Chapter 3

Countervailing State Measures for Asymmetric Private Relations

598. The protection of the “weaker party” has always been the office of the judge and a major task of State legislation. There is, however, little common ground with regard to the measures that States should take in this respect. This chapter is intended to shed some light on what weakness means in the light of economic considerations and with a particular view to international private relations, see below section 1. The analysis will then focus on two examples and discuss the particular conflict rules emerging in the fields of consumer contracts, see below section 2, and individual employment contracts (as opposed to collective labour relations), see below section 3.

Section 1: The “Weaker Party” and Its Protection

1. Traditional Civil Law

599. The plea for party autonomy as the basic conflicts principle does not amount to the assertion that parties electing the applicable law are always fully aware of what they are doing. In this respect the situation is not different from any substantive agreement under the applicable national law. According to traditional civil law rules, a choice may be invalid or invalidated because a party involved is under age or has been compelled to agree by mistake, threat or fraud. All legal systems provide for some kind of remedy in such situations which, however, only infrequently give rise to legal disputes in national and international commercial practice. The protection of the “weaker party” in the case of defective consent appears to be generally subjected to the putative lex contractus, i.e. to the law that would have governed the contract had the choice been valid.¹²⁷⁴

¹²⁷⁴ See for the United States Rest. Second, Conflict of Laws § 201; Hay, Borchers and Symeonides, p. 1212; for the European Union see Article 10, para. 1, Rome I, and Mayer and Heuzé, No. 736 at p. 567; Martiny in Reithmann and Martiny, Nos. 299 and 302 at pp. 226 and 229. Without explicitly addressing defects of consent, the report of Giuliano and Lagarde points out that Article 8, para. 1, of the Rome Convention, which is now Article 10 para. 1, Rome I, “is intended to cover all aspects of
There are, however, special conflict rules applicable to minimum age requirements for contracting as well as other aspects of the capacity to act. In most jurisdictions they are governed by the law of personal status, namely either by the national law or by the law of the habitual residence. But the protection granted by that law is qualified where the person in question acts in a different country; if he or she is considered as being of age and fully capacitated in that country, an incapacity resulting from the personal law will usually not be considered. Thus, with regard to these traditional types of "weaker parties", no need for an enforcement of the protective provisions under special conflict rules has been acknowledged so far. In fact, the opposite has been observed: with regard to minors and other incapacitated persons, legislatures rather protect the opposing market participants against foreign legislation that would generally be applicable under the relevant conflict rules but which would unexpectedly invalidate an agreement. It is not the "weaker party" that private international law protects, but its contracting partner who therefore can trust in the capacity of the other party without any need to investigate a foreign law. In economic terms this rule can be interpreted as keeping transaction costs low.

2. Categorical “Weakness” Resulting from Asymmetric Information

a) Findings in legislation and economic explanation

In the course of legal developments occurring since the nineteenth century, more and more categories of market participants have been acknowledged as “weak” and, under certain conditions, deserving of protection from their contracting partners: workers from employers; shippers of goods and passengers from carriers; policyholders vis-à-vis insurers; investors, borrowers and mortgagors from banks; commercial agents and franchisees in their relations with their principals and franchisors; consumers from professionals; tenants from landlords; builders vis-à-vis construction companies. De-