

# INTRODUCTION

The choice of governing contract law has historically been conceived as a paramount decision in cross-border negotiation of contracts, inasmuch as it governs a contract's life from beginning to end. As a matter of fact, the governing contract law dictates and regulates a party's behaviour by attaching legal and economic consequences to each step taken in the course of the contractual relationship. Whilst this choice may often result in anticipating the allocation of stakes (monetary value) between the parties, the economic analysis of law assists us in understanding law as incentives for changing behaviour (implicit prices) and as instruments for policy objectives (efficiency and distribution).<sup>1</sup> Consequently, parties will cooperate or not depending on the incentives in play which, as readers will appreciate, may vary greatly.

In a cross-border sale, where parties may come from vastly different jurisdictions, both in terms of cultural and legal traditions, one may wonder which law should regulate the deal. Would domestic law better fit that purpose? Perhaps third-party law? Or a neutral legal framework? How can parties find the right balance? Is there a right balance, after all? More importantly, do they want to find it at all?

Despite its acknowledged theoretical importance, it is often suggested that negotiators might dedicate less attention than they should to the particulars of the choice of law clause. Instead, negotiators tend to opt for law that may be convenient for business, or be the result of previous experiences, including, for example, following in a partner's footsteps, or a successful deal in the past, without further deliberation.

In light of this apparent discrepancy between theory and practice, we decided to investigate further how traders actually choose the law for their deals. We also wanted to find out the reasons for these decisions and the foundations on which these decisions are based. This is how the Global Empirical Survey on Choice of Law, which will be discussed in detail in this book, was conceived in 2014. The survey was essentially designed to investigate parties' concerns regarding choice of law and to assess whether neutral legal frameworks were welcome in addressing these concerns.

It is undisputed that negotiators have traditionally tried to impose their own law in deciding which system of law is to govern a contract. This tendency can pose hindrances, as parties might not make the best decision they could. This is precisely our first point of concern: we aim to reveal how and what factors determine the way contracting parties choose the law to govern their agreements. We shall also elaborate on whether parties are

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<sup>1</sup> See R. Cooter & T. Ulen, *Law and Economics*, Addison-Wesley, Boston, 2007, p. 9.

actually aware of biases and heuristics,<sup>2</sup> cognitive blinders that might simply cloud or blur a decision. Alternatives to ‘home turf’ and ‘arm-wrestling’ tactics, which are often seen in practice, will also be discussed.

Readers will subsequently be invited to consider the major market distortions and failures to which contracting parties are routinely exposed. We shall demonstrate that, with the increase of market activities and complexity of deals worldwide, parties need to be equipped with the most efficient tools to maximize gains from cross-border contracts, thereby avoiding risks and costly mistakes. With this purpose in mind, we shall analyze choice of law studies undertaken and offer alternatives to be used in practice, which seek to overcome recurrent complaints, uncertainties and fears when it comes to choosing governing contract law. We shall also attempt to verify the effectiveness of these solutions in light of the evidence presented.

It is the aim of this book to examine the position of the choice of law in the decision-making processes in cross-border sales. The first part of the book sets out evidence on the choice of law: the available data will be explored in fine detail, including a focus on how negotiators typically approach the subject and what are the main drives and triggers of this decision. We shall further investigate whether contracting parties are aware of the vast legal market options available and whether they actually enjoy their benefits. In the second and third chapters, we shall map out some of the market distortions and imperfections to which negotiators are (consciously or not) routinely exposed. We shall also reveal the common psychological triggers that influence decision-making processes and how to identify and better control them to a party’s best advantage. We shall further shed light on the idiosyncratic contract design and the mechanisms to manage this properly in an international context, all in an attempt to identify and use the appropriate tools to make better decisions and obtain more efficient outcomes.

The final part of the book (Chapters 4 and 5) will concentrate on alternatives to escape ‘arm-wrestling’, ‘home turf’, deadlock situations and other tactical scenarios in cross-border sales. We shall present and compare alternatives which can be used in international contract settings and then test the effectiveness of the solutions they can provide, taking into account both the legal and economic aspects and contracting parties’ real-life concerns and preferences collected in the earlier chapters. Readers are invited to find out the answers to the following questions: what really matters to contracting parties when drafting choice-of-law clauses? Are there key provisions, ‘backbones’, legal standards or frameworks that are indeed indispensable? Do contracting parties consider legal and economic choices at all? With this in mind, we aim to offer to legal practitioners tools that enable them to excel and effectively optimize, at a rather even level between parties, the exchange of goods worldwide.

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2 Cognitive biases are mental shortcuts commonly used in making daily decisions. Because a decision can (and usually does) take time and effort, the mind uses routes (heuristics) to facilitate the process of reaching a conclusion or making a decision. The topic will be further discussed in Chapter 2.