviet Conflict of Laws in International Commercial Transactions, (1956-57), p. 593;
[41] RS, **§ 187**

Overall, with respect to the mandatory rules and public policy, the SR took the position that that parties could select the law of a particular state to govern their agreement. Still this ability shall be subject to **two limits**.

The first limitation requires that **either the chosen law has a "substantial relationship" to the parties or the transaction or there be a reasonable basis for the parties' choice.** The first restriction, as mentioned above, is provided by the **RS § 187 (2) (a).** The second requires that the chosen law must not be contrary to a "fundamental policy of a state which has a materially greater interest in the determination of the particular issue and which (. . .) would be the state of the applicable law in the absence of an effective choice-of-law by the parties".[42]

Even though the SR's rule for PA, applies to all contracts without differentiation, the US law imposes a specific restriction to PA, based on the objective of the contract's type.[43] Particularly, several states exclude the following contracts from the general application of PA.

(a) **Consumer contracts**

An **Indiana** statute requires the application of Indiana law to consumer credit transactions that have certain connections to Indiana and prohibits a contractual choice of another state's law. A **Tennessee** statute provides that *"Any provision in any agreement (. . .) requiring the application of the laws of another state with respect to any claim arising under or relating to the Tennessee Consumer Protection Act (. . .)* ***is void as a matter of public policy****."* Many other states have similar regulations.[44]

(b) **Employment contracts**

A **Louisiana** statute provides that *" (…) the provisions of every employment contract (...) by which any (...) employer (...) includes a (...) choice-of-law clause (...) shall be null and void except where the (...) clause is expressly, knowingly, and voluntarily agreed to and ratified by the employee after the occurrence of the franchise or distributorship contracts"*. Similar regulations exist in **Iowa, California, Puerto Rico.**

(c) **Insurance contracts**

[42] RS, **§ 187(2)**
[43] ***E.g., Courts refuse to enforce choice-of-law clauses selecting the law of a state other than that of the borrower's residence.*** *See* Uniform Consumer Credit Code, (1986), **§1.201(8);**
[44] *See* Sawicki v. Stavanger Prince (2001);

An **Oregon** statute provides that, in an insurance policy *"delivered or issued for delivery in [Oregon]," any "condition, stipulation or agreement requiring such policy to be construed according to the laws of any other state or country (...) shall be invalid"*.

***(d)* Construction contracts**

An **Ohio** statute provides that *"(...) any provision of a construction contract (...) for improvement (...) to real estate in this state that makes the construction contract (...) subject to the laws of another state is void and unenforceable as against public policy*[45]*."* Several states, including **Illinois, Louisiana, New York, North Carolina** and **Wisconsin** have similar statutes. In addition, some of these statutes require additional connections[46].

Notwithstanding the above, the US law, now more than ever, is tended to provide further rein to PA. Namely, by expanding the scope of PA, US law developed a more flexible and unique attitude towards the application of PA regarding certain types of contracts. Many states established statutes that **relaxed these restrictions for a high-dollar-value commercial agreement.**

For example, the **New York State** enacted a statute directing its courts to enforce choice-of-law clauses selecting New York law in commercial contracts for more than **$250,000 even when the parties and the transaction lacked a "reasonable (substantial) connection" to the State of New York**[47]**.**

In the subsequent years, similarly, several other states followed the example of New York and enacted statutes requiring their courts to enforce choice-of-law clauses selecting their law even where the transaction lacked a "reasonable (substantial) connection" to the state **(e.g., Oregon and Louisiana:** they have enacted legislation that does not require any connection to the chosen law)[48]. Additionally, **Texas** has enacted a provision that allows a choice-of-law for transactions involving not less than **$1,000,000.00** regardless of whether the transaction bears a reasonable relation to that jurisdiction[49]. For the same purpose, **California** and **Illinois** allow for a free choice of their law without any further requirements as long as the transaction in

[45] Ohio Revised Code, **Chapter 4113, paragraph 62**;

[46] *See* Symeonides S. C., The Scope and Limits of Party Autonomy in International Contracts: A Comparative Analysis, (2019) p. 6;

[47] New York General Obligations Law § **5-1401(1)**; ***The purpose of this statute was to encourage companies with no other connection to the state of New York to select that state's law to govern their agreements without any concern that their choice-of-law clause would be invalidated for the lack of any "reasonable/substantial connection" to the State of New York.***

[48] Louisiana Civil Code **Article 3540**; Oregon Revised Statutes § **15.350;**

[49] Texas Business & Commerce Code § **35.51 (c)**;

question covers in the aggregate **not less than $250,000.00**[50]**.** More importantly, the substantial relationship requirements have recently been rejected by the new **UCC § 1-301**[51]**,** provided that one of the parties is not a consumer[52].

1.4. SUMMARY

The approach of common law states is economically beneficial and advantageous for the contracting parties. From the analysis, as mentioned above, it can be stated that the common law supports the will of parties and PA in its full capacity. The regulatory framework of common law is much more liberal and flexible. It is mainly regulated by case law, which provides the court an opportunity to examine and decide the enforceability of the chose-of-law clauses of each case individually.

The common law mitigates the absolutism of PA by imposing, both generally accepted restrictions (public policy, the prohibition to evade from mandatory rules) and restrictions regarding certain types of contracts based on their specific nature. Most importantly, the application of PA in common law is qualified by the "substantial connection". Although, in this case, the requirements for meeting "substantial connection" are quite reasonable. Even the smallest connection to the chosen law will suffice the courts. Additionally, at the same time, the common law waves from the main principle of "substantial connection" by establishing some exceptions for certain types of contracts. This is how the common law treats the PA in practice.

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[50] New York General Obligations Law **§ 5-1401**; 735 Illinois Compiled Statute **105/5-5**; California Civil Code **§ 1646.5.**;

[51] UCC, **§ 1-301 (e) (1)**;

[52] *See* Ruhl G., Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency, *(Research Report No. 4/2007), (*2007), p. 15;

CHAPTER 2: PARTY AUTONOMY IN CONTINENTAL EUROPE

2.1. GENERAL PERCEPTION OF PA IN CONTINENTAL EUROPE

The history of PA institute in continental Europe goes back to Roman times when the Roman citizens could claim entitlement to Roman law anywhere in the world, as well as refuse such law by choosing the law of their place of residency.

Initially, the doctrine of the continental Europe supposed that in the case of all voluntary obligations, parties, since they have the right to choose whether or not they will be bound, also have the right to choose the law under which they shall be bound[53]. However, beyond these concepts, PA in contractual relations didn't go far until the 19th century[54]. Later on, the growth of international trade in the 19th-20th centuries increased the acceptance of the doctrine, since PA was seen as a means of achieving economic efficiency[55]. It could be stated that the *"final victory"* of the doctrine in continental Europe came in 1980 when it was incorporated in the **Rome Convention** (further on Rome I)[56].

Overall, the development of PA proceeded more calmly in continental law states, rather than in common law[57]. The changes were not "impulsive, rash and wholesale" as in common law, but rather "careful, reserved and respectful[58]." Continental Europeans followed a different path: **from traditional to contemporary and more liberal choice-of-law systems.** They were able to identify the relatively small number of cases in which the modern analysis surpassed the conventional approach and included these cases as exceptions to the traditional method.

The early predominant view of civil law states affirmed that the national law of **the place where the contract was made** or **the law of the place of performance** should be the applicable law[59]. In other words, a contract is subject to the law of the place of control because parties have technically acceded to the law of the contracting's place. However, over time the approach of the territorial law was replaced by the law of parties' voluntary submission.

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[53] *Supra Note* 12, p.7;

[54] ***It was Pasquale Mancini, who in 1851, formulated the doctrine of PA as we know today.*** *See more on page 4;*

[55] *See* Giesela Ruhl, PA in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency, (2007) p. 6;

[56] 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);

[57] *See* Symeonides C., The American Choice-of-Law Revolution: Past, Present, and Future, (2006), pp. 411-419;

[58] *See* Ferrari F., Fernánde D.P., Private International Law: Contemporary Challenges and Continuing Relevance, (2019), p. 20; *via* ***Web Source****;*

[59] *See* Lorenzen E.G., Validity and Effect of Contracts in the Conflict of Laws, (1921), p.573;

Nowadays, the universal approach of continental Europe is purely based on the principle that **"the will of the parties is sovereign".**

The development of the doctrine of PA in continental Europe shows that the PA doctrine was formerly chained with the territorial limitations of the place of contract and performance. Still, it grew considerably, and despite some early opposition, has been accepted as a well-established doctrine. Notably, the will of the parties, express or implied, should be the determining factor of the governing law of a contract. Nevertheless, if the choice is not expressly made, the governing law must be determined by the surrounding circumstances of the contract *(e.g., closely connected law, the law of the place of the contract, etc.).* It is known in theory as a **"tacit choice"** doctrine, which is considered to be the founder of the PA principle in common law *("reasonable or substantial connection").* Negatively, **in continental law, it is not required for the enforcement or application of PA to have any connection to the chosen law. Parties are free to choose any law to govern their contracts; regardless, there is a connection to that law or not.**

2.2. PA REGULATIONS IN CONTINETAL EUROPE: ROME I REGULATION

As already been noted, in the sphere of contractual relations, Rome I is considered to be the most crucial and revolutionary achievement in continental Europe. They finally recognized the application of the modern PA, not only through their domestic legislation but also through the supranational source. Since then, any identification of contractual relations and applicable law by EU courts are made through Rome I.

Rome I is a convention whereby all EU member states (except Denmark) have agreed to use the same rules in regulating conflict-of-law regulations in contractual relations, including identifying the applicable law. It fully recognizes this principle of PA. Article 3(1) of the Rome I Regulation allows for an extensive PA from a substantive point of view. The parties to the respective legal regulation may, in principle, choose any state law[60]. In particular, Article 3(1) stipulates that *"A contract shall be governed by the law chosen by the parties (…)."*

Based on the content of the aforementioned regulation, it can be stated that EU law adopted the application of PA within its full capacity. Unlike common law, this regulation doesn't

[60] *See* Plender R., Wilderspin M., The European Private International Law of Obligations, 4th Ed., (2015), paragraph 6-011 – 6-017;

require the transaction to demonstrate material (or any) connection with the chosen law[61]. Therefore, the choice made by the parties is enforceable if other formal requirements, imposed by the regulation, are met. However, this doesn't mean that the scope of the PA application in EU law is unlimited. The Rome I, provides certain restrictions, which are intended to prevent the absolutism of PA *(the limits will be further discussed in the next provision).*

Moreover, if the contract is connected with more than one jurisdiction, in the meaning of **Article 3(3)**, a choice-of-law clause shall be enforced. Namely, *"Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement".*

Similar regulations exist in the national legal framework of continental European states (outside the borders of EU). For instance, in Switzerland, as an example of a legal system with the most advanced regulations of PIL and PA. Swiss law institutes PA as a priority principle of determination of applicable law. According to the **Federal Act on Private International Law of Switzerland** *"Contracts are governed by the law chosen by the parties[62]."*

2.3. THE SCOPE OF PA APPLICATION: RESTRICTIONS IN CONTINENTAL EUROPE LAW

However, as in any other law systems, the principle of PA is be subject to limitations. The legal framework of restrictions in continental Europe is separated into three regulatory models that are meant to fulfill specific protective tasks. The respective models are as follows,

(1) a prima facie free choice-of-law is limited by a separate application of protective norms,

(2) a primary limitation of PA (especially to, so-called, connected laws) and

(3) a time-related limitation of PA[63].

In the first model, a prima facie free choice-of-law is limited by an individual application of additional rules to perform certain protective functions. This model is established, first of all, in the Rome I for most types of contracts. For instance, the application of the law elected by

[61] *See* Svolmar Shipping Co. Ltd. v. Hellenic Steel Co (1991), *See in* Plender P, Wilderspin M., The European Contracts Convention, no. 5-24, (2001), p. 105, *also* Reynolds F.M.B., Vita Food Resurgent, (1992), p. 108;

[62] *See* Federal Act on Private International Law of Switzerland (1987), **Article 116**;

[63] *See* Maultzsch F., Party Autonomy in European Private International Law: Uniform Principle or Context-Dependent Instrument *(in Journal of Private International Law, Vol. 12, pp. 466-491)*, (2016), p.22-24

the parties may be refused by **Article 21**, where such application would be manifestly incompatible with **public policy** ***(ordre public)***[64]. A separate application of PA is stipulated for consumer and employment contracts, where a choice-of-law often has limited effect[65]. Another mechanism of an initial limitation of the scope of permitted laws is purely provided for contracts for the carriage of passengers and insurance contracts (not covering a so-called significant risk)[66]. Moreover, a prima facie free choice-of-law is also limited by overriding mandatory provisions[67].

This method was used by Rome I, based on the objective that separate applications of restrictions are less intrusive and more flexible means of protection of rights than complete exclusion of PA.

The next model operates by way of limiting the scope of permitted laws. This solution can protect specific individuals from imposing alternative laws. This mechanism is aimed to enforce specific public and sovereign interests. More particularly, the restriction *(a ban to choose from specific laws)* is often considered as a particular defense mechanism towards certain relations, where the state has some sovereign interests.

Namely, the approach of limited freedom of choice can be found within the European rules on choice-of-law in family and inheritance law. The scope of permittable laws in these fields is usually limited to the connecting factors of habitual residence or nationality. As long as such a connection is preserved or condition is met, each contracting party can be legitimately held bound by its choice of such law since no arbitrary allocation of the legal relationship has taken place[68]. However, if we look at this model from another angle, it can be considered as synonymous with the first model. Namely, the restriction is based on the imperative norms set forth by the respective regulation, which doesn't allow the application of PA in specific fields in the same capacity as it would have been in other areas. Therefore, the mandatory requirement itself excludes any choice which is not within its permittable boundaries.

The third model can barely be found in modern continental European law. This model functions more formally by giving the involved parties a special warning in the form of a time-related "break." It is represented on the level of choice-of-law in **Article 14(1)(1)(a) of the Rome II**

[64] *See* Rome I Regulation, **Article 21**;
[65] *See* Rome I Regulation, **Articles 6(2) and 8(2)**
[66] *See* Rome I Regulation, **Articles 5(2) and 7(3)**
[67] *See* Rome I Regulation, **Articles 9**
[68] *See* Lipp V., Parteiautonomie im Internationalen Unterhaltsrecht, *(in Confronting the Frontiers of Family and Succession Law: Liber Amicorum Walter Pintens, Vol I)* (2012), p. 864;

Regulation "On the Conflict of Laws on The Law Applicable to Non-Contractual Obligations[69]."

Synonymously, Swiss law simultaneously uses the first and second models of restrictions. Under the Swiss federal law, PA is generally subject to restriction based on public policy and mandatory provisions[70]. Additionally, regarding the application of PA, certain types of contracts are subject to some limitations, such as contracts relating to real property or the use of real property, consumer contracts, employment contracts, contracts on intellectual property[71]. Similarly, these restrictions have their particular objectives: the welfare of society, protection of state's sovereignty, and the rights of a relatively weaker party (*e.g., **consumer agreements:** bank agreements, public service field agreements, comprehensive consumption products agreements, etc.)*, etc.[72].

2.4. SUMMARY

The approach towards PA in continental Europe is remarkable. They preserve the uniform idea of PA. The continental European law has managed to harmonize the whole the respective legal framework by recognizing PA as a fundamental and primary principle of the determination of applicable law in the contractual obligation). Such an approach has been successfully developed due to similarities in legal systems, mutual legal "borrowings", harmonious development of PA regulations. In particular, contractual Europe reached the highest level of harmonization by the adoption of unified and thoroughly codified international sources, such as Rome I.

Similar to common law, continental law has followed the path of flexible and liberal regulations by giving the parties an unlimited, yet strictly regulated, right to choose a governing law. However, unlike common law, continental law imposes less strict requirements for the enforcement of choice-of-law clauses[73]. Besides, in almost all continental Europe states (contrary to common law regulations), the respective regulations (as well as Rome I) don't require any connection to the chosen law.

[69] ***According to these rules, a choice of court can only be made after the dispute has arisen.***
[70] *See* Federal Act on Private International Law of Switzerland (1987), **Articles 17,18 and 19**;
[71] *See* Federal Act on Private International Law of Switzerland (1987), **Articles 118,119,120,121 and 122**
[72] *See* Manukyan M., International Private Law of the Republic of Armenia: Scientific and Practical Commentaries to the 12th Chapter of the Civil Code of the Republic of Armenia (International Private Law), (2013), pp. 248-249;
[73] *See* Borchers P. J., The Internationalization of Contractual Conflicts Law, (1995) pp. 421-434;

Furthermore, analogously, the PA, is subject to some restrictions and exceptions. Namely, in continental law, the exemptions from PA have been precisely codified. The possibility of unforeseen cases, where rules produce inconsistent or incorrect results, has been accommodated via escape clauses, as they did in the common law[74].

[74] *Supra Note* 73, p. 415;

CHAPTER 3. PARTY AUTONOMY IN ARMENIA:
THE SCOPE OF ITS APPLICATION AND THE CURRENT ISSUE

3.1. THE REGULATION

Since the first adoption of **the Civil Code** the PA was introduced under the **12th "PIL Section".** In particular, the right for the contracting parties to choose an applicable law is guaranteed by **Article 1284** of the **Civil Code** [75]. According to the **1st paragraph of this article**:

"(1) The contract shall be regulated by the law of the state designated upon the agreement reached by the parties (…)".

It can be stated from the above-mentioned and the study of the following Articles, namely **Article 1285** (determination of the applicable law in case of absence of choice), that under Armenian legislation, PA is considered to be the priority conflict of law principle for the contractual obligations. Nevertheless, in the Armenian legal framework, there is a certain ambiguity in regard to the application of PA and its boundaries. From the content of the whole **12th Section of the Civil Code** and, more specifically, **Chapter 81, §5**, no definite limits are set for the application of PA.

Notably, the interpretation of **Article 1284** and even the whole **12th Section of the Civil Code** give us a reason to believe that PA has an **"absolute" nature**[76]**.** Through the entire legal framework, no principle or regulation (restriction) can deprive of enjoyment of PA and prevail over its exercising *(provided that the choice is valid and satisfies the requirements under **Articles 1284, 1258 and 1259**)*. Furthermore, no explicitly mentioned exclusion for the application of PA exists in the civil legislation. Therefore, when choosing an applicable law to the contractual obligation, the forum should give priority to the law chosen by the autonomy of the will of the parties.

However, under Armenian practice, there is an ambiguous and vouge approach, according to which PA to choose a foreign law (other than the domestic law) is subject to application and is enforceable only when a FE exists in the contractual obligations.

[75] Civil Code of the Republic of Armenia, N ՀՕ–239, dated 05.05.1998, amended as of 24 October 2018;
[76] *See* Haykyants A., Private International Law, Textbook, 2nd Ed, (2013), p. 221;

If more specific, until very recent times, the definition of "FE" was provided solely by the doctrine. In theory, FE exists in the commercial and non-commercial relations in the presence of one of the following conditions:

- *Foreign subject;*
- *Foreign object;*
- *Legal facts on the territory of a foreign state.*

In the Armenian legislation, the FE is defined under **Article 1253(1) of the Civil Code**. Particularly,

"(1) The law applicable by the court to civil law relations with the participation of foreign citizens, including individual entrepreneurs, foreign legal persons, and organizations not considered as legal persons in accordance with foreign law, stateless persons, as well as in cases where the object of civil rights is located abroad shall be determined on the basis of this Code, other laws of the Republic of Armenia, the international treaties of the Republic of Armenia and international customary practices recognized by the Republic of Armenia. (…)"

Namely, when in the relations of the participants, one of the following components exists, the relation shall be subject to PIL norms and be regulated under the **12th Section of the Civil Code**. The components are the following:

- *foreign citizen(s),*
- *individual entrepreneur(s),*
- *a foreign legal person(s) and organizations not considered as a legal person(s)*
- *stateless person(s)*
- *object(s) of civil rights located abroad.*

IN SUM, any case which involves a single FE invites the application of PIL. Therefore, it can be concluded that the regulations of the 12th Section of the Civil Code apply only to the relations with FE.

3.2. THE ISSUE

As noted earlier, under the light of **Article 1253**, there is a misconception regarding the scope of application of PA. The problem is that there is a vast uncertainty as to the extent to FE as a mandatory prerequisite for exercising PA regarding their right to choose a foreign law. If more

symbolic, there is an issue **whether the chosen foreign applicable law is enforceable to the same extent in domestic agreements?**

For instance, two Armenian founded companies agreed *(the object and the performance of which does have a domestic character)* and decided to choose the English law as applicable law. A question may arise: **Are they allowed to exercise their PA and choose a foreign law as an applicable law under Armenian law? Whether their choice will be enforced in Armenian courts?**

According to **Article 41 of the RA law "On Normative Acts[77]"**

"A norm of a normative legal act is interpreted by taking into account the purpose of the body adopting it when adopting a normative legal act, based on the literal meaning of the words and expressions contained in it, the context of regulation of the entire article, chapter, section, provisions of the normative legal act, the principles established by this normative legal act, and if such principles are not established from the principles of the branch of law regulating this legal relationship".

The combined interpretation of these Articles *(Article 1253 and 1284 of the Civil Code and Article 41 of the RA law "On Normative Acts")* let us conclude that Article 1253 defines the scope of application of 12th Section, and thereby conditions the existence of private international relations and the implementation of the respective Section as a general norm.

However, in practice the unambiguous regulation of such situations and the deep analysis of the civil law framework brings out two opposite approaches. The first approach argues that **in the case of choosing a foreign law, PA is dependent on the FE.** The second approach disagrees by stating that **under Armenian law, FE is not a mandatory prerequisite to allow parties to choose a foreign law as their governing law**.

This uncertainty in the regulatory framework is quite problematic. Firstly, such a situation generates a massive issue of legal certainty. In general, the law shall be sufficiently precise to allow the person if need be, with appropriate advice, to foresee, to the degree that is reasonable in the circumstances, the consequences which a given action may entail[78]. Therefore, the vague regulations under Armenian PIL norms cause an inability of the parties to foresee the scope of

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[77] RA Law on "Normative Acts" N ՀՕ–180-Ն, dated 07.04.2018, amended as of 29 February 2020;

[78] *See Khlaifia and Others v. Italy (15.12.16, no.16483/12,) § 92; Del Río Prada v. Spain (10.07.12, no.* 42750/09*) § 125; Creangă v. Romania (23.02.12, no. 29226/03) § 120; Medvedyev and Others v. France (29.03.2010, no. 3394/03) § 80;*

their rights. Besides, the contractual parties are not even sure whether their right to choose an applicable foreign law for their domestic transactions is available and enforceable.

3.3. THE ARGUMENT

To this extent, we would like to present the approach, which in our opinion, is "reasonable" and derives from the main essence of the civil and contractual relation's and nature of its principles, at the same time with the objectives that highly support the statement of ours.

It is widely known: **the contractual relations are based on the free will of the parties.** Parties, within the respect to state's public order and mandatory rules, shall have the full length to govern their contractual relations - including applicable law matters - notwithstanding whether their relationships include FE or not. By confirming the statement above, it is essential to discuss the PA in a **two-folded manner: as a mere conflict of law principle and as a synonym/sub of the general principle of "freedom of contract".**

The autonomy of the will is often seen as a reflection of "freedom of contract"[79]. Historically PA has always been regulated within the framework of "freedom of contract". Only later on, it gained theoretical foundation as a conflict-of-law rule, independently of the substantive "freedom of contract"[80]. Correspondingly, the phrases **"PA"**, **"private autonomy"** and **"freedom of contract"** are often used mutually[81].

Moreover, **Hugo Grotius,** an English lawyer, considered that the liberty of contract to be a natural right[82]. Similarly, PA, as a substitute of "freedom of contract" is protected by international human rights instruments, such as "The Universal Declaration of Human Rights". Since the declaration protects the liberty of individuals, such privilege should not just be exercised within the personal and political sphere but also in the economic sphere by allowing parties to "liberally" choose the legal system which governs their contracts[83]. Indeed, a contract is a product of the parties' free will, which they exercise by deciding the terms in their contracts.

[79] *See* Anufrieva L. P., Private International Law, Special part Vol 2 Textbook 2nd Ed, (2002), p. 129;
[80] *See* Nishitani Y., Party Autonomy in Contemporary Private International Law: The Hague Principles on Choice-of-law and East Asia (2017) p. 8;
[81] *See* Meng Zh., "Party Autonomy, Private Autonomy, and Freedom of Contract" (2014) p. 215; *See also* Symeonides S. "Party Aautonomy in International Contracts and the Multiple Ways of Slicing the Apple" (2014) p. 1130;
[82] *See* Pound R., Liberty of Contract, (1909), p.454;
[83] *See* Ogunranti A. O., The Scope of Party Autonomy in International Commercial Contracts: A New Dawn? (2017), p. 45;

Ludwig Erhard once said, *"independent and free will be one of humanity's most basic motives; we need to protect it and strengthen it day after day* [84]*."*

Accordingly, the **"freedom of contract"** is established under the Armenian legal system as one of the main principles of civil legislation. According to **Article 3 of the Civil Code,** *"Civil legislation is based on the principles of equality, the autonomy of will and property autonomy of the participants of relations regulated thereby, inviolability of ownership, "freedom of contract", impermissibility of arbitrary interference by anyone in private affairs, necessity of unhindered exercise of civil rights, ensuring the reinstatement of violated rights, judicial protection thereof."*

Even though under Armenian legislation the **"freedom of contract"** is defined as "freedom to enter into a contract [85]", in theory, however, the it consists of several elements:

(1) the freedom to make a contract or not to make any contract;

(2) the freedom to choose with whom one should contract;

(3) the freedom to decide the contents of the contract.

According to **Article 1284(4),** *"the choice-of-law made shall be expressed or directly follow from the conditions of the contract"*, which means that the agreement shall determine the "choice-of-law": it's included in the content of the contract. Since the "freedom of contract" principle, involves the right of the parties to determine the content of their contract individually, therefore, it also includes the right of the parties to determine the applicable law. That is, in this aspect, the PA is a structural element of freedom of contract.

Therefore, the restraining the will of parties will result in a deviation from the real nature of the "freedom of contract" principle. The artificial restriction of PA by FE is unnecessary and contradicts to the main principles of civil legislation. In international practice, they are many other more effective mechanisms to restrict the PA, which does not disagree with the principle of "freedom of contract". However, FE is not one of them *(the possible restriction mechanisms will be discussed further).*

The aforementioned let us argue that no matter whether the elements set forth by **Article 1253** exists, any choice of parties shall be enforceable. Since, in any case, if the FE is present, the relations will bear an international nature, and the conflict of choice rules will respectively be

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[84] *See* Ludwig E., Prosperity Through Competition (Commercial Press China) (1983), p.38;

[85] Civil Code, **Article 437(1)**;

applied. However, the contractual relationships which are purely domestic shall enjoy the freedom of choosing any applicable law to the same extent as the international contractual relations.

THUS, in context the PA and "freedom of contract" are synonymous[86]. It is the "freedom of contract" that makes it possible for the parties to have the autonomy to determine the applicable law under which their contract will be governed[87]. Therefore, even if FE is absent, the choice made by the parties shall be permissible and enforceable.

3.4. THE OBJECTIVE

The idea of relatively "unlimited" PA is pursuing some significant objectives. One of them is to ensure the **ease of defining the applicable law** in any situation.

Indeed, the application of PA is an extreme measure. However, PA, as a quite flexible mechanism, allows the participants of civil relations to define and enforce the applicable law effortlessly. Moreover, when enabling the domestic transactions to be (entirely or partially) regulated by foreign law, it promotes the **flexibility of contractual obligations**. Since civil relations are free and liberal than any other regulated relationships. Thus, any flexible mechanism, such as the opportunity of parties to choose a foreign law for their domestic contractual obligations, is highly appreciated and supported by the participants of contractual relations.

Furthermore, the application of PA, within its all potential (in international and domestic contracts), primarily seeks an economic objective. From this point of view, the "freedom of contract" and the PA are viewed as a means to maximize the welfare of the parties and the good of society as a whole, as well as to accord to individuals a sphere of influence in which they can act freely. The opportunity of choosing an applicable law enables the parties to gain the economic benefits from their chosen legal jurisdiction. Through PA, the parties enjoy the freedom to choose any contract law of any country to suit their commercial need[88].

Besides, the full application and enforcement of PA also promote international, transnational, and national commerce, as parties can choose applicable law(s) outside the respective domestic

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[86] *See* Zhang M., Contractual Choice-of-law in Contracts of Adhesion and Party Autonomy (Akron Law Journals), (2015), p. 123;

[87] ***Charles Fried argued that "preserving PA should be the primary goal of contract law".*** *See* Fried C., Contract as Promise, A Theory of Contractual Obligation, (1981), pp. 1-2;

[88] *See* Richardson S.M., International Contracts and The Choice-of-law (2005), p.155;

legal system. It significantly encourages the participation of the parties in the global development of the market and improves the healthy evolution of international civil and commercial communication[89].

Finally, PA provides the opportunity to the parties to choose a foreign law with legally more advanced mechanisms (regulations, international contracts, institutions, principles), in contrast to their domestic law. The contracting parties should also be given a broader opportunity in deciding the choice-of-law to be applied, in particular, allowing the parties to choose **not only a specific legal system but also international instruments[90].**

3.5. THE RISK

Although the existence of FE shall not condition the application and enforcement of PA, it is not our intention, however, to imply that the parties' autonomy is absolute. On the contrary, like "freedom of contract", PA can be subject to specific restrictions and be exercised within those limits. Thus, the parties can only choose the governing law of a contract if a national system of law or PIL rules of a state permits them to do so[91]. Indeed, *"the forum State, which ultimately controls the choice-of-law, has to determine the conditions, the limits and the scope of the parties' autonomy[92]."*

No matter what benefits PA offers and what objectives it follows, its exclusivity is hazardous. The unregulated and unlimited PA can result in the loss of state sovereignty and control, evasion from mandatory rules (imperative norms), and certain contractual obligations' specific regulations (e.g., consumer-based contracts), abuse of rights, violation of third parties' rights, violation of legitimate expectations, etc.

The unlimited scope of application is another issue that the Armenian legal framework has. In literature, it is argued that in Armenia, PA has an unlimited nature[93]. This means that it doesn't matter whether the chosen law has any connection to the existing contractual obligations or not, or whether the contractual relations have some specific features or not (e.g., adhesion contracts, consumer contracts, low-amount contracts), the application of PA is the same.

[89] *See* Zhaohua M., Study on the Meaning of Lex Voluntatisin the Choice-of-law in International Private Law, Vol. 7, No. 1, (2014), pp. 41-45;
[90] ***E.g., UNIDROW principles.*** *See* Haykyants A., Mankuyan M., Kirakosyan E., Qocharyan V., Aghababyan N., Concept of private international law reform (Section 12 of the Civil Code of the Republic of Armenia), pp.8-9
[91] *See* Moss G. C., International Arbitration and the Quest for the Applicable Law (2008), p. 6;
[92] *See* Vischer F., General Course on Private International Law (1993) p. 139;
[93] *Supra note* 76;

Meanwhile, many states adopted a relatively limited approach towards PA, where the fundamental restrictions of PA are as follows:

- the choice of the law to be applied to the contract must not contradict the public order of the state in whose territory the PA is exercised **(Public Order)**;
- the choice of the law to be applied to the contract should not be intended to avoid the national law of the state *(the purpose of excluding the imperative norms of the state)*, which the parties have renounced by executing PA **(Imperative Norms)**;
- the chosen law shall be somehow connected to the contractual obligations of the parties otherwise, it shall not be enforceable **(Doctrine of "Substantive Connection")**.

Armenia has borrowed the "public order" and the "prohibition to evade from the imperative regulations of the forum state" restrictions and adopted them as general exceptions from PIL regulations **(Civil Code Articles 1258 and 1259)**. While the third restriction, mostly used by common law states[94], isn't present in the current PIL legislation of Armenia.

In addition, the PA can be subject to restriction based on the type of contractual obligations and its specific features. This commonly used restriction enables the regulator to separate certain types of contracts and impose much stricter rules of application and enforcement of PA *(was discussed earlier)* to protect various interests.

THUS, in order to mitigate the unlimited application of PA in Armenian legislation, the regulator shall reduce and balance the risk through the above-mentioned restrictions. It will guarantee the most useful application of PA within the set forth reasonable boundaries.

3.6. OUR FINAL CONSIDERATIONS AND SUGGESTIONS

Based on the analysis made throughout the whole Paper, we would like to present our final considerations regarding the raised problem question and possible solutions that the Armenian legal framework can refer to.

[94] *See* Baxter I. F. G., Choice of Law, 42 Can. B. Rev. (1964), p. 46; ***"The whole common law system is based on the "substantial connection" doctrine. Even, a prominent English barrister expresses his horror at a theory which would allow the parties to choose any law in the world, even the one with which the contract has no factual connection whatever. To select an unconnected law, according to another English author Ian Baxter, would be "an attempt by the parties to evade some law that would otherwise apply".***

As we have already discussed in the previous Chapters the whole civil law is based on the principle of freedom of contact. Any restriction imposed on freedom of contract shall have a specific purpose and objective. Namely, the “freedom of contract” is restricted for two main reasons:

- **protection of the interests of the state, in a concentrated form expressing the interests of society;** and
- **protection of the weakest party from the stage of contract conclusion to its execution.**[95]

Indeed, among others, **the public policy, mandatory application of imperative norms, substantial connection to the chosen law, as well as special treatment towards contracts (including immovable property)** have the purpose of protecting the state and society’s interests. Different treatment in connection with specific agreements, such as consumer contracts or adhesion contracts, is indented to safeguard the interests of the relatively weaker party in the contractual obligations.

BUT what about FE? Can it objectively restrict the PA?

The Armenian legislation includes both “PA” and “freedom of contract” principles. Nevertheless, due to the legislative “errors”, “incomplete regulation”, and non-unequivocal interpretation of respective regulations, the essence of PA and “freedom of contract” principles significantly suffer.

Even though it’s not explicitly mentioned, but due to uncertainty in the legal framework, the FE is considered as a prerequisite for exercising PA in contractual relations. Notably, such interpretation assumes that to apply PA, the PIL regulations which define the applicable law of the contractual obligations require the mandatory existence of FE. However, as it has already been discussed, the concept of PA and authority of parties to decide the content of their contractual obligations are more than just a PIL principle. **Thus, PA shall be understood and accepted beyond the boundaries of PIL.** Mainly, in PIL principle of “lex voluntaris” as an expression of PA in the conflict-of-law relations allows the forum to easily define the contract’s applicable law, which includes a combination of the element of different legal jurisdictions. However, it doesn’t mean that in domestic relations, the free choice of parties, regarding applicable law of contract, cannot be equally expressed as in cases of other contractual

[95] *See* Kondratyeva E. M., Freedom of Contract And “Autonomy of The Will of The Parties” As Guarantees of The Constitutional Rights of Russian Participants in Foreign Economic Activity in Private International Law, (2003), p. 35

provisions. Therefore, it can be claimed that in the manner and essence, PA and "freedom of contract" are synonymous and shall be respected accordingly.

Analogical to "freedom of contract" the PA shall also be restricted for the same or similar purposes. Any other restriction imposed on PA contradicts the essence of civil law. Therefore, in the terms of FE being a legitimate restriction to PA we can argue that FE doesn't serve to the purposes for which such restrictions are intended. In essence, **it neither helps for the protection of the public policy and interests of society nor the protection of the considerably weaker party's interests.** Moreover, this limitation doesn't even serve any specific purpose. It's artificial. Yet, at the same time, in general terms it serves a sperate purpose: **define the PIL relations.**

Additionally, if we consider that FE can restrict the PA, it will violate the principles of **lawfulness, certainty,** and **"freedom of contract"**. Firstly, because the Armenian regulation doesn't explicitly restrict the PA by FE. Therefore, refusing the enforcement of the application of foreign law based on the suspicious and groundless interpretation that to exercise PA it is compulsory to meet Article 1253's requirements, contradicts any perception of legality. Second, the same statement also violates the principle of certainty since the legal regulation shall be sufficiently precise to allow the parties to foresee the consequences of exercising the right (in our case PA) by them. Finally, the purposes to which principle of "freedom of contract" follows, in no case do they justify the restriction of PA by FE.

Furthermore, based on the practical examples mentioned in the common law and continental law, none of them conditions the application of PA to the existence of FE. Therefore, such an approach cannot have any actual value and applied concerning defining the scope of application of PA in Armenian legislation. Consequently, PA can be exercised in a manner of deciding by which law shall the contractual obligations be governed even in case of domestic contracts.

Alternately, the enjoyment of such right has some economic and logical objectives. Mainly, when the parties are choosing a foreign law, they are generally doing that for some severe purposes. Moreover, the parties are better equipped for finding the law most suitable to govern their contractual relationship than an "abstract" conflict rule is capable of doing. They will not choose a governing law unless they have a good reason to do so. The parties select a particular law, because they know it, like it and consider it best for their purposes. Even in cases where the chosen law is unconnected, generally, it would be found that convenience is the connecting

factor. The parties may wish to have a law governing their contract, or a law which conforms with market practice[96].

Based on the above-demonstrated argumentation and thorough analysis of Armenian legislation and common and continental law practice, we can conclude that YES, the choice of foreign law in domestic contracts, is allowed, regardless of the existence of FE.

Still, even if we argue that **Article 1253 of the Civil Code** cannot condition the application of **Article 1284(1)** and the parties shall be free to decide the content of their contract, including the applicable law **(regardless FE exists or not)**, it doesn't mean that in practice the parties of domestic contracts cannot just draft a contract with foreign applicable law clause. **The main issue is whether such a choice will be enforced by the courts if necessary.** The inability to enforce such clause is the main obstacle that parties can face in practice because of vague regulations and poor judicial practice. Without the opportunity to enforce the chosen, the entitlement to choose it means nothing. That is why, the analysis made throughout this Paper shall also be considered as an argumentation that supports the enforceability of that choice.

Nevertheless, to avoid contradictions in interpretation and judicial practice and uncertainty in the legal framework, we suggest that the following amendments/additions be made into the Armenian legislation.

Taking into account that until now, no applicable or related judicial practice has been established by the Armenian courts regarding the problem question raised in this Paper, we suggest that respective amendments/additions be made in the Civil Code.

Particularly, we recommend that **Articles 1253(1) and 1284(1) of the Civil Code** shall be written as follows:

Article 1253(1)

"Unless otherwise provided by this Chapter the law applicable by the court to civil law relations with the participation of foreign citizens, including individual entrepreneurs, foreign legal persons and organizations not considered as legal persons in accordance with foreign law, stateless persons, as well as in cases where the object of civil rights is located abroad, shall be determined on the basis of this Code, other laws of the Republic of Armenia, the international treaties of the Republic of Armenia and international customary practices recognized by the Republic of Armenia."

[96] *See* Teyssi Z. B., Les groupes de contrats, (1975), pp. 447-473.

Article 1284(1)

"The contract shall be regulated by the law of the state-designated upon the agreement reached by the parties, regardless of the fact of the existence of a foreign element defined in the first provision of Article 1253 of this Code."

Thus, by inserting a mutual exception mechanism in **Article 1253(1)** and **Article 1284(2)**, it will clarify the role and approach of PA in Armenian legislation. Namely, it will ensure that no court will interpret FE as a restriction to PA by referring to **Article 41 of the RA Law on Normative Acts** or the whole PIL Chapter of the Civil Code. Thereby, it will provide an unambiguous and definite approach regarding the FE and PA relationship. At the same time, if we state that **Article 1253** and **Chapter 12** apply in case of a FE only unless an exception applies **(such as Article 1284)**, we will also assure that all other Articles will be subject to the application of **Article 1253(1)** and particularly FE. Additionally, by making an exception from **Article 1243(1)** only for **Article 1284,** we will also not isolate the latter from the PIL Section. Still, we will make sure that both Articles will be used accordingly. Besides, the isolation of PA from the PIL Section will not lead to the outcome that we are hoping for. Notably, if we regulate PA as both the PIL principle and as part of "freedom of contract", we will be able to impose the restrictions provided by the PIL Section as well as by the whole civil law framework.

If more practically, imagine a situation when two Armenian founded companies **(ALPHA - the lender and BETA - the borrower)** have entered into a loan agreement (hereinafter referred to as the "**Agreement**") whereby ALPHA has provided loan facility to BETA. The parties agreed upon the governing law to be a foreign law, e.g., the **Tuvalu law**. Then due to the fact that the BETA's financial condition has deteriorated the parties decide to carry your mezzanine financing i.e., convert the debt owed by BETA to ALPHA into shares through acquiring relevant shares in the charter capital of BETA **(let's suppose that Tuvalu's law allows such repayment of the loan)**. After the transfer of the shares, the minority shareholder(s) of BETA applied to the Armenian court to challenge the legality of the transfer of the BETTA's shares to ALPHA. Not going deep into procedural issues, the Armenian court will start examining the case by first referring to the terms and conditions of the Agreement.

Under the current regulation, the Armenian court would most probably deny the application of the English law by referring to **Article 1253(1)** and establish the absence of FE. However, in case of the suggested version the court will refer to **Article 1253(1)**, see that the latter stipulates

that "***Unless otherwise provided by this Chapter*** *(…)*" and find out that Article 1284 is that one exception which does not require the presence of FE to be exercised.

Moreover, at the same time, the fact that these contractual obligations are subject to PA, it will invite the application of the general restrictions, such as public policy and the prohibition to overcome the imperative norms. Namely, in this case, the parties are willing to convert the debt owed by the borrower to the lender into shares. However, under Armenian legislation, there is an imperative norm which stipulates that **the shareholder shall not be released from the payment toward the shares[97].** Therefore, even though the court will enforce the choice made by the parties and apply the English law to the Agreement, due to the imperative regulation in the Armenian legislation and by virtue of **Article 1259 of the Civil Code**, it will declare the invalidity of the share transfer.

By this example, we can see how, in practice, the legislative changes would affect the situation, even though the result of both scenarios was substantially the same. Yet, in a different situation, these changes would make a significant difference and result in two different opposite outcomes: enforcement of choice and refusal of enforcement. The example, however, is also essential to show that even though the PA is not restricted by FE, it can be restricted by other mechanisms presented in the Civil Code (such as Article 1259).

In addition to the above-provided amendment, we would also like to suggest some additions to be made in the PIL Section regarding the restrictions of the PA. Particularly, by taking into consideration the doctrine of PA and respective international practice, we consider that in the event of refusing the so-called "FE and PA" approach, the PA institute under Armenian legislation needs to be reformed. Namely, to use the PA institute properly, and at the same time mitigate the risk of "extensive" or "unlimited" PA institute, the latter shall be subject to certain restrictions. **In particular, for a more practical implication of PA and to avoid the abuse of rights by either party, it will be more compelling if the Armenian legislation stipulates certain restrictions regarding consumer agreements. Moreover, for a better outcome, it would be more beneficial if the legislation requires "subsequent connection" to the chosen law, at the same time, applying very light requirements to meet the "connection". At the same time, it will be more advantageous to attract contracting parties to choose the Armenian national legislation as an applicable law by putting a threshold of the specific**

[97] RA Law on "Joint Stock Companies", N ՀՕ-232, dated on 06.12.2001, amended as of 31.03.2020, **Article 42(5)**

agreements. In that case, the suggested "subsequent connection test" will not be exercised, and the choice made by the parties will become enforceable. These measures will contribute to avoid the solely formal choices and help to balance the sovereign right of the state and the freedom of the contracting parties.

CONCLUSION

To conclude, we can state that:

- *PA is a generally recognized institute in modern legal systems. Over time, it has strengthened its position as a fundamental and critical determinator of contractual obligations' applicable law. Although it has been recognized worldwide, the implementation of PA differs in every legal framework. The nature of PA is mostly the same everywhere. The difference is how each legal system treats it.*
- *In theory, PA is considered to be a substitute for the "freedom of contract" principle. Therefore, it shall be executed in the same manner as the "freedom of contract." The restrictions imposed on the freedom of contract are synonymous to those applied to PA.*
- *In the common law, the will of parties, is fully supported. The liberal and flexible regulations of common law provide the court the opportunity to solely decide the application of PA based on the specialty of each case. At the same time, the wide use of PA is restrained by generally accepted limitations, as well as those which are connected with the specific nature of the contractual obligations. Additionally, specific to common law the PA is subject to "substantial connection test". Although, even the smallest connection to the chosen law is enforceable.*
- *The continental law adopts a uniform perception of PA by recognizing PA as a primary principle in case of the determination of applicable law. In particular, the Rome I is considered as a final victory in the patch of defining the role of PA in contractual relations. The strictly regulated, yet liberal, the approach of continental Europe enables the parties to choose a governing law in and demands less strict requirements for the enforcement of choice-of-law clauses. Analogously, the PA is subject to some restrictions and exceptions, such as public policy, imperative norms, specific restrictions on consumer contracts, etc.*
- *The problematic Armenian regulations result in two controversial approaches regarding the role of PA in the Civil Code and its scope of application. Namely, according to the first approach, in case of choosing a foreign law, PA is dependent on the FE, and the second approach claims that FE is not a restriction to the parties' free will of choosing an applicable foreign law.*
- *The overall examination of the nature and theory of PA and foreign law practice helps us to understand that PA shall be considered and accepted not only as a PIL principle but also as a part of universally recognized principle: the principle of "freedom of contract". The logical*

and well-grounded analysis throughout the Paper enables us to argue that in no case can the PA be restricted by FE. The foreign law choice of parties in case of the absence of FE is entirely permissible and enforceable.

- *Finally, in order to fully solve the problem existing under Armenian law, we have suggested several amendments to be made in the existing legislation that will finally settle down the contradictions and balance the sovereign right of the state and the freedom of the contracting parties.*

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