Kluwer Copyright Blog

Limitations to parties' choice of law in copyright exploitation contracts in the digital era (Part 2)

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This is the second of a set of two blog posts (see Part 1 here) which analyses the limitations to parties' freedom to determine the law applicable to contracts aimed at the exploitation of protected content online. It discusses the concept of overriding mandatory provisions and its potential application to relevant rules of (copyright) contract law, as well as the specific private international law regimes foreseen by the Rome I Regulation for

employment and consumer contracts.

Overriding mandatory provisions

The courts of Member States seized to rule on a dispute must apply so-called ‘overriding mandatory provisions’ of their own national law (Article 9(1)-(2) Rome I Regulation). In addition, in a contractual context, courts may at their discretion give effect to overriding mandatory provisions of the law of the country of performance of the contractual obligations—a third country that is different from the forum—, but only to the extent that these provisions render contract performance unlawful (Article 9(3) Rome I Regulation). The concept of overriding mandatory law refers only to legal provisions that a country considers to be crucial to its public interests, including—but not expressly limited to—its political, social or economic organisation.

The author has researched the laws of Belgium, France, Germany and the Netherlands. Several of these jurisdictions declare certain provisions of copyright contract law compulsorily applicable in an international context if there is a close link between the contract and their territory, regardless of any contrary choice of law. The parallel with the concept of overriding mandatory provisions is clear:

- In France, Article L 132-24 para 2 French Intellectual Property Code is of particular note, as it seeks to counter buyout practices in the audiovisual sector. Film composers may always invoke the right to proportionate remuneration, the contract adjustment mechanism and the reporting obligations specific to audiovisual production contracts for the exploitation of their work on French territory, regardless of any choice of law.
- The German legislator has provided for the compulsory application of its provisions concerning fair remuneration, the contract adjustment mechanism, the reporting obligations and alternative dispute resolution under the following conditions:
- if the contract would be governed by German law in the absence of choice of law and/or
- to the extent that the contract covers significant acts of exploitation in Germany (Article 32b German Copyright Act).
- Dutch law goes even further and declares *all* copyright contract law provisions of the Dutch Copyright Act to be applicable if:
- the contract would be governed by Dutch law in the absence of choice and/or
- the acts of exploitation (must) take place wholly or predominantly in the Netherlands (Article 25h(2) Dutch Copyright Act).

It could be argued that legislative measures that seek to counter the weaker bargaining power of artists primarily seek to safeguard *private* interests and not the public interest, as is required to qualify as overriding mandatory law. However, the broader socio-economic policy objective of the legal framework is to avoid the abuse of weaker parties, to secure artists’ freedom to create and/or to achieve a fair balance of stakeholders’ interests; all in a bid to further civil society and, thus, the public interest. Analogous reference may be made to case law of the CJEU on the Commercial Agency Directive, which seeks to protect commercial agents in a principal-agent relationship in

view of their perceived weaker bargaining power. These provisions have been repeatedly qualified as overriding mandatory law in the context of disputes with an EU dimension, even if the principal (which equates to the corporate partner in a copyright exploitation context) is established outside the EU (see here, here and here). In addition, it is worth reminding that Article 17(2) of the Charter of Fundamental Rights of the EU expressly sets forth that IP rights are protected, thus confirming the status of IP as a fundamental right and increasing the potential public interest dimension of IP legislation, including copyright contract law.

There are certainly arguments in favour of the qualification of at least some protective legislative measures as overriding mandatory law. It should not be all too easy to render the legal framework moot in practice by way of a contrary choice of law clause. This holds especially true for provisions that have an impact on moral rights or artists' freedom to create, such as rules that limit the grant of rights concerning future music. A solution similar to what is foreseen in Germany or the Netherlands may be envisaged, provided that it is clear exactly (1) what acts of exploitation in a certain territory are required for the requisite close connection that leads to the application of the not-contractually-elected law, as well as (2) which provisions (should) have the status of overriding mandatory law. However, drawing a line between what is 'important enough' and what is not seems to be a near impossible and inherently subjective task.

Moreover, substantive considerations also argue against a qualification of provisions of (copyright) contract law as overriding mandatory law, in particular the exceptional nature of this concept and the ensuing need for a strict interpretation thereof. Indeed, this corrective mechanism ought to be interpreted more narrowly than the concept of mandatory law and with due respect for the parties' freedom of contract, as confirmed by the CJEU (see here and here). An overly broad interpretation could lead to a slippery slope and could even boil down to a pretension of global effect of EU law. Caution is advised against such overreach and associated watering down of the concept of overriding mandatory law, if only for the sake of international comity. The wider the potential territorial reach of a certain rule, the higher the risk of its non-application in practice. Possible contributing factors in this regard are potential language barriers and/or a lack of material (or even moral) resources on the part of foreign judges.

An additional hurdle arises in view of the complexity of the copyright licensing chain. Indeed, foreign sub-licensees may not only seek legal certainty, but are also likely to favour the application of a more lax legal framework—or at least the obtention of certain guarantees or indemnities in this regard from the artist's initial corporate partner. This puts corporate partners in an unenviable position, since they may be forced to increase their own liability.

Regardless, it is submitted that the substantive merits of the (copyright) contract law framework outweigh corporate partners' interests in seeing this framework disapplied in international situations. The specific regimes foreseen for parties deemed to have a weaker bargaining position, namely employees, insurance takers and consumers, may provide more fruitful ground for inspiration, and an alternative route to secure the application of the relevant provisions of mandatory law.

Preferential regimes for employees and consumers

Employees—and thus also employed artists—may rely on an advantageous regime under EU

private international law: they can invoke preferential provisions of mandatory law of the country where they habitually carry out their work (Article 8 Rome I Regulation). Where the habitual place of work cannot be determined, reference is made to the place of business of the employer (to be determined in accordance with Article 19 Rome I Regulation). If the circumstances of the case show a closer connection with another country, the mandatory law of that other country applies. Consumers also receive preferential treatment. Under certain circumstances, they can rely on preferential rules of mandatory law of the country of their habitual residence, regardless of the choice of law in the consumer contract (Article 6 Rome I Regulation).

An argument may be made in favour of extending the protection granted to employed artists to freelancers that usually operate in the context of a single ensemble/company or a limited number of ensembles/companies. Otherwise, a risk of discrimination may arise. A more ambitious alternative would be to foresee a new regime entirely, modelled on the pre-existing rules applicable to consumer contracts, for all copyright exploitation contracts and allowing artists to invoke the mandatory laws that apply in their country of habitual residence. Such a solution was advocated in the context of the soft law 'Kyoto Guidelines', which resulted from in-depth research by an international group of academics (see in particular Articles 21 in conjunction with 22 Kyoto Guidelines).

Incidentally, the existence of regimes specific to situations where a difference in bargaining power exists provides another argument against the qualification of the (copyright) contract law framework as overriding mandatory law, as such a finding would apply by analogy to these existing regimes. Therefore, among other reasons for the sake of coherency of the private international law framework, reliance on the concept of overriding mandatory law may constitute a suboptimal solution.

Conclusion

There are several potential legal bases to curb the contractual circumvention of the legal protection offered to artists under (copyright) contract law in the EU Member States. The qualification of the protective legal framework as overriding mandatory law is possible, but raises additional issues. Mirroring the protective regimes applicable to either employment or consumer contracts presents itself as a more ambitious, but also fairer alternative.

This post discusses part of the presentation on copyright contracts and private international law given by the author at the Copyright Contracts Tomorrow conference in Ghent on 23 September 2022. It relates to the author's doctoral thesis, which focuses on the substantive legal framework surrounding contractual dynamics in the digitised music industry in Belgium, France, Germany and the Netherlands, as well as the application thereof in practice.

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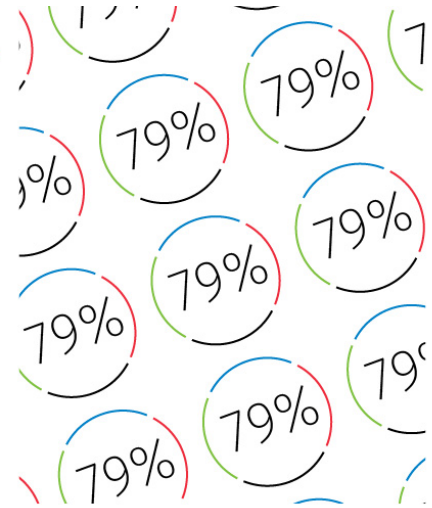

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