

Domestic Contract Law as an Obstacle to the European Internal Market

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2. Situation

Regulatory competence of the EU Member States

Freedom of contract

Freedom of choice concerning the applicable law

2 a) Mandatory rules in domestic contract law

- Conclusion (e.g. form, error)
- Transaction (e.g. termination)
- Content (e.g. liability and exemption clauses; judicial control of standard terms; good faith; immoral contracts)
Special: Rules shaping the subject; “legal product” (financial services; insurance contracts)

2 b) Restrictions of the free choice of law in international private law

- Choice of law, Art. 3 (1)
- No evasion, Art 3 (3)
- Protection of the "weaker party"
 - Consumer contracts, Art. 6 (1)-(2)
"provided that the professional:
 - (a) pursues his commercial or professional activities in the country where the consumer has his habitual residence [...]
 - Insurance contracts, Art. 7 (3) ... only the following laws may be chosen ...
 - (a) the law of any Member State where the risk is situated at the time of conclusion of the contract;
 - (b) the law of the country where the policy holder has his habitual residence;
 - (c) in the case of life assurance, the law of the Member State of which the policy holder is a national; ...
- Application of overriding mandatory provisions of the law of the forum, Art. 9

2. Situation

Result 1.

Two kinds of civil law rules must be distinguished:

First, contract law rules from which derogation by agreement or choice of law is possible.

Second, mandatory rules (especially for consumer and insurance contracts) from which no derogation is possible because they shall protect a certain minimum standard. Some of them are even internationally applicable, should the law of another country be chosen.

3 Contract law rules as obstacle according to *Dassonville*

a) Case law of the European Court of Justice

Case 8-74 Dassonville par. 5

All trading rules enacted by member states which are **capable of hindering, directly or indirectly, actually or potentially, intra-community trade** are to be considered as measures having an effect equivalent to quantitative restrictions.

Case 120/78 Cassis par. 14

There is therefore no valid reason why, provided that they have been **lawfully produced and marketed in one of the member states**, alcoholic beverages should not be introduced into any other member state [...]

a) Case law of the European Court of Justice

CMC Motorradcenter par. 12 (Art. 28)

It follows that the restrictive effects which the said obligation to provide information might have on the free movement of goods are ***too uncertain and too indirect*** to warrant the conclusion that it is liable to hinder trade between Member States

b) No general exemption for contract law

Arguments pro exemption

- Tradition
- civil law as pre-condition
- coherence of civil law systems

Arguments contra exemption

- Supremacy of EC-Treaty
- no “carte blanche” for the national legislator
- no difference in potential restrictive effects between civil and public law rules
- coherence is not an aim in itself
- principle of subsidiarity cannot exclude whole contract law from EC-Treaty

c) Rules from which no derogation is possible

= Obstacle

- Bind private parties
- Re-draft standard contracts
- Costs for information, legal advice and adaptation
- Suppliers regard offering in other countries as economically unviable and refrain from doing so

d) Rules from which derogation by choice of law or agreement is possible

= no obstacle

If choice of law possible

- So ECJ in *Alsthom Atlantique*
- Choice of law is complementary
- Differences inherent in federal system
- Information costs no obstacle

If derogation by agreement possible (= default rules)

- Possibility to exclude
- save transaction costs
- restriction arise from private actors

3 Contract law rules as obstacle according to *Dassonville*

Result 2

Whether domestic contract law rules fall within the scope of Art.28 and 49 EC-Treaty is to be scrutinized under the effect-based test of *Dassonville*. Especially mandatory rules which cannot be avoided by choice of law are liable to hinder intra-Community trade. In contrast, restrictive effects are generally unlikely for default rules or cases when choice of law is given.

4. The *Keck*-exemption

a) The *Keck*-decision and criticism: the market access approach

Joined cases C-267/91 and C-268/91 *Keck and Mithouard* par. 16-17

16 By contrast, contrary to what has previously been decided, the application to products from other Member States of national provisions restricting or prohibiting **certain selling arrangements** is not such as to hinder directly or indirectly, actually or potentially, trade between Member States within the meaning of the *Dassonville* judgment (Case 8/74 [1974] ECR 837), so long as those **provisions apply to all relevant traders** operating within the national territory and so long as they **affect in the same manner, in law and in fact**, the marketing of domestic products and of those from other Member States.

17 Provided that those conditions are fulfilled, the application of such rules to the sale of products from another Member State meeting the requirements laid down by that State is not by nature such as to prevent their access to the market or **to impede access** any more than it impedes the access of domestic products. Such rules therefore fall outside the scope of Article 30 of the Treaty.

b) Transposition of the *Keck*-exemption to the other fundamental freedoms

- no general supervisory power of the ECJ
- similar structure
- material assessment
- principle of subsidiarity
- increasing application of *Keck*-criteria by the ECJ

4. The *Keck*-exemption

Result 3

The *Keck*-rationale, according to which certain selling arrangements may fall outside the scope under the three conditions that they are indistinctly applicable, that they have the same factual impact on imports and domestic products and that they do not prevent market access, is applicable within the scrutiny of all contract law rules whether they affect the free movement of goods or services.

5. Application of *Keck* to the contract law rules

Categorisation product requirement – selling arrangements?
Effect based test

Not sufficient to create obstacle: Mere differences between legal orders and information and adaptation costs from that

Unless: impede market access

5. Application of *Keck* to the contract law rules

a) Rules concerning the conclusion and transaction of the contract apply only once per transaction

- no additional burden
- do not impede access

→Falls under *Keck*; no obstacle according to Art. 28 or 49

→Except: rules which hamper the conclusion in particular of cross-border contracts

b) Rules that shape the content or structure of the service as a “product”

- concern especially financial products
 - impede market access for services provided on the basis and according to contract law rules of the country of origin
 - insurance contracts must be re-designed and re-calculated
- raises costs
- no single risk pool
- no *Keck*; obstacle which has to be justified

c) Other rules concerning the content of the contract: defining the boundaries

Effect based test:

liability rules:

- do not concern the main contractual obligation
- apply only once per transaction, no double burden
- apply equally in law and fact

rules granting or regulating contractual rights

- do not concern the product itself
- no adaptation necessary, only of the price

ex post control of standard terms and conditions

- concern side aspects, unlikely to impede market access
- except: control of main contractual obligations

c) Other rules concerning the content of the contract: defining the boundaries

nullity of immoral contracts

- if rules concern the conditions of conclusion → mostly selling arrangements
- if rules concern main subject as gambling → need for justification

price control

- maximum / minimum prices might impede access
- prohibition of a resale at a loss → *Keck*

d) Rules going beyond mandatory rules based on European directives

Prohibited by directive itself?
Frustrating harmonising effect?
Mutual recognition?
→ Very problematic

5. Application of *Keck* to the contract law rules

Result 4

Rules concerning conclusion and transaction of a contract

Most rules concerning the content of the contract

→ *Keck*

Rules shaping the subject of the contract, the “product

→ no *Keck*-exemption but justification

→ Result 4 (handout)

6. Justification

Consumer protection

Proportionality: no justification if the consumer is sufficiently protected by the binding consumer protection rules of the Member State of origin of the product

→ Result 5 (handout)

7. Conclusion: No necessity of a uniform European contract law

- Mutual recognition according to *Cassis*
- Information concept
- Supplemented by minimum harmonisation in the relevant areas
 - Considers the principle of subsidiarity and the federal structure of the EU
 - Preferable to a European Contract Code
 - Result 6 (handout)

Thank you very much for your attention!