



## CROSS BORDER EMPLOYMENT CONTRACTS UNDER PRIVATE INTERNATIONAL LAW

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### ABSTRACT

*“The concept of cross border employment contracts is at center of the net formed between private international law and internal labour marker regulations of nations. In the specific context of European Union, the link between the internal and external law is found in Rome I Regulation which clarifies the determination of applicable law to the contract of employment. The conclusion will be aimed at analyzing how the interpretation by the European Court of Justice has not been able to reconcile the benefits accorded in private internal law with the benefits of the internal market. Another angle being explored in the paper is the attitude of countries whose legislations do not have any express provisions governing the choice of law on employment contracts. The approach in these countries has been to create a system which favours local workers over foreign workers”*

**Keywords:** private international law, choice of law, employment contracts, mandatory provisions, protection of works, habitual

carries out his/her work, close connection, principal place of business of engagement

## CROSS BORDER EMPLOYMENT CONTRACTS UNDER PRIVATE INTERNATIONAL LAW

### INTRODUCTION

‘Private International Law’, also referred to as ‘Conflict of Laws’ is defined as a body of model laws, treaties, domestic law and other instruments which govern and “regulate private relationships across geographical borders”.<sup>1</sup> It is also a determinative factor in deciding the country whose laws will be applicable in disputes pertaining to international contracts, either commercial or employment, when parties to the contract belong to different countries. Such decision is relevant because usually parties to the contract are free to choose the law under which their contract should be regulated. The concept is understood as party autonomy which also allows parties to choose the adjudicatory forum, which they would prefer to approach in the event of a dispute.<sup>2</sup>

Party autonomy in having the freedom of choice of law, in fact, is referred to as a “consummated romance” and rests on the core foundation of consent.<sup>3</sup> The determination of choice of laws becomes extremely significant in cases of unequal bargaining power, for example employment contracts. In the growing age of global markets and with the proliferation of various multi national corporations (MNCs), there is

<sup>1</sup> American Society of International Law, *E-Resource Guide, Don Ford, Private International Law 3* (2013), available at, [https://www.asil.org/sites/default/files/ERG\\_PRIVATE\\_INT.pdf](https://www.asil.org/sites/default/files/ERG_PRIVATE_INT.pdf) (Accessed on March 23, 2018).

<sup>2</sup>ibid.

<sup>3</sup>William P, *Non-Signatories and International Contracts: An Arbitrator’s Dilemma*, available at, [http://www.arbitration-icca.org/media/4/80099054862031/media012571271340940park\\_joining\\_non-signatories.pdf](http://www.arbitration-icca.org/media/4/80099054862031/media012571271340940park_joining_non-signatories.pdf) (Accessed on March 26, 2018).



a strong need for ensuring stable and predictable enforcement institutions. When these MNCs have offices in different countries, spread across the globe—from developed to developing, it creates a myriad of jurisdictions. This paper seeks to analyse cross border enforcement of employment disputes in the context of Private International Law. Part I of the paper provides an outline of the private law system of the European Union (EU) relating to the choice of law and the choice of jurisdiction. Part II attempts to analyse the system discussed in part I. Further, Part III explains the extraterritorial application of numerous labour laws in India and other nations across the globe. Part IV concludes the paper.

## OVERVIEW OF THE PRIVATE INTERNATIONAL LAW SYSTEM IN THE EU

### Rome Convention

The member states of EU adopt the concept of party autonomy as the determinative factor in choosing the law—as provided in the Rome Convention.<sup>4</sup> However, the Convention creates exceptions of certain contracts, one such contract being contract of employment.

The specific provision which deals with party autonomy as the foundation on which the contract is to be governed is given in Art. 3(1).<sup>5</sup> Further, as per Art. 2, the parties to the convention are free to determine the law as a non-member state.<sup>6</sup> Art. 3(1) requires that the

expression of the choice of law should be with “reasonable certainty”<sup>7</sup>. The use of the term suggests that the expression may not necessarily be in writing. However, Art. 3(3) carves out an exception wherein a waiver to comply with mandatory law will override the principle of party autonomy.<sup>8</sup> The provision governing employment contracts is Art. 6(1), which states that the parties can choose the applicable law but cannot cause deprivation of protection of mandatory rules.<sup>9</sup> The underlying rationale in creating this exception is based on the nature of the employer-employee relationship—where the former has a better socio-economic standing as opposed to the latter. Further, when the laws of another country are being applied, consideration will be given to the mandatory rules of that country and disallowed to be opted out through a contract.<sup>10</sup> These provisions imply that the country in which the worker is habitually carrying out work might be the country whose mandatory rules will apply—such application is often referred to as *lex loci laboris*.<sup>11</sup>

When there is no choice of law provided in the contract of employment, the default applicable rule is that the country in which the employee “*habitually carries on his/her work*” will be the applicable law.<sup>12</sup> Therefore, *lex loci laboris* governs both the application of mandatory rules of employment as well as scenarios when there is no choice of law in the employment of

<sup>4</sup> Convention on the Law Applicable to Contractual Obligations, opened at Rome on June 19, 1980, OJ L266 09/10/1980 0001-0019, 80/934/EEC, 1980 WL 115585, effective Apr. 1, 1991, European Parliament. (This convention was adopted as legislation in some EU countries like Denmark, Germany, Luxembourg and Belgium before it even came into effect). [‘Rome Convention’].

<sup>5</sup> Rome Convention, Art. 3(1).

<sup>6</sup>Rome Convention, Art. 2.

<sup>7</sup> Rome Convention, Art. 3(1).

<sup>8</sup>Rome Convention, Art. 3(3).

<sup>9</sup>Rome Convention, Art. 6(1).

<sup>10</sup> Rome Convention, Art. 7(1)

<sup>11</sup> The conclusion is reached on a joint reading of Rome Convention, Art. 6 and Art. 7.

<sup>12</sup> Rome Convention, Art. 6(2).



contract. *In* a scenario where the employee does not carry out his/her work in a specific country, then the governing law will be the state of place of business ('business' being the establishment through which he/she is engaged).<sup>13</sup> However, if the employment contract is 'closely connected' to some other country, then that country's law will be the applicable law.<sup>14</sup> Therefore, an international contract will be effected, but the courts will undertake application of mandatory rules of the host country where the employee habitually works. This provides an employee an opportunity to choose a country where the conditions of employment are relatively favourable.

#### Rome I Regulation

Another relevant document in ascertaining the application of law in employment contract is Rome I Regulation.<sup>15</sup> This Regulation has replaced the application of the Rome Countries in all European Union Member states excluding Denmark.<sup>16</sup> It binds all contracts of employment which parties entered 18 months after the adoption of the Regulation by the Parliament on November 29, 2007. Therefore, the Rome I Regulation will apply to all employment contracts signed on or after December 17, 2009. The regulation is famous for approaching the question of choice of law from the perspective of 'rule of law'.

The difference between this regulation and the Rome convention is exhibited in the textual approach of both documents. The

Convention is worded as "*in a contract of employment a choice of law made by the parties shall not have the result of depriving the employee of the protection afforded to him by the mandatory rules of the law*" of the country in the employee habitually carries out his/her work or in the absence of such country, the country of place of business.<sup>17</sup> Whereas, the Rome I Regulation "*result in depriving the employee of the protection afforded to him [or her] by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable*"<sup>18</sup> It can be seen that the Rome Regulation does not use the term "mandatory law" and instead terms it as "provision that cannot be derogated from", providing for a higher threshold which cannot be waived off. There also exists a similarity, wherein just like the Rome Convention, the Rome I Regulation follows the concept of *lex loci laboris* to determine the significant mandatory rules to be applied in case. Similar to the Rome Convention, in the absence of any choice of law by the parties, as per Art. 8 of Rome I, the country where the worker "*habitually carries his/her work*" will be the choice of law.<sup>19</sup> Such choice of law will not change if the employee is employed in a different country on a temporary basis.<sup>20</sup> When the country of habitual work cannot be ascertained, the governing law will be the place of business through which the engagement of the employee took place.<sup>21</sup> Further sub section 4 of Article 8 of Rome I states that if circumstances indicate that there is a country

<sup>13</sup> Rome Convention, Art. 6(2)(b).

<sup>14</sup> Rome Convention, Art. 6.

<sup>15</sup> Regulation (EC) on The Law Applicable to Contractual Obligations, No. 593/2008 of 17 June 2008, European Parliament. ['Rome I Regulation'].

<sup>16</sup> Rome I Regulation, Art. 24.

<sup>17</sup> As explained on Pg. No. 4.; Rome Convention, Art. 6.

<sup>18</sup> Rome I Regulation, Art. 8(1)

<sup>19</sup> Rome I Regulation, Art. 8(2).

<sup>20</sup> Rome I Regulation, Art. 8(3).

<sup>21</sup> Rome I Regulation, Art. 8(4).



which is closer in connection to the contract compared to the country of *habitual residence of work*<sup>22</sup> or principal place of business of engagement<sup>23</sup>, then the law of that country will become applicable.

### Rome II Regulation

The third relevant document is Rome II.<sup>24</sup> The regulation deals with matters which include tortious claims which result in cases of ‘damage’ both inside the EU as well as outside.<sup>25</sup> The main areas under the regulation are whistle-blower claims, defamation, legislations aimed at preventing discrimination.<sup>26</sup>

Party autonomy is the foundation of Rome II regulation just like the Rome Convention and Rome I regulation. The default rule under the regulation is that the place where the damage took place will be the place whose law will govern the contract.<sup>27</sup> However, after the injury, the parties may consent to choosing some other country.

In a scenario where in the parties to the dispute belong the same habitual place of residence, then the law of that country where the place of habitual residence is situated, will apply to their dispute. There is an exception created from the mandatory laws of the country where the damage results when the tort can be considered to be ‘manifestly more closely connected’ with some other

country.<sup>28</sup> This close connection might be established based on an already existing relationship between both the parties, for example-an already existing contract which is closely connected to the tortious claims in the question.

### Brussels I Regulation

The Brussels Convention<sup>29</sup> was an EU document containing consolidation of law which pertains to the choice of jurisdiction and similarly, there existed the Lungao Convention<sup>30</sup>. These legislations formed the basis of the Brussels I Regulation.<sup>31</sup> The underlying principle of the Brussels I regulation is allowing suits in the EU country where the defendant is a domicile.<sup>32</sup> Further, the defendants can also be sued at the place of performance.<sup>33</sup> An illustration of this would be when an EU Company ‘A’ is sued in a country ‘B’ because his branch office wherein the dispute arose is situated in B.<sup>34</sup> When the defendant is not a domicile in an EU member state, then the rule of jurisdiction of individual EU states will apply and not the provision of Brussels I.

Therefore, in the context of employment contracts, employers can be sued where they are domiciled or when the employee, who is suing, habitually carries his/her work and when there is no such place where the business, in which the employee is engaged, is situated. An employer can be understood to

<sup>22</sup>Rome I Regulation, Art. 8(2).

<sup>23</sup> Rome I Regulation, Art. 8(3).

<sup>24</sup>Regulation (EC) on The Law Applicable to Non-Contractual Obligations, No. 864/2007 of 11 July 2007, European Parliament. [‘Rome II Regulation’].

<sup>25</sup> Rome II Regulation, Art. 2.

<sup>26</sup>Similar to Public Company Accounting Reform and Investor Protection Act, 2002.

<sup>27</sup> Rome II Regulation, Art. 14(1)(a).

<sup>28</sup>Rome II Regulation, Art. 4(3).

<sup>29</sup>Regulation (EU) on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, No. 1215/2012 of 12 December, 2012, European Parliament. [‘Brussels I’].

<sup>30</sup>ibid.

<sup>31</sup>ibid.

<sup>32</sup>Brussels I, Art. (2).

<sup>33</sup> Brussels I, Art. 5(5)

<sup>34</sup>Brussels I, Art. 5(5).



be domiciled at a place where there is an establishment of the employer, or a branch or any agency of the employer.<sup>35</sup> However, when the employer has to bring a suit against an employee in a country no other than the one where he is domiciled.<sup>36</sup> However, these rules can be altered by parties through an agreement wherein, they agree that a forum will have the exclusive jurisdiction to hear the dispute that arose between both the parties.<sup>37</sup>

Interpretation by the European Union Courts

There is sufficient difference in opinion regarding the interpretation of where a person habitually carries his/her work. There are two such cases where the Court of Justice of the European Union addressed the question of identifying the workplace in international modes of transport, namely land and sea. Traditionally, the place of work of the employee is usually either connected with the place of business of the employer or the flag which the vessel, on which the employee is working, bears.<sup>38</sup> The preparatory documents of Rome I suggest that the place of work is highly significant in case of work undertaken by a worker aboard.<sup>39</sup> In the cases namely *Koelzsch*<sup>40</sup> and *Voogsgeerd*<sup>41</sup>, the court rejected the importance of the principle of

connection to the place of business when completely disregarding the flag principle.<sup>42</sup> It stated that the place of business is not the primary consideration. The facts of the cases were centered around: in *Koelzsch*, a truck driver working in international transportation and in *Voogsgeerd*, a sailor on a vessel. The court held that the nature of labour legislations is protective in nature and hence, Art. 6 of the Rome convention should be comprehended to apply the law of the place work of of the workman and not the place of business of the employer.<sup>43</sup> It is the former wherein, he/she carries out his/her duties and hence, is entitled to the rights in the context of that state.<sup>44</sup> It will be the commercial and regulatory environment of that particular state which influence the employment activity of the workman.<sup>45</sup> This to ensure that maximum protection is guaranteed to the labour.

There are several factors which the court should take an account of in cases of international transportation—place of the where the transporting work is undertaken, place where the instruction is received and the place where the tools related to his activity are located.<sup>46</sup> Furthermore, the Courts must also consider the place where the

<sup>35</sup>Brussels I, Art. 18(2).

<sup>36</sup>Brussels I, Art. 20(1).

<sup>37</sup> Brussels I, Art. 23.

<sup>38</sup>Ajuka A.H. van Hoek, Private International Law: An Appropriate Means to Regulate Transnational Employment in the European Union?, Erasmus Law Review, Vol. 3, 2014, Pg Nos. 157-169.

<sup>39</sup> Proposal for a Regulation Of The European Parliament And The Council on the Law Applicable To Contractual Obligations (Rome I), COM (2005) 650/F1, Directorate General Justice, Freedom and Security, European Commission.

<sup>40</sup>*Koelzsch v. Luxembourg*, C-29/10 (in Court of Justice of the European Union) [*'Koelzsch v. Luxembourg'*].

<sup>41</sup>*Voogsgeerd v. Navimer*, C-384/10 (in Court of Justice of the European Union) [*'Voogsgeerd v. Navimer'*].

<sup>42</sup> In neither of the cases, the flag of the ship was submitted to be a connecting factor. An argument to include the factor has been made by U. Grušić, *Should the Connecting Factor of the "Engaging Place of Business Be Abolished in Private International Law?'*, International and Comparative Law Quarterly, Vol. 62 2013, Pg. Nos. 173-92.

<sup>43</sup>*Koelzsch v. Luxembourg*, Para No. 42.

<sup>44</sup>ibid.

<sup>45</sup> ibid.

<sup>46</sup>*Koelzsch v. Luxembourg*, Para No. 48 and 49; *Voogsgeerd v. Navimer*, Para no. 38.



goods are off-loaded and the place to which the workman reports after finishing his work activity.<sup>47</sup> The place of business of the employer should be looked at, as a secondary factor, when it is impossible to conclude the habitual place of the work of the employee from the above mentioned factor. Significance is to be given to the conditions which existed at the time of the appointment and not the real performance of the agreement.<sup>48</sup>

From a socio-economic outlook, the location from where a business is being run from may not be an applicable connecting aspect. The CJEU acknowledges the same in the Voogsgeerd case.<sup>49</sup> The assumptions with respect to the customary location of business and the actual place of work, when examined by the court in this particular instance, it was found to be more closely associated with another nation – an inference made from circumstantial facts. The ambiguity regarding the position of law concerning employment contracts between individuals has been cleared in the recent *Schlecker*<sup>50</sup> case. Currently, the potential usage of such an “escape clause” is outlined in Article 8(4) Rome I.<sup>51</sup> In the *Schlecker* case, there had been a clash between an employee (Ms. Boedeker) and employer (the Schlecker company), both of German origin. Such a fight was sparked by the termination of employment of the employees by the employer in the state of Netherlands.

Subsequent reinstatement has been provided for in German, and that too in a distinct capacity. A dozen out of the almost three decades of service (shy of three years) had been spent by the employee managing three hundred local Dutch branches of the Schlecker company. The habitual place of work being Netherlands was not under dispute.<sup>52</sup>

The employee wanted to rely on the law in Netherlands because she was accorded more protection under that regime, however, the other side claimed that the contract was closely connected with Germany and hence, the German law applies. The claim of the defendant was based on the Germany being the nationality and domicile of the claimant and the defendant, the contract was written in German and the consideration currency was of Germany. The Advocate General stated that the protective nature of the Rome I Regulation calls upon the usage of habitual place of work and the factor of close connection should rarely be used in comparison to the habitual place principle.<sup>53</sup> The Court of Justice held that even though the habitual place of work has primacy over the place of business where the employer was engaged. However, no such overriding nature exists in cases of close connection. Further, the close connection principle is not a mere accounting of all factors, it should be recognized that different factors carry different amount of weightage. The most

<sup>47</sup>Koelzsch v. Luxembourg, Para No. 48 and 49; Voogsgeerd v. Navimer, Para no. 38 and 39.

<sup>48</sup> It is a logical conclusion drawn from both cases. In *Koelzsch*, the driver of the vehicle would work from Germany. Similarly in *Voogsgeerd*, the sailor would operate from Belgium. However, both their employment was from Luxembourg.

<sup>49</sup>U. Grušić, *Should the Connecting Factor of the "Engaging Place of Business Be Abolished in Private*

*International Law?*, *International and Comparative Law Quarterly*, Vol. 62 2013, Pg. Nos. 173-92 at pg. no. 190.

<sup>50</sup>*Schlecker v. Boedeker*, C-64/12 (in Court of Justice of the European Union) [*Schlecker v. Boedeker*].

<sup>51</sup>*ibid.*

<sup>52</sup>*Schlecker v. Boedeker*, Para No. 27.

<sup>53</sup>*Schlecker v. Boedeker*, Opinion of Advocate General Wahl.



significant factors are the place where the employee pays income tax, is covered under the pension benefits, medical insurance schemes.<sup>54</sup>

Therefore, there is primacy accorded to the habitual residence of work being carried out to ensure all forms of socio-economic protection. However, the entire structure of the Art. 8 of Rome I is based on the rule of closest connection.

The Advocate General in *Schlecker* has a different approach to the protectionist characteristic of Art. 8 of Rome I. The protective nature is exhibited when the parties are restricted in their freedom of choice of law and such protection is disallowing any deviation from the close connection principle.<sup>55</sup> The employee should be protected through the law with which he/she has the maximum familiarity and in the factual matrix of *Schlecker*, such law will be the employee's country of origin and domicile instead of the place of work. The Advocate General also states that interpreting this close connection clause in a detailed manner serves the purpose of protecting the employee because it focuses on an actual analysis of facts and not just "legal predictability and certainty".<sup>56</sup> Therefore, the Court of Justice implicitly overturns the holding in cases of *Koelzschand Voogseerd*. Furthermore, considering the factors that are used to determine the country

of close connection, in most of the cases, the country will be that of origin.<sup>57</sup>

### APPROACH IN COUNTRIES WITHOUT SPECIFIC STATUTES

Majority of the labour laws in the Indian jurisdiction are non-derogatory in nature. For example, the Payment of Wages Act states that any contract though which a person waives off the rights conferred by the Act will be void to the extent that it causes a deprivation of rights.<sup>58</sup> Similarly, under § 27 of the Maternity Benefit Act, 2017, the provisions of the Act will override anything contained in a contract which is inconsistent with the provisions of the Act.<sup>59</sup> The Indian judiciary has held that the settlement of disputes between the employers and workers, the function of the adjudicatory body is not merely limited to administering justice in consistency with law.<sup>60</sup> Therefore, additional rights and privileges maybe conferred on either of the parties, even if they do not exist in the agreement, when it considered to be proper to do so.<sup>61</sup> It can also provide for new rights when it is seen as necessary to maintain peace in an industry.<sup>62</sup>

Now when some Acts highlight the importance of non-derogatory rights, there are also certain Acts which provide that contracts may will in the lacuna left by the law. A depiction of this is founded in the Industrial Dispute Act, while defining 'retrenchment', the legislation states that it

<sup>54</sup>*Schlecker v. Boedeker*, Para No. 41.

<sup>55</sup>*Schlecker v. Boedeker*, Opinion of Advocate General Wahl, Para No, 25.

<sup>56</sup>*Schlecker v. Boedeker*, Opinion of Advocate General Wahl.

<sup>57</sup>Ajoke A.H. van Hoek and MijkeHouwerzijl, *Complementary Study on the Legal Aspects of the Posting of Workers in the Framework of the Provision of Services in the European Union* in A Report to the

European Commission under Contract VC/2011/0096 (2011), Pg. No. 20-28.

<sup>58</sup>The Payment of Wages Act (1936), § 23.

<sup>59</sup> The Maternity Benefit Act (1961), §. 27.

<sup>60</sup> *Bharat Bank Ltd. v. Their Employees 1950 II LLJ 921* (Supreme Court of India), Para No.

<sup>61</sup> *Ibid.*

<sup>62</sup> *ibid.*



does not include retirement when the contract of employment contains such stipulation.<sup>63</sup> This is supported by numerous factors such as the employer not meeting the legal threshold of the minimum number of workmen for the employer to be governed under the legislation. The nature of work and the relationship of the employer-workman falling outside the scope of the labour legislation. These factors cumulatively create a legal environment which favours the employer more than the employee.

USA also follows a similar system.<sup>64</sup> However, it is not expressly stated that the labour laws will not be derogated from and yet, the labour laws are considered to be a fundamental part of the American public policy regime and hence, it is implied that these rights cannot be contracted out of.<sup>65</sup> When it comes to wage and hour legislations, a difference in approach is exercised when the principle place of business is abroad and the worker is just a guest worker and yet, the minimum wage legislation of the host country will apply to the employee.<sup>66</sup> The basis for such application is that when the minimum wage legislation of a country abroad is more favorable to the employee and it is allowed then the employee will be in a more advantageous position in the market as opposed to the local employees. Similarly, countries such as China, Laos, Vietnam and North Korea attempt to favour

local workers by designing a policy structure under which the foreign workers have to opt out of their national employment laws.<sup>67</sup>

## CONCLUSION

It is seen during the course of the paper that the Rome Convention, Rome I Regulation, Rome II Regulation and Brussels I govern the choice of law and jurisdiction in cases of disputes which arise out of contracts of employment. They have a significant exception where the parties cannot derogate from the mandatory rules of employment of the applicable country. However, the European Court of Justice is tilting towards interpreting the applicable country as the country which the contract has the closest connection with as opposed to the country where the employee habitually carries out his/her work. Therefore, in a lot of case scenarios, the applicable country will be the home country of the employer and employee. This, in a way, defeats the protectionist objective of the EU regime which was to allow employees to be governed by same socio-economic regulations which mirror the duties that they have to undertake as employees—which will be of the country where they work and not where they originated from.

Even though India and USA do not have any extensive statute dealing with such cases, it is observed that the policy is to accord

<sup>63</sup>The Industrial Dispute Act (1947), § 2(oo)(b).

<sup>64</sup> Restatement (Second) of Conflict of Laws, § 187 and § 196.

<sup>65</sup> Ruiz v. Affinity Logistics, 667 F. 3d 1318 (9th Cir. 2012).

<sup>66</sup> U.S. Department of Labor Wage & Hour Division Field Operations Handbook, August 15, 2002, §10e01(c) (U.S. Fair Labor Standards Act becomes applicable to any guest worker who works more than seventy two hours in US).

<sup>67</sup>Donald C. Dowling Jr., *How to Determine Which Jurisdiction's Employment Laws Reach Border-Crossing Staff* in 9th Annual Labor & Employment Law Conference Philadelphia, PA on "Cross-Border Litigation: The Practical and Legal Issues that Arise When Evidence is Located Abroad or Just Across State Lines", November 5, 2015, available at, [http://www.americanbar.org/content/dam/aba/events/labor\\_law/2015/november/annual/papers/97.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/events/labor_law/2015/november/annual/papers/97.authcheckdam.pdf) (Accessed on March 4, 2018).



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fundamental importance to labour laws and disallowing parties to contract out of them.

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