Chapter 9
Choice of Law for Void Contracts and Their Restitutionary Aftermath: The Putative Governing Law of the Contract

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INTRODUCTION

Void contracts are an oxymoron. They are ‘contracts’ which do not exist; in other words, ‘contracts’ which are, in fact, not contracts at all. Void contracts give rise to some of the most demanding issues of choice of law as they yield logically intractable problems which have to be resolved by reference to putative factors and concepts.

There are two parts of the equation when looking at choice of law for void contracts: first, establishing voidness; and secondly, the aftermath of voidness. The initial question of which law determines whether a contract is void is generally answered by the putative governing law of the contract.¹ Once a contract

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¹ Article 8(1) of the Rome Convention on the Law Applicable to Contractual

is adjudged void, a claim that may be pursued in its aftermath is a personal unjust enrichment claim. The general choice of law rule in this area is also the putative governing law of the contract. Thus, the concept of the putative governing law of the contract plays a central role in both parts of the equation where void contracts are concerned.

This paper will examine issues surrounding the concept of the putative governing law of the contract by studying its role in establishing a void contract and personal unjust enrichment claims arising in the aftermath of voidness. In particular, the use of the concept, how such a law is and should be identified, and the justification for the pivotal role that is delegated to it despite its inherent illogicality, will be studied.

1) THE ROLE OF THE PUTATIVE GOVERNING LAW OF THE CONTRACT IN DETERMINING THE VOIDNESS OF A CONTRACT

a) An overview

Questions arising from a contract, such as whether the parties have fulfilled their mutual obligations, or the interpretation of certain terms used in the contract, are referred to the governing law of the contract. However, when the very question is the validity of the contract itself, there can apparently be no governing law of the contract unless and until the contract is pronounced valid. This classic conflicts conundrum is resolved by recourse to the concept of the putative governing law of the contract. The choice of law solution here is to apply the law which would have governed the contract if it were valid, to determine whether the contract is valid.

Unless the governing law of the contract can be said to be separable from the contract,3 the illogicality of this approach is obvious: one is ‘seeking to

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3 An argument that is considered by Nygh (n. 1) 84–86; A. J. E. Jaffey, ‘Offer and Acceptance and Related Questions in the English Conflict of Laws’ (1975) 24 ICLQ 603; J. Harris, ‘Does Choice of Law Make Any Sense?’ (2004) 57 Curr Leg Prob 305,