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THE PRINCIPLE OF PROXIMITY IN CONTRACTUAL OBLIGATIONS: THE NEW TURKISH LAW ON PRIVATE INTERNATIONAL LAW AND INTERNATIONAL CIVIL PROCEDURE

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ABSTRACT

The conflict rules on contracts which have been formulated with reference to the principle of proximity have left a considerable mark on the second half of the twentieth century and similar rules are still in use in the early twenty-first century. The reason for that high acceptance seems to be that the common character of such rules is "flexibility." Such rules have always stood against the hard-and-fast choice-of-law rules that preclude the development of the conflict of laws, so that they give each system of law the opportunity of adopting its own understanding of proximity. In Turkish Private International Law, flexibility seems finding itself a broad place in contractual obligations with the entry into force of the new Turkish Law on Private International Law and International Civil Procedure (Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun –MÖHUK). The general rule and many particular rules on contractual obligations now reflect the heavy influence of the principle of proximity. This study is going to examine mainly how the conflict rules on contractual obligations in the new MÖHUK reflect flexibility and the principle of proximity.

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ÖZ

Sözleşmeden doğan borç ilişkileri alanında yakınlık ilkesinden hareketle formüle edilen ihtilaf kuralları, yirminci yüzyılın ikinci yarısına damgasına vurmuş ve taşıdıkları ortak özellik olan "esneklik" fikri sebebiyle kanunlar ihtilafı hukuku alanında sevk edilmiş belli başlı hukuki düzenlemelerde yirmi birinci yüzyılda da varlıklarını önemle sürdürmektedirler. Bunun sebebi, yakınlık ilkesinin, içerdiği esneklik fikri ve yanı sıra esneklik derecesi konusunda hukuk düzenlerine kendi yorumunu getirme imkânını tanımasıdır. Yakınlık ilkesi, yeni Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanuna da, sözleşmeden doğan borç ilişkileri itibariyle damgasını vurmuş görünmektedir. Bu çalışmada, yakınlık ve esneklik fikrinin sözleşmeden doğan borç ilişkilerini konu edinen genel ve özel ihtilaf kuralları itibariyle yeni MÖHUK'ta ele alınış biçimi değerlendirilecektir.

Keywords: *Contract conflicts, contract, conflict of laws, choice-of-law, applicable law, private international law, proximity, flexibility, principle of proximity, the closer connection, the closest connection, most significant connection, escape device, exception clause, Turkish, Turkish law, MÖHUK, Law on Private International Law and International Civil Procedure, Turkey, renvoi, public policy, formal validity, internationally-mandatory rules.*

Anahtar Kelimeler: *Sözleşmeden doğan borç ilişkileri, sözleşme, yakınlık ilkesi, yakınlık, esneklik, akit, kanunlar ihtilafı hukuku, uygulanacak hukuk, yetkili hukuk, uluslararası özel hukuk, milletlerarası özel hukuk, en sıkı irtibat, daha sıkı irtibat, en yakın irtibat, daha yakın irtibat, kaçış kuralı, istisna kuralı, Türk Hukuku, Türkiye, MÖHUK, Milletlerarası Özel Hukuk ve Usul Hukuku Hakkında Kanun, atıf, kamu düzeni, şekil, doğrudan uygulanan kurallar, milletlerarası emredici nitelik taşıyan kurallar.*

I. GENERAL INFORMATION ON THE NEW LAW

The new Turkish Law on Private International Law and International Civil Procedure[1] has recently entered into force. Like the former law (No. 2675, May 20, 1982),[2] the new law addresses the law applicable to private law transactions and relationships that involved a foreign element, the international jurisdiction of Turkish courts, and the recognition and enforcement of foreign judgments

[1] Law No. 5718, Nov. 27, 2007. For the official text of the Law *see* the Turkish Official Gazette Nr. 26728, dated Dec. 12, 2007. This article will refer to the law by its Turkish acronym, hereinafter "the MÖHUK" or the "new MÖHUK". *See also* the governmental report of the MÖHUK *available at* http://www.tbmm.gov.tr/kanunlar/k5718.html (last visited Mar. 16, 2008).

[2] Hereafter the former law or the "former MÖHUK". For the Turkish text of the former MÖHUK *see* the Turkish Official Gazette Nr. 17701, dated May 22, 1982. For a brief study of the author on contract conflicts on the former law *see* Gülin Güngör, *Contract Conflicts,* IPRAX 61, Issue 1, 61-67 (2006).

without prejudice to any applicable international conventions to which Turkey is a party.[3]

A. Application of Foreign Law

As was the case with the former law, the new MÖHUK explicitly allows the application of foreign law when the relevant Turkish choice-of-law rules require its application.

In Turkey, foreign law is applied as a law.[4] Hence, foreign law is not regarded as a fact whose application is subject to allegation and proof by the party that relies on it. The judge is under a duty to apply Turkish choice-of-law rules and, *sua sponte* to determine which foreign law should be applied in accordance with these rules.[5] Nevertheless, the judge is entitled to seek help from the parties in the course of finding the material scope of the foreign law.[6] It should be noted that it will be in the best interests of the party who is going to benefit from the application of the foreign law to provide the necessary help. This help should cover information on the desired foreign law, including its statutory rules, case law, theory and the doctrinal views relevant to the given case. Otherwise, despite his efforts, if the judge cannot succeed in determining the material scope of the foreign law, it is well settled that Turkish domestic law should be applied.[7]

On the other hand, the new MÖHUK follows an informative approach with respect to the domestic conflict of laws by expressly stating that the issues relating thereto are to be solved with reference to the law of the relevant country. In the absence of such a rule in the law of the relevant country then the law of the partial system of law with which the dispute has the closest connection should be applied.[8]

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[3] *See* MÖHUK Art. 1.

[4] For an early commentary on the application of foreign law in Turkey *see* Ergin Nomer, DAVADA YABANCI KANUN [FOREIGN LAW IN LITIGATION] 5 *et seq.* (Istanbul University Printers, 1972).

[5] *See* MÖHUK Art. 2/1.

[6] *See Id.*

[7] *See* MÖHUK Art. 2/2.

[8] *See* MÖHUK Art. 2/5.

B. Renvoi

Different from the former law, the new MÖHUK admits *renvoi* only in disputes mainly related to the law of persons and the family law.[9] In other disputes, the references made to another law by a foreign law, referred by virtue of the relevant Turkish choice-of-law rule, shall be disregarded. In the latter case, the substantive law of the jurisdiction referred by the relevant Turkish choice-of-law rule should be applied.

Nevertheless, the new MÖHUK makes an exception for cases where the contracting parties have the power to choose the applicable law. Thus the exception also operates subject to the principle of party autonomy. So the parties may also prefer to choose the choice-of-law rules of the jurisdiction that they have designated as the applicable law.[10] If the parties did not make a choice to that effect, only the substantive law of the jurisdiction chosen by the parties is applied.[11]

C. Public Policy Proviso

The new MÖHUK favors the application of applicable foreign law as a rule, whereas derogation thereof is an exception.[12] Thus, in Turkish law, interference of the Turkish public policy proviso is an extraordinary device. When the judge, in a given case, considers that a particular substantive rule of the applicable foreign law is explicitly contrary to Turkish public policy, that foreign rule is not applied, and Turkish law is applied where necessary.[13] The state of being contrary to the Turkish public policy within the sense of Article 5 does not mean that the foreign system of law as a whole is contrary to Turkish public policy but a particular rule of the foreign law is. In this context, the mere fact that substantive scope of the foreign law is substantially different than that

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[9] *See* MÖHUK Art. 2/3.

[10] *See* MÖHUK Art.2/4. The grounds of endowing such power seems far from clear.

[11] *See Id.*

[12] *See* Ergin Nomer and Cemal Şanlı, DEVLETLER HUSUSI HUKUKU [PRIVATE INTERNATIONAL LAW] 164 (Beta Publishing Co. 2008).

[13] *See* MÖHUK Art. 5. Yargıtay in its judgment of May 6, 1998 tries to draw the general framework of Turkish public policy and considers the events seriously contrary to or agitating the rules of morality and honesty, the basic principles and the values of the law and the society, justice, the understanding of morality and the fundamental rights in the Constitution as cases that seriously violate Turkish public policy. See the judgment of Yargıtay HGK, E.1998/12-287, K.1998/325, 6.5.1998 *available at* http://www.kazanci.com.tr.

of the Turkish law does not trigger the public policy proviso and the application of Turkish law.

In cases where Turkish public policy interferes with the application of a particular rule of the foreign law, recourse to Turkish domestic law is made subject to the requirement of absolute necessity. At this point, it has been suggested by some commentators that the existence of any other relevant rule of the applicable foreign law may remove the need to refer to Turkish domestic law.[14] According to that view, in such cases, if another relevant rule of the foreign law still remains, it should still be applied.

D. Internationally Mandatory Rules of Turkish Law

The new law also includes a particular rule on the application of the internationally mandatory rules[15] of Turkish law. Nevertheless, not the issue itself, but its adoption in the MÖHUK is new to Turkish law. The issue is apparent and familiar to Turkish legal doctrine since the early days of the former law. By adopting a particular rule, the legislature aims to remove the ambiguities that may arise in practice.

The new MÖHUK provides that any issue, covered by virtue of subject or place, by a Turkish rule which has an internationally-mandatory character, is excluded from the field of application of the applicable foreign law.[16] Thus it is well settled that the internationally-mandatory rules of the Turkish law have superior effect in Turkey than that of any applicable foreign law, including foreign rules having a similar character.

E. Formal Validity of Transactions

With respect to the formal validity of transactions, the new MÖHUK continues to follow its former permissive approach. Accordingly, a transaction will be treated as formally valid in Turkey if it is concluded in accordance with the formal requirements of the law governing the essential validity of that transaction,[17] or the law of the place where the transaction is concluded.[18]

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[14] *See* Nomer and Şanlı, *supra* note 12, at 182.

[15] In the sense of *lois applicable immediate* [rules of immediate application] under French law.

[16] *See* MÖHUK Art. 6.

[17] *lex causae.*

[18] *locus regit actum / lex loci actus.*

Conversely, for a transaction (e.g. a contract) to be formally invalid in Turkey, it should be invalidated by both sets of law (Turkish and place of transaction).

Since Article 7 of the MÖHUK favors upholding transactions[19] whenever possible, it deserves to be treated as a rule of validation under Turkish law.[20] Finally, it has been clearly stated in the MÖHUK that only the substantive provisions of the applicable laws are going to be applied.[21]

F. Extinctive Prescription

MÖHUK refers issues of extinctive prescription to the law governing the essential validity of the relationship.[22] Starting from the entry into force of the former MÖHUK in 1982, Turkish law has been admitting the substantive nature of the concept of extinctive prescription.[23] Accordingly it has been clearly settled in Turkish law that the law governing the essence of the relationship shall also govern issues related to extinctive prescription.[24] It should be noted, however, that the application of the foreign rules of prescription may be precluded on the basis of opposition to Turkish public policy.

II. THE PRINCIPLE OF PROXIMITY IN CONTRACT CONFLICTS

A. Principle of Proximity and the General Rule on Contract Conflicts

MÖHUK, in Article 24/1, admits, in principle, the freedom of contract (party autonomy) which enables the contracting parties to choose the law governing their contract. The parties' choice of the applicable law may govern the whole or a part of their contract.[25] Nonetheless, the parties' choice of the applicable law must either be explicit or implicit; both of them are considered to

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[19] *favor negotii*.

[20] *lex validitatis*. For a brief information on the former MÖHUK (Art.6), *see* Gülin Güngör, MİLLETLERARASI ÖZEL HUKUKUTA TÜKETİCİNİN KORUNMASI [CONSUMER PROTECTION IN PRIVATE INTERNATIONAL LAW] 224 et seq. (Yetkin Academic Publishing Co. 2000).

[21] *See* MÖHUK Art. 7.

[22] *See* MÖHUK Art. 8.

[23] *See* the former MÖHUK Art. 7. Also see Cemal Şanlı, *Milletlerarası Akitlerde Zamanaşımı [Extinctive Prescription in International Contracts],* 63 İBD 637, 637-649 (1989).

[24] From time-to-time, judgments have been released from the courts of first instance (trial courts) to the opposite effect that the extinctive prescription is procedural in nature.

[25] *See* MÖHUK Art. 24/2.

be the parties' choice. The implicit choice is to be derived from the terms of the contract or the circumstances of the case. In cases where parties do not have an explicit or an implicit choice, the presumed intent of the parties as to applicable law is not a matter of concern.

By virtue of the new law, the parties may also choose to apply the choice-of-law rules of the jurisdiction that they have designated as the applicable law.[26] If they did not make such a choice, then only the substantive rules of the chosen law must be applied.[27]

A choice-of-law agreement may be contracted or amended at any time.[28] Nonetheless, a valid choice-of-law agreement concluded after the conclusion of the main contract is considered to have retrospective effect, but is not permitted to affect adversely the rights of the third persons.[29]

The rule stating that a choice-of-law agreement may be contracted or amended at any time needs to be read together with the related rules of the Law of Turkish Civil Procedure,[30] which may limit the latest moment at which a choice-of-law agreement or a change thereto, can be made. It may be regarded by reference to the Turkish civil procedural law that a choice-of-law agreement or a change thereto is to be considered by the court only if it is concluded at a time earlier than the court has been trying the essence of the case.[31]

On the other hand, pursuant to Article 24/4 of the MÖHUK, in cases where the parties did not include a choice-of-law agreement in their contract, their contractual relationship is governed by the law which is most closely connected with the contract. Thus, the principle of proximity appears first in Article 24/4 of the MÖHUK. Nonetheless, the principle of proximity interferes, not only with cases where the parties did not make a choice at all or to the extent that they did not make a choice of the applicable law, but also when they could not have made a valid choice pursuant to the applicable law.[32]

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[26] *See* MÖHUK Art. 2/4.

[27] *See Id.*

[28] *See* MÖHUK Art. 24/3.

[29] *See Id*.

[30] Law No. 1086, June 18, 1927. For the official text of the law, *see* the Turkish Official Gazette Nr. 622-623-624 dated June 2-3-4, 1927. Hereafter the HUMK.

[31] *Cf.* HUMK Arts. 375, *et seq*.

[32] *lex contractus.*

Therefore the general contract conflicts rule, in the absence of a choice of law agreement, is the law which is most closely connected with the contract.

MÖHUK Article 24/4, in principle, does not have an open-ended[33] or *a* non-rule approach. Rather it has an understanding of a sort of principled flexibility which operates through a number of rebuttable presumptions.[34] Nevertheless, the understanding of principled flexibility employed in the MÖHUK is different than that of the Rome Convention[35] or the Swiss Federal Act on Private International Law.[36] In MÖHUK, the presumptions are adopted to have the nature of choice-of-law rules.[37] On the other hand, similar to the Rome Convention and the Swiss Federal Act on Private International Law, the MÖHUK, in principle, apparently follows a jurisdiction-selecting or country-selecting approach based on conflict justice.

In Article 24/4 of the MÖHUK, the law which is presumed to have the closest connection with the contract is put forward according to various possibilities. In all cases, the applicable law is that which was in force at the time of conclusion of the contract ('time factor').

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[33] *See* §188 of the Restatement (Second) of the Law, Conflict of Laws 2d, §§ 1 to 221, As Adopted and Promulgated by The American Law Institute (Revised and Enlarged), Introduction, s.VII, St.Paul, Minn. 1971; hereafter the Restatement II; for the summary of the Restatement II cases between July 2005 to June 2002 *see* Restatement of the Law, Second, The American Law Institute, Restatement of the Law Conflict of Laws 2d Cumulative Annual Supplement For Use in 2003 Reporting Cases From July 1995 Through June 2002 that Cite Restatement of the Law of Conflict of Laws (1 Vol.) and Restatement of the Law Second, Conflict of Laws 2d (2 Vols.) §§1 to End, St.Paul Mn. 2003.

[34] *See* MÖHUK Art. 24/4.

[35] *See* Art. 4. For the text of the EC Convention on Law Applicable to Contractual Obligations (Rome, 19 June 1980) see 1991 UNIFORM LAW REVIEW, Issue 2, 68-113; see also Mario Giuliano and Paul Lagarde, Report on the Law Applicable to Contractual Obligations, Official Journal of the European Communities, C 282 (Oct. 31, 1980) 1-47. Conversely, in Article 4 of the Rome I Regulation (Proposal) an approach of principled flexibility is adopted so that the presumptions of the law of the country with which the contract is most closely connected are now put in the form of objective choice-of-law rules. See the Proposal For A Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I) – Outcome of the European Parliaments First Reading (Brussels, 28 to 29 November 2007), 15832/07, Brussels 3 December 2007, CODEC 1357, JUSTCIV 320.

[36] *See* the Swiss LDIP Art. 117. For a detailed commentary on the Swiss Private International Law Statute, *see* B. Dutoit, COMMENTAIRE DE LA LOI FEDERALE SUISSE SUR LE DROIT DU 18 DÉCEMBRE 1987 [COMMENTARY ON THE SWISS FEDERAL LAW OF 18 DECEMBER 1987] (Troisième édition revue et augmentée, Bâle 2001).

[37] For a similar approach, *see* Art. 4 of the Rome I Regulation, *supra* note 35.

First, the law of the habitual residence of the party who is to do the characteristic performance governs the contract. Nevertheless, certain possibilities are also considered in Article 24/4.

> *If the contract is concluded in the course of commercial or professional activities of that party, then the law where his/its place of business situated is applied.*
>
> *If that party has more than one place of business then the law of that place of business which is most closely connected with the given contract is applied.*
>
> *If the contract is concluded in the course of commercial or professional activities of that party, however he/she has no place of business, then the law of his/its domicile is applied.*

The new MÖHUK, like the former one, makes use of the concept of characteristic performance in Article 24/4 as a part of its objective test. It doesn't, however, define the concept of characteristic performance, which also was the situation in the former law.[38] In doing so, it refers to the test of characteristic performance to be clarified in practice and in the doctrinal studies. Hitherto, Turkish doctrine has followed the narrowest understanding of characteristic performance and the practice has followed the doctrine.[39] Accordingly, in the time of the former law, the characteristic performance was considered to be the counter-performance of the monetary performance.

In the view of this author, that may be one test to follow in the determination of the characteristic performance. However, such a view does not help much when both of the parties' performances are monetary or non-monetary. It is apparent in such cases that the criterion seems to be supplemented by having it detailed, or replaced by other criteria, as it is the case in the homeland of the concept of characteristic performance, Switzerland.

The criterion supplementing the counter-monetary performance view is addressed to determine which performance stands in lieu of the monetary performance in cases where both of the parties' performances are non-monetary and upon the consideration that its counter-performance is characteristic.[40]

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[38] *See* the former MÖHUK Art. 24/2.

[39] *See* Nomer and Şanlı, *supra* note 12, at 316; *see also* Bilgin Tiryakioğlu, TAŞINIR MALLARA İLIŞKIN MILLETLERARASI UNSURLU SATIM AKITLERINE UYGULANACAK HUKUK [LAW APPLICABLE TO INTERNATIONAL SALES OF GOODS] 223 (Ankara University Printers 1996).

[40] See Dutoit, *supra* note 36, at 350 *et seq*.; *see also* Gülin Güngör, TEMEL MİLLETLERARASI ÖZEL HUKUK METİNLERİNİN SÖZLEŞMEDEN DOĞAN BORÇ İLİŞKİLERİNE UYGULANACAK HUKUK

> *For example, in a case where a dentist pays a visit to an exhibition and offers the artist a dental treatment in return for having one of his works, since the performance of the dentist is to be considered to be a substitute for the monetary performance, the counter performance, i.e. the artist's performance/the debt to deliver the work, shall be treated as the characteristic performance.*[41]

It is clear in the Swiss conflict of laws doctrine that there are two other criteria applied in the former and the current Swiss conflict of laws practice to determine the characteristic performance, mainly when both of the parties' performances are monetary or non-monetary.[42] These are the performance of the party who takes the greater risk, and the performance of the party who assumes the greater liability in the contractual relationship. Accordingly, the performance of the party who takes the greater risk or assumes the greater liability has normally been considered to be the characteristic performance. Nevertheless, it should be borne in mind with respect to complex contracts[43] that, before having applied any of the criteria to find out the characteristic performance, it seems essential on the part of the judge to first determine the dominant nature of the contract. Otherwise it is likely to result in a determination of two characteristic performances. So, since no definition of characteristic performance has been provided in the Turkish positive law, there seems no good reason not to make use of the guidance of comparative law.

On the other hand, the presumptions in Article 24/4 are the choices of the legislature as the laws that are most closely connected with the contract. Nonetheless, the MÖHUK gives the judge the opportunity to disregard them if it appears from the circumstances as a whole that another law is more closely connected with the contract. By doing so, the MÖHUK on one hand attempts to objectify the law which is most closely connected with the contract but on the other hand aims to soften the system which is traditionally used to apply the hard-and-fast choice of law rules. In this context, it should be noted that the conflict rules in the MÖHUK are all mandatory in nature. Therefore, the opportunity to avoid the objective choice-of-law rules should not be read to the effect that Article 24/4 creates weak presumptions. The presumptions in Article 24/4 should be treated as reasonably strong presumptions.

KONUSUNDA YAKINLIK YAKLAŞIMI – RESTATAMENT II, ROMA SÖZLEŞMESİ, İSVİÇRE LDIP, MÖHUK [PROXIMITY APPROACH IN THE LAW APPLICABLE TO CONTRACTUAL OBLIGATIONS OF THE BASIC TEXTS ON PRIVATE INTERNATIONAL LAW - RESTATEMENT II, ROME CONVENTION, SWISS LDIP, MÖHUK] 176-177 (Yetkin Academic Publishing Co. 2007).

[41] *See* Dutoit *supra* note 36, at 352; *see also* Güngör, *supra* note 40, at 177.

[42] *See* Dutoit, *supra* note 36, at 350 *et seq*.; *see also* Güngör, *supra* note 40, at 176-177.

[43] These are contracts having more than one nature, such as contracts of exclusive distribution.

As it is mentioned above, the presumptions in Article 24/4 are the preferences of the legislature. They are suppositions in relation to the laws which are, in general, most closely connected with a contract. Hence, if there is another law having a closer connection with the contract, then that law shall be presumed to be the law which is most closely connected with the given contract. Thus, if another law has a closer connection with the contract than that of the objective applicable law in the given case, the existence of the exception clause entitles the judge to formulate a new presumption particular to the given case. In such cases, the new presumption constitutes a counter-presumption to the supposition of the legislature's statutory and objectively most closely connected law.

In view of this author, the presumptions may be rebutted if:

a. it is apparent that another law has a closer connection with the case than that of the objective applicable law. In such cases the circumstances of the case apparently indicate that that correct law is the law having the closest connection with the given case.

b. the objective choice-of-law rule technically cannot be applied. This may be due to problems with the elements of the choice-of-law rule. For example, it may not be possible to determine the characteristic performance, or correctly allocate the objective connecting factor in a given country.

c. the objective choice-of-law rule does not serve the needs of the day or a particular type of contract, because it turned into an old-fashioned or an anachronistic rule or the contract is a atypical one, so that it is unsuitable to be governed by the objective governing law.

All three possibilities mentioned above require the assistance of the exception clause ('escape device') to rebut the objective presumptions. Nevertheless, in relation to the last two possibilities, queries may arise as to the operation (methodology) of the escape clause.

- Whether the judge is to formulate a particular choice-of- law rule as a new objective presumption (objectivist approach) or

- Whether the judge should suffice with an *ad hoc* determination of the law which has a more close connection with the given case?

Although the system under MÖHUK follows an objectivist approach serving the conflicts justice, the answer of the query shall vary depending on the development level of the contemporary conflict of laws. The development level

of the conflict of laws of the day may or may not supply sufficient data to formulate a reasonable choice-of-law rule. Therefore, it should be accepted that the judge may end with the *ad hoc* determination of the law which has a closer connection with the given case.

B. Principle of Proximity and the Particular Choice-of-Law Rules on Contract Conflicts

Different from the former law, the new MÖHUK presents particular choice-of-law rules on certain types of contracts involving a foreign element. It seems apparent that the principle of proximity has a heavy influence in adoption of the particular choice-of-law rules on contract conflicts. These are, in order, contracts for employment, intellectual property rights, carriage of goods and certain consumer issues. Additionally, some supplementary rules are also adopted mainly regarding the internationally-mandatory rules of a third country, the existence of the contractual relationship and its essential validity, and the modalities of performance and precautions, to which we shall refer where necessary.

1. Proximity in Employment Contracts

In the new MÖHUK, employment contracts are governed by the choice-of-law rules in Article 27. In addition, the law applicable to employment contracts also covers contracts concluded with the employer regarding intellectual proprietary rights on intellectual products created by the employee within the scope and during the performance of the work.[44]

The MÖHUK gives parties the opportunity to choose the applicable law which will govern their contract. They may also choose to apply the choice-of-law rules of that law. In all cases, the applicable law must involve a higher standard of employee protection than that of the mandatory rules of the law of the employee's habitual place of work.[45] Otherwise, the mandatory rules of the latter law replace those of the applicable law.

In cases where the parties did not include a valid choice-of-law agreement, the law of the employee's habitual place of work governs the employment contract.[46]

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[44] *See* MÖHUK Art. 28/3.

[45] *See* MÖHUK Art. 27/1.

[46] *See* MÖHUK Art. 27/2 (first sentence).

> *If the employee has been temporarily carrying on his work in another country then that country is not considered his habitual place of work.*[47]

Therefore, the legislature's first initial choice in selecting the law which is most closely connected with the employment contract is the law of the employee's habitual place of work. By doing so, the legislature objectifies the law which is most closely connected with the employment contract.

If the employee does not have a habitual place of work and has been regularly carrying on his work in several countries the law of the employee's habitual place of work is not applied. In such cases the choice-of-law rule turns on the employer's principal place of business.[48] Thus, the legislature's second initial choice for the law which is most closely connected with the employment contract is the law of the employer's principal place of business.

The new law presents an escape device as well, which may operate where necessary. It may be invoked in lieu of both of the above-mentioned objective choice-of-law rules. To use the escape device, another law must have a closer connection with the employment contract than that of the objective law.[49] Nonetheless, it is an exception clause that should be distinguished from the general escape devices, e.g. public policy. Exception clauses have been considered to be superior devices than the general escape devices by their very nature, based on the fact that they do not require a state of being contrary to public policy to invoke such rules.

Under ordinary circumstances, exception clauses are mandatory; however, such is not the case in Article 27/4. In an Article 27/4 case, the exception clause is used subject to the judge's discretion. Although the circumstances of the case will indicate whether there is another law having a closer connection with the contract, it seems still within the full discretion of the judge whether or not to refer to that law.

Finally, by way of adopting an exception clause the legislator has turned the objective choice-of-law rules into rebuttable presumptions. Nonetheless, since the rules of the MÖHUK are mandatory in nature, the objective rules should not be considered to be weak presumptions.

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[47] *See* MÖHUK Art. 27/2 (second sentence).

[48] *See* MÖHUK Art. 27/3.

[49] *See* MÖHUK Art. 27/4.

2. Proximity in Contracts Regarding Intellectual Property Rights

The MÖHUK respects party autonomy also in contracts related to intellectual property rights.[50] For cases where the contracting parties did not choose the applicable law, the legislature designated the law of place of business at the time of conclusion of the contract[51] of the party who has transferred the intellectual property right or its right to be used shall be applied.[52] If that party does not have a place of business, the applicable law is then going to be the law of his habitual residence.[53]

In Article 28/2 we come across a legislative approach similar to that of Article 27. That is, the objective choice-of-law rules employed in Article 28/2 are the objective choices of the legislature for typical cases in relation to the law which has the closest connection. Accordingly, the presumptions may be disregarded upon the existence of another law which is more closely connected with the contract. Thus, the new law provides an escape device again in the nature of an exception clause for the contracts related to intellectual property rights. If another law, which is more closely connected with the contract, exists the contract is then going to be governed by that law.[54] Different than that of an Article 27/4 case, the application of the law which is more closely connected with the contract related to intellectual property rights is mandatory. So the judge neither has discretion nor power to ignore that law.

Lastly, if the contracting parties (employee and the employer) have concluded a contract regarding the intellectual proprietary rights on intellectual products created by the employee within the scope and during the performance of the work, then the legal issues related to that contract do not fall within the scope of the law applicable to intellectual property rights but the law applicable to the employment contract.[55]

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[50] *See* MÖHUK Art. 28/1. The explanations related to party autonomy and renvoi are also valid for the contracts regarding intellectual property rights. *See supra* Sec. I B and II A.

[51] "Time-factor".

[52] *See* MÖHUK Art. 28/2 (first sentence).

[53] *See* MÖHUK Art. 28/2 (second sentence).

[54] *See Id.*

[55] *See* MÖHUK Art. 28/3.

3. Proximity in Contracts for the Carriage of Goods

The MÖHUK adopts the principle of party autonomy also in contracts for the carriage of goods.[56] If the parties did not make a valid choice-of-law agreement the law of country where the principal place of business of the carrier is situated at the time of conclusion of the contract has been considered to be the law which has the closest connection with the contract if at the same time that country is the country where the goods are loaded or unloaded, or the country where the sender's principal place of business is situated.[57]

> *The rule is also applied to charter-party contracts for a single voyage and the contracts whose main subject is the carriage of goods.*

At this point the law is silent if there is no such concurrence of these laws. No objective choice-of-law rule is provided for that possibility. Nevertheless, it is likely that the general rule on contract conflicts[58] will govern the contract. In this context, it should be mentioned that, although the legislature has formulated a particular choice-of-law rule, which is even specific to contracts for the carriage of goods, it seems that either a relevant title to that effect or a provision suitable for the current title has been omitted.

On the other hand, an exception clause has been employed in Article 29[59] which compels the judge to apply the law having a closer relationship with the contract for the carriage of goods. For such an exception clause to appear in Article 29 seems surprising after having attributed enormous effect to the concurrence of the referenced laws in the second line. Nevertheless, it may be predicted that Article 29/3 will have a considerably narrow field of application.

4. Particular Understanding of Proximity in Consumer Contracts

The MÖHUK, in Article 26, only covers consumer contracts pertaining to the supply of goods, services and credits, other than for professional or commercial purposes, and adopts an approach very similar to that of Article 5 of the Rome Convention on certain consumer contracts. Therefore, although omitted in its title, MÖHUK Article 26 only covers certain types of consumer contracts entered in the circumstances provided in its second line. Other

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[56] *See* MÖHUK Art. 29/1. The explanations related to party autonomy and *renvoi* are also valid for contracts for the carriage of goods. *See supra* sec. I B and II A.

[57] *See* MÖHUK Art. 29/2.

[58] *See* MÖHUK Art. 24.

[59] *See* MÖHUK Art. 29/3.

consumer contracts will likely fall within the scope of Article 24 of the MÖHUK.

As a liberal approach, the new law entitles the contracting parties to choose the law governing their consumer contract.[60] Nevertheless, the applicable law, to be applied in full, must have a higher standard of consumer protection than that of the law of the habitual residence of the consumer. Otherwise, the mandatory rules of the consumer's habitual residence prevail. Thus the standard of the law of the consumer's habitual residence has been considered to be the minimum standard for the international protection of certain consumers.

It is more common in practice that either the parties do not make a choice-of-law agreement or the other party, having a powerful position inserts a standard choice-of-law clause for his benefit[61] in the consumer contract so that the consumer cannot understand its true meaning and effects. In the case of abuse of the powerful position, the opportunity to set aside such a choice-of-law clause by the chosen law should be carefully considered.[62]

When there is no valid choice-of-law agreement done by the contracting parties, the law of the habitual residence of the consumer governs the essential validity and the intrinsic quality of the consumer contract provided that:[63]

a. the consumer contract is concluded in the country of the consumer's habitual residence upon a private invitation addressed to him or upon an advertisement, and the necessary legal formalities for the conclusion of the contract on the part of the consumer had been done in that country[64] *(*'the home deal 1') or,

b. the other party or its representative has received the consumer's order in that country[65] ('the home deal 2') or,

c. the relationship is a sales contract, and the seller must have arranged the trip to another country with the intention of convincing the consumer to deal

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[60] *See* MÖHUK Art. 26/1. The explanations related to party autonomy and *renvoi* are also valid for consumer contracts. *See supra* sec. I B and II A.

[61] In the nature of an adhesive contract.

[62] *See* MÖHUK Art. 32/1.

[63] *See* MÖHUK Art. 26/2.

[64] *See* MÖHUK Art. 26/2-a.

[65] *See* MÖHUK Art. 26/2-b.

with him, and the consumer must have attended the trip and placed his order there[66] ('the traveler's deal').

Therefore, the law of the habitual residence of the consumer is the objective choice-of-law rule provided by the legislature. It also governs the formal validity of the consumer contracts which fall under Article 26/2.[67]

MÖHUK Article 26 is also applied to package tours.[68] Conversely, other consumer contracts, including the contract of carriage and those where the service must be supplied to the consumer in a country other than his habitual residence do not fall within the scope of Article 26,[69] but are likely covered by the general rule on contract conflicts.[70]

The principle of proximity in the field of international consumer protection operates "one-sided" in comparative law. Accordingly, the law of the consumer's habitual residence is considered to be the law having the closest connection, not with the consumer contract *but* with the consumer.[71] Such a conclusion can not be reached through the home deal cases, but through a careful analysis of the traveler's deal.[72] It is apparent in Article 26/2-c that, in cases of the traveler's deal the law of the consumer's habitual residence, i.e. the objective applicable law or the objective proper law, has a considerably looser connection with the country where the consumer's habitual residence is situated but has a strong connection with the seller's country. In the international protection of consumers, the idea underlying the reference made to the law of the consumer's habitual residence is to protect certain consumers[73] with the standards of their home country.[74] Therefore, the law of the consumer's habitual residence is the law having functionally the closest connection with the

[66] *See* MÖHUK Art. 26/2-c.

[67] *See* MÖHUK Art. 26/3.

[68] *See* MÖHUK Art. 26/4.

[69] *See Id*.

[70] *See* MÖHUK Art. 24.

[71] *See* Güngör, *supra* note 40, at 220.

[72] *See Id.*

[73] *See* MÖHUK Art. 26/2.

[74] *See* Güngör, *supra* note 40, at 220.

consumer[75]. Accordingly, with the aim of reaching that goal, no *renvoi* is permitted and no exception clause is provided which serve to escape from the objective applicable law. Thus, the law of the consumer's habitual residence in the new MÖHUK displays a character of a typical hard-and-fast choice of law rule that employs a functional understanding of proximity.

5. Proximity and Internationally Mandatory Rules of Third Countries

The new MÖHUK makes use of the principle of proximity also under another title which is related to internationally-mandatory rules of a third country. In the time of the former law, there was no particular rule in the statute so the topic was highly controversial in the doctrine to the effect that whether an internationally-mandatory rule of a third country may be applied; if the answer is affirmative, then should it be applied as a law, or should it merely be considered a factual datum. Happily, the new law has brought a particular rule reflecting both of these views.

The new law provides that, the internationally-mandatory rules of a third country may be given effect if the law of that country has a close connection with the contract.[76]

Nonetheless, having a close connection with the contract is one test which is to be supplemented by another test provided in the second sentence of Article 31. The law also requires the judge to ascertain the aim, nature, content and the effects of the potentially applicable rules. Thus, the aim, nature, content and effects of the rule are a group of determinant factors as to whether an internationally-mandatory rule of a third country should be used.

Finally, it should be mentioned that Article 31 makes no discrimination between the internationally-mandatory rules of the third country.[77] Hence, the internationally-mandatory rules having the nature of public law, together with those having the nature of private law seem to be applicable if the requirements of the criteria mentioned above are met.

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[75] *See* Siehr, K., Private International Law At the End of The Twentieth Century: Progress or Regress? Rapport suisses présentés au XVéme Congres international de droit comparé-Swiss Reports Presented At the XVth International Congress of Comparative Law (Bristol, 27.7.1998 – 1.8.1998), Zürich 1998, 411, 413–414; *see also* Güngör, *supra* note 40, at 220–221; Güngör, *supra* note 20, at 205.

[76] *See* MÖHUK, Art. 31.

[77] For internationally mandatory rules in general see Güngör, *supra* note 20, at 108 et seq.

CONCLUSION

The principle of proximity has now found considerable room in the new MÖHUK in relation to conflict rules on contractual obligations. Since the principle gives each system of law the opportunity to adopt its own understanding of proximity, the new law prefers to follow an objectivist approach. The conflict rules on contractual obligations are adopted as the expressions of the objective laws which are considered to have the closest connection with the contract. Nonetheless, the new law mostly provides an escape device in the nature of an exception clause. The existence of a law having a closer connection with the contract than that of the objectively closest law enables the judge to escape from the latter law. Thus, the existence of such an opportunity turns the related objective choice-of-law rules into rebuttable presumptions.

In view of this author, the exception clause may operate in cases where:

a. another law apparently has a closer connection with the case than that of the objective applicable law or,

b. the objective choice-of-law rule technically does not work or,

c. the objective choice-of-law rule does not serve the needs of the day or a particular type of contract.

Particular to such cases, the applicable law which is presumed to have a closer connection with the contract constitutes,

a. a new presumption of law having the closest connection, and

b. a counter-presumption to the objectively closest law referred in the related choice-of-law rule.

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