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Reforming Choice of Law Rules for International Sales Contracts: A Comparative Study of the Law of Ghana and the European Union

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ABSTRACT

This article examines the current private international law rules governing choice of law in international sales contracts in Ghana and evaluates their suitability in enhancing legal certainty and predictability of results for the contracting parties and the courts. It does this by comparing Ghana's legal rules with the European Union's Rome I Regulation on the Law Applicable to Contractual Obligations of 2008 (Rome I/Rome I Regulations). The discussion begins by looking at the extent to which Ghana's choice of law allows contracting parties to expressly or impliedly choose the applicable law of their international sales contracts. It then considers how Ghanaian law determines the applicable law when the parties do not make a choice – the objectively determined applicable law. The article goes on to compare Ghana's approach with that of the Rome I Regulation, which is recognised globally as a leading instrument for resolving choice of law issues in international commercial transactions. By comparing the two systems, the article evaluates the effectiveness and efficiency of both legal frameworks when applied by courts to determine the applicable law of international sales contracts. Finally, based on this analysis, the article offers suggestions to improve Ghana's choice of law rules, aiming to increase legal certainty and predictability for contracting parties.

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Introduction

Private international law, a discipline with both national and international dimensions, provides a standard for measuring the extent to which a country's legal system engages with other legal systems. This engagement is promoted by the personal and commercial interactions between persons, natural or legal, in the respective legal systems (Oppong, 2007, p. 678). Increasingly, many governments around the world are keen on reforming their legal system in order to make their countries more attractive to cross-border trade and investment. The continuing increase in cross-border and intercontinental trade around the world calls for states to cooperate to make rules that will facilitate the smooth transaction of persons engaged in these activities. The harmonisation and/or unification process is on-going in most developed countries. However, the same cannot be said about emerging economies in Africa. Commercial activities will flourish in a particular legal system if expectations of contracting parties are protected by the courts. The courts can do this by, for example, giving effect to contracting parties' choice of the applicable law to their international contracts. In situations where the parties do not select a legal system to govern their contract, the rules applied by the court to determine the applicable law must be one that is predictable and certain (Marshall, 2012, p. 508). This is so because in the world of commerce legal certainty should reign and,

therefore, ought to be the point de depart for choice of law in commercial contracts (Wolff, 2010, p. 482).

In the context of Africa, the French speaking civil law countries who make up the Organisation for the Harmonisation of Business Law in Africa (OHADA), have reformed their law by the promulgation of a treaty at the substantive law level on cross-border contracts – Uniform Act on Cooperatives for the Organisation for the Harmonisation of Business Law in Africa of 2010. However, this does not address private international law issues which may arise, for example, between contracting parties from any of these countries and a non-OHADA country (and which falls outside the scope off applicability of the uniform legislation applicable in these states). These issues are left to the individual member states of OHADA to deal with. In Ghana, these matters continue to be governed by inherited English common law rules on private international law, even though England itself has moved beyond these traditional principles (Oppong, 2012).

Indeed, the United Kingdom – the historical cradle of the common law – abandoned its traditional choice of law rules for contracts to maintain its competitiveness in global commerce by adopting the Rome I Regulation. This shift reflected the recognition that modern commerce demands a legal framework that prioritises party autonomy, predictability, and legal certainty. Notably, even after Brexit, the UK retained much of the substance of the Rome I Regulation by transposing its provisions into domestic law through statutory instruments[1]. This continuity affirms the Regulation's value as a model framework for choice of law in international contracts. It also offers a compelling precedent for Ghana, suggesting that reforms along similar lines would not represent a departure from the common law tradition but rather a natural evolution in response to global commercial realities.

This article critically examines the current legal framework governing the private international law of contracts in Ghana, with a particular focus on how Ghanaian conflict-of-law rules address party autonomy in selecting the applicable law for international contracts. It also explores the methods by which Ghanaian law determines the objective proper law of an international contract when the parties have not made an explicit choice. To provide a robust analysis, the article contrasts Ghana's approach with the European Union's Rome I Regulation on the Law Applicable to Contractual Obligations of 2008 (Rome I / Rome I Regulation / the Regulation). By drawing this comparison, the study seeks to evaluate the effectiveness and efficiency of Ghana's legal frameworks in providing legal certainty and predictability for contracting parties. Based on the comparative analysis, the article concludes with recommendations for reforming Ghana's choice-of-law rules to align them more closely with international best practices, thereby enhancing the predictability and reliability of legal outcomes in cross-border contractual disputes.

The EU's Rome I Regulation was chosen for comparison not only because it is one of the most comprehensive and modern frameworks governing choice of law in international commercial contracts, but also due to the significant trading relationship between Ghana and EU member states. The Regulation's principles of party autonomy, legal certainty, and predictability are crucial for fostering stable and predictable legal environments – an aspect that is particularly beneficial given the close economic ties between Ghana and the EU. Moreover, the fact that even major economies like China, often viewed as adversaries of the West, have adopted the EU model

[1] The content of the Rome I was adopted into UK law. The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834) (Regulations) came into force. The Regulations provide for the continued application of the retained EU law version of Rome I (UK Rome I) as domestic law in all parts of the UK, to determine the law applicable to contractual obligations and amend UK Rome I.

in their contractual frameworks speaks to the Regulation's global influence and effectiveness. By using the Rome I as a benchmark, this article aims to identify gaps in Ghanaian law and propose reforms that will bring it in line with international standards, thereby benefiting all parties involved in cross-border trade with Ghana.

The article will be limited to rules meant for the determination of the proper law of an international contract and will, therefore, exclude an investigation of the choice of law rules which determines, for example, the existence of contract, formal validity of a contract and capacity to contract. Also, the application of public policy and mandatory rules of the forum, which serve as limitations to the application of the proper law, will not be considered in this article.

Methodology

This article focuses on providing an appropriate solution to choice of law issues in international sales contracts. It is a comparative study between the relevant provisions of the choice of law rules in international sales contracts of Ghana and the EU's Rome I Regulation on the Law Applicable to Contractual Obligations (Rome I). The study examines the solutions provided under Ghana law and the Rome I and, thereafter, proposes that Ghana adopts a solution similar to that of the Rome I as it better represents the position of the contracting parties and also provides the legal certainty and predictability of results needed in international commercial contracts.

1. The applicable law in international sales contracts in Ghana and its challenges

In international sales contracts, choice-of-law issues often arise when multiple legal systems could potentially govern the contract (Roosevelt, 2012, p. 10). In Ghana, the first reference point for determining the applicable law is to refer to the agreement between the contracting parties. Under common law, where the parties by their contract have chosen a specific law to govern their transaction, it is required that the chosen law does not operate to invalidate the contract itself. This is especially true if the said contract would have otherwise been valid under the putative proper law (Bilkis, 2016, pp. 11–12). As previously mentioned, Ghana has not codified the rules for determining the applicable law in international sales contracts; instead, these rules are derived from common law principles inherited from the English and which were established through case law. This reliance on common law is reinforced in section 54(2) of the Courts Act of 1993, which mandates that Ghanaian courts apply common law rules to resolve choice of law issues in international sales contracts. All relevant statutes that address international commercial transactions operate within a more limited scope (for example, the Electronic Transactions Act 772 of 2008 and the Bills of Exchange Act of 1961). Therefore, when addressing choice-of-law problems in international sales contracts, the courts in Ghana continue to rely on common law principles inherited from the English.

Historically, English common law courts applied the *lex loci contractus* rule to determine the applicable law in international sales contracts. However, this rule faced significant criticism for some germane reasons (Pitel & Rafferty, 2010, p. 269). First, it required the use of artificial constructs, such as the "postal rule," to determine the *loci contractus*[1]. Secondly, the *lex loci*

[1] According to the postal rule acceptance is deemed to have occurred at the place where the offeree mailed it: Duwuona-Hammond, C. *The Contract Law of Ghana* (2011) 43. Also, in *Henthorn v Fraser* 1892 2 Ch 27 the court stated: that the postal rule "is applicable where the circumstances are such that it must have been within the contemplation of the parties that according to the ordinary usage of mankind the post might be used as a means of communicating acceptance of an offer".

contractus rule could not be applied in all contracts, as in cases where contracts were formed on international waters (Pitel & Rafferty, 2010, p. 269). Thirdly, the rule failed to adequately respect the autonomy of the contracting parties (Pitel & Rafferty, 2010, p. 270). In *Amin Rasheed Shipping Corp v. Kuwait Insurance Co*, Lord Diplock noted that the determination of the *loci contractus* was often a "matter of chance" (para 62). Today, the "proper law" doctrine governs international commercial contracts under common law (Nygh, 1999, p. 125). The proper law of a contract is the legal system that the parties expressly or tacitly/impliedly select to govern their contract, or in the absence of such choice, that system of law with which the transaction has its closest and most real connection (Marshall, 2012, p. 505).

In Ghana, the Court of Appeal has been called upon to resolve choice-of-law issues in international sales contracts in the leading case of *Godka Group of Companies v. PS International Ltd* (1999–2000 1 GLR 409). The facts of the case are briefly as follows: the plaintiff, an American company incorporated in Indiana, USA, entered into a contract for the sale of goods with the defendant, a company incorporated in Ghana. The contract did not specify the applicable law, leaving the court to determine the proper law governing the contract. The Court of Appeal in Accra, Ghana, relying on the English cases of *Boissevain v. Weil* (1949 1 KB 482 490) and *Bonython v. Commonwealth of Australia* (1951 AC 201 219 HL), held that the applicable law was the law of Ghana. The court's decision was based on the fact that Ghana was both the place of performance and the jurisdiction with the most substantial connection to the transaction. The decision was later affirmed on an appeal to the Supreme Court of Ghana on the same grounds Godka Group of Companies v. PS International Ltd 2002 CA 12/2000).

The court settled the issue by applying the English common-law rules of private international law as adopted by Ghana. The court, in its holding, confirmed that by section 54(2) of the Courts Act 459 of 1993 the English common law rules of private international law shall continue to apply in Ghana and they will be used to resolve conflict-of-law issues that arise in cases brought before the Ghanaian courts. According to the common law rule on choice of law, a contract is governed by "the law by which the parties intend to govern their contract or, where the intention is neither expressed nor can be implied from the circumstances, the system of law with which the transaction has the closest and most real connection" (Oppong, 2012, p. 131). This means, under Ghana's private international law of contract, the applicable law may be determined in one of three ways: through an express choice of law made by the parties; through an implied choice inferred from the terms of the contract and the circumstances of the case; or, in the absence of any choice, by the court identifying the law most closely connected to the contract (the objective proper law).

Express choice of law. In Ghana, as mentioned earlier, parties to an international sales contract have the autonomy to choose the law that will govern their contract, as demonstrated in the *Godka* case[1]. Although the court in the *Godka* case recognised that contracting parties may agree on the applicable law, whether expressly or impliedly, it did not discuss the specific requirements that must be met for such a choice to be upheld. This omission likely stemmed from the fact that the issue of express or implied choice of the applicable law was not directly before the court since the parties had not made an express

[1] This is subject to limited exceptions which include mandatory rules and public policy obligations. However, mandatory rules and public policy is beyond the scope of this paper.

choice of law. However, it is reasonable to infer, based on the Ghanaian courts' reliance on common law principles in private international law cases and the provisions of Section 54(2) of the Courts Act 459 of 1993, that Ghanaian courts will likely enforce the parties' choice of law in a manner consistent with common law standards. This implies that before giving effect to a chosen law, the courts would first assess whether the choice meets the general common law requirements, as established in *Vita Foods Productions Inc v. Unus Shipping Co* (1939 AC 277(PC) 290) by the Privy Council.

In *Vita Foods*, the Privy Council indicated that a choice of the applicable law made by contracting parties will only be upheld if it satisfies three key conditions: it must be made in good faith (*bona fide*), it must be legal, and it must not be contrary to public policy. The court went on to state that in determining the validity of the choice of the applicable law by the parties, there is no requirement for the legal system chosen by the parties to have direct connection to either the contract or the parties (para 290).

An analysis of this common law choice of law rule suggests that the main limitation imposed by the Privy Council in the *Vita Foods* case on the contracting parties' right to choose a particular legal system to govern their contract was the requirement that their choice must be made in good faith (Lin, 2014, 312). This condition imposes a significant restriction on the principle of party autonomy and warrants careful consideration (Lin, 2014, 312). Although Ghanaian courts have not yet had the opportunity to rule on the issue of good faith in the context of an express choice of law, it is likely that if such a case arises in the future, the courts will follow the principles established in *Vita Foods*. They would likely examine whether the parties' choice was made in good faith before enforcing it. This expectation is rooted in Section 54(2) of the Courts Act of Ghana, which directs Ghanaian courts to apply common law principles inherited from English law. Further, the courts have consistently relied on English precedent in deciding choice-of-law issues, as evidenced in landmark cases like *Godka Group of Companies v PS International Ltd* and *Société Générale de Compensation v. Ackerman* (1972 1 GLR 413).

In determining whether the parties' choice of law was made in good faith, common law courts typically examine all relevant circumstances surrounding the contract, including events leading up to and following the choice. Case law has established that this good faith requirement functions as an anti-evasion-of-law measure (Lin, 2014, p. 317). This means, when the chosen legal system has little or no connection to the contract, the *bona fides* of the choice may be questioned, potentially leading the courts to disregard it. This concern is particularly heightened when it appears that the choice was made to evade legal provisions that would otherwise apply to the contract (*Peh Teck Quee v. Bayerische Landesbank Girozentrale* 2000 1 SLR 148).

Further, the interpretation of the "good faith" requirement by other common law jurisdictions analogous to Ghana's legal system can provide valuable insights. For instance, the Singaporean Court of Appeal's ruling in *Peh Teck Quee v. Bayerische Landesbank Girozentrale* offers a noteworthy perspective that could be instructive in the Ghanaian context (2000 1 SLR 148). In *Peh Teck Quee*, the court affirmed that evading foreign law could render an express choice of the applicable law by contracting parties *mala fide*. The court further noted that a choice of law would not be considered *bona fide* if it was made solely to avoid the laws of another legal system (Lin, 2014, p. 315). This suggests that the old requirement for the chosen law to have some connection to the contract or the parties may still persist in a subtle form. Consequently, the common law imposes limitations on the parties' right to select their own law, thereby curtailing the principle of party autonomy. The

uncertainty surrounding when courts might declare an express choice of law as *mala fide* can make it challenging for parties to international commercial contracts to predict the proper law governing their agreement. Such legal uncertainty can be a barrier to international trade and commerce.

With respect to the "legal" requirement as indicated in the *Vita Foods* case, there is some debate on whether it pertains specifically to the choice of the applicable law itself. Scholars suggest that the Privy Council's reference to the "legal" requirement was not directly related to the parties' freedom to choose the governing law but rather concerned the substantive legality (or illegality) of the contract (Lin, 2014, p. 311). Further, Lord Wright's judgment in the case seem to supports this interpretation (para 292).

However, since the relevant rule in *Vita Foods* was framed in the context of choice of law, it is more appropriate to interpret the "legal" requirement in a manner consistent with matters on the applicability of the chosen law. A coherent reading, rooted in the conflict of laws framework, would be to construe the "legal" requirement as a reference to the operation of overriding mandatory rules or provisions. These are provisions of an otherwise applicable domestic law that, by their nature, cannot be excluded by the parties' choice of law. If the application of the chosen law would contravene a relevant overriding mandatory rule, it would be considered unlawful (or "illegal") for a court to enforce such a provision. This interpretation aligns more closely with widely accepted principles in private international law, which hold that the application of the *lex causae* must not undermine the operation of relevant overriding mandatory rules.

Moreover, it has been suggested that, beyond the requirements of *bona fides* and legality, common law courts may refuse to recognise an express choice of law if enforcing it would result in injustice or serious hardship to the party challenging its application (Lin, 2014, p. 327). This position may be appropriate in situations where the contracting parties have an unequal bargaining power which may have led to a choice of law that largely reflects the will of the stronger party. While Ghanaian courts have not yet addressed this issue too, it is advisable that they proceed cautiously when confronted with such problems, especially in the context of international contracts where legal certainty is paramount. The courts should uphold and protect the parties' agreements, intervening only when the terms are restrictive, oppressive, or otherwise incompatible with societal goals.

Implied/tacit choice of law[1]. The doctrine of implied or tacit choice of law has been criticised by some legal scholars as an artificial construct, attempting to impose a rule of law based on a presumed common intention of the parties where such intention is either non-existent or is purely speculative (Carter, 1950, p. 259). In continental Europe, scholars like Pillet (1903) have dismissed the notion of an implied choice of law imposed by the courts, although he concedes that parties may indeed tacitly choose the applicable law, particularly in cases where the circumstances clearly suggest that the parties made an actual choice but

[1] A true or real choice of law which is not made expressly is termed in some legal systems as tacit choice of law and in other legal systems as implied choice of law. In general, contracting parties are said to have made a tacit choice of law in situations where there is evidence to show that the parties, in fact, made an actual choice of law but did not express this in their contract. This tacit choice may have been communicated through other means but an express pronouncement by the parties. However, implied choice of law, as used by the common law courts, is a broader concept which embodies more than tacit choice as described. For example, parties may be said to have made an implied choice in situations where evidence suggests they did not make such choice but are presumed to have made a choice by the operation of law. The fine distinction between the two, implied and tacit choice of law, can be seen as one of inferred versus true intention respectively.

failed to explicitly record it (p. 429). Such a choice, when genuinely reflective of the parties' intentions, is considered a true choice of law (Neels & Fredericks, 2011, p. 104).

In contemporary practice, the ability of contracting parties to make a tacit choice cannot be denied. The contract itself often reveals the parties' intention for a particular law to govern their agreement, even if this intention is not explicitly stated. Nygh, for instance, argues that only in cases where there is an "actual choice" communicated through means other than an express stipulation should it fall within the scope of tacit choice (Marshall, 2012, 513). This interpretation aligns with the approach adopted by courts in Ghana (*Société Générale de Compensation v. Ackerman* 1972 1 GLR 413), England (*Vita Foods Productions Inc v. Unus Shipping Co* (1939 AC 277(PC) 290), and other common law jurisdictions such as Australia (*Akai Pty Ltd v. The People's Insurance Co* 1996 188) and India (*National Thermal Power Corp v. Singer Company* 1992 3 SCC 551).

In determining an implied choice of law in international sales contracts in Ghana, courts apply the standard of a reasonable businessperson to ascertain the parties' intentions at the time of contract formation (Oppong, 2012, p. 53). The system of law that the parties are presumed to have selected is typically the one that reasonable individuals in their position would have intended. In *Garcia v Torrejoh* (1992 GLR 143), the High Court of Ghana held that where the parties did not choose the proper law, an implied choice could be inferred from the "nature and terms of the contract and the general circumstances of the case".

At common law, traditional indicators that may demonstrate the existence of an implied choice of law are well established, although no single indicator is deemed conclusive of the parties' common intention (Marshall, 2012, 513). The terms of the contract are often the primary source of inference. Notable indicators include exclusive jurisdiction or arbitration clauses, the use of standard forms, and inferences drawn from the parties' previous dealings or related transactions where they had previously made a choice of the applicable law (Marshall, 2012, p. 513; *Re O'Brein v. Canadian Pacific Railways Co* 1972 25 DLR. 3rd 230 (Sask CA) 224). Other indicators may include the use of a specific language reference to provisions of a foreign statute, and the use of technical terms particular to a specific legal system (Nygh,1999, p. 118). The problem with this common law approach is that no one factor is more significant than the other in deciding whether the parties have made a true choice, albeit impliedly (Marshall, 2012, p. 514). This could undermine the principle of predictability, which is essential in the commercial context.

Among the various factors considered by common law courts in determining whether an implied choice can be inferred, choice of forum clauses often carry significant weight. At common law, the selection of a forum is a strong indication of the parties' intention to have the law of that forum govern their contract (*Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* 1970 3 All ER 71 (HL)). The maxim *qui elegit judicem elegit jus* reflects this perspective. For example, it has been suggested obiter in India that "if there is no express choice of the proper law of the contract, the law of the country of the chosen court or tribunal will usually, but not invariably, be the proper law" (Neels, 2016, p. 365; *Modi Entertainment Network v. WSG Cricket Pte Ltd* 2003 4 SCC 341). This reasoning, however, may overlook the fact that parties may choose a particular forum for reasons other than the application of its law (Neels, 2016, p. 363). For example, parties may opt for a court due to its neutrality, the expertise and experience of its judges, or mere convenience, without necessarily intending for the forum's law to govern their contract (Neels, 2016, p. 363). Thus, the choice of forum should not automatically be indicative of the parties' choice of the applicable law. Goode (1988), for instance, notes that foreign contracting parties frequently choose English law, not because of a preference for English

jurisdiction, but because their rights and obligations can be more easily ascertained under English law (p. 135).

To date, the Ghanaian courts have not had to address this issue directly and have thus made no pronouncement on the relationship between choice of forum and choice of law. However, given Ghana's adoption of common law precedents in private international law, it would not be unreasonable for commercial parties to assume that Ghanaian courts will adhere to the traditional common law position on this matter as well.

Objectively determined choice of law (the objective proper law). In Ghana, when parties to a contract do not explicitly or impliedly choose a governing law, the proper law of the contract is determined by the law with which the transaction has the closest and most real connection (*Godka Group of Companies v. PS International Ltd* 1999–2000 1 GLR 409). To ascertain this connection, the court considers all relevant circumstances surrounding the formation of the contract. As indicated above, this "closest and most real connection" test has replaced the old common law rule that, in the absence of an agreement to the contrary, the lex loci contractus governs the contract (*Vita Foods Productions Inc v. Unus Shipping Co* (1939 AC 277(PC) para 290). For instance, in Godka, where the court was concerned with the determination of the applicable law in the absence of choice (the objective proper law), it did so by applying the "closest and most real connection" test of the common law by weighing all the connecting factors in the contract (para 419–520). Ultimately, the court decided that the proper law of the contract was Ghanaian law (para 420), after considering various elements: the nationalities of the contracting parties (United States and Ghana), the place of performance (Ghana), the mode of payment (effected by a Ghanaian agent in Ghana), and the intended use of the goods involved (also in Ghana) (para 411).

The tests for determining the objective proper law can create some uncertainty due to their similarity that for determining the implied choice of the applicable law. This issue was acknowledged by the court in *Bonython v. Commonwealth of Australia* (a case relied upon by the Ghanaian court in *Godka*), which noted that the distinction between searching for "inferred" intention and determining the objectively proper law was a fine one, often blurred (*Bonython v. Commonwealth of Australia* 1951 AC 201 para 219). However, the tests are in fact different. The determination of an implied or tacit choice of law requires the courts to look for indications of the contracting parties' intentions, while the determination of the objective proper law involves no reference to such intentions (*Société Générale de Compensation v. Ackerman* 1972 1 GLR 415). Instead, the courts seek the legal system with the "closest and most real connection" to the contract. Factors considered include the place of contracting, the place of performance, the parties' residences, and the place of business (*Godka Group of Companies v. PS International Ltd* 1999–2000 1 GLR 409). The test is flexible, with its application depending on the specific facts of each case. If the *locus contractus* and *locus solutionis* are identical, the law of that place is likely to be deemed the law with the "closest and most real connection" to the contract (Collins, 1987, p. 1164). Nonetheless, as indicated, the test allows judges to consider all surrounding circumstances before making a final decision.

In the Ghanaian case of *Société Générale de Compensation v Ackerman* (1972 1 GLR 413), a contract written in French but executed in Ghana involved the plaintiff, an Israeli national, who agreed to serve as the works supervisor for the defendants, a French company, under the control of the defendants' Ghanaian representative. The work was to take place at the defendants' building site in Ghana over a three-year period, including a four-month probation period. The plaintiff's salary was to be paid in French currency

in France, except for living expenses, which were to be paid in Ghanaian currency. Either party could terminate the contract during the probation period without notice or compensation, subject to the defendants' limited right to terminate for professional or disciplinary reasons. However, before the expiration of the probation period, the defendants summarily terminated the plaintiff's contract on entirely different grounds. In deciding that Ghanaian law was the objectively determined proper law of the contract, the court considered various factors: the *locus contractus* (Ghana), the *locus solutionis* (Ghana), the currency of payment (French), the language of the contract (French), and the place of incorporation of the company (France). The court ultimately ruled that Ghanaian law should apply, given that Ghana was the place of performance. The court relied on the English case of *Re United Railways of Havana v. Regla Warehouses Ltd* (1960 2 All ER 332 356) in deciding the case.

The application of these common law rules to determine the objective proper law introduces a significant level of discretion on the part of the decisionmaker, potentially leading to inconsistencies in cases with similar facts. This approach undermines the commercial law principle of predictability, complicating the ability of potential investors and commercial actors to accurately predict the applicable law in the event of a dispute arising from their contracts.

2. The Rome model: an option for determining the applicable law in Ghana?

From the discussion above, one will not be wrong to assert that the common law approach adopted in Ghana presents major challenges to the principles of "party autonomy" and "predictability" of results in respect of Ghanaian choice of law rules. To develop Ghana's private law on international sales law, particularly in the area of international sales, a paradigm shift from the existing common law approach (with its inherent inefficiancies) is essential. Such a shift would ensure the upholding of party autonomy and the achievement of legal certainty. Modern solutions that align with the core commercial law principles of party autonomy and predictability should be considered, and these solutions can be found in the EU's Rome I Regulation[1].

The Rome I Regulation governs the choice of law in civil and contractual matters within the European Union, applying in all EU member states except Denmark[2]. This regulation harmonises choice-of-law rules across the EU, making the choice of the applicable law to cross-border sales contracts more predictable and consistent (Article 1(1) of the Rome I Regulation of 2008). Those who support the Rome I Regulation argue that it provides a reliable and consistent framework, which enhances legal certainty in international contracts (Bilkis, 2016, p. 15).

As the most influential models for codifying private international law of contract rules on choice of law, the Rome I Regulation has had a significant impact on the statutory

[1] Important models are the Mexico City Convention on the Law Applicable to International Contracts, the Rome I Regulation on the Law Applicable to Contractual Obligations, and its predecessor, the Rome Convention on the Law Applicable to Contractual Obligations, and the Hague Principles on Choice of Law in International Commercial Contracts. Neels and Fredericks, in their paper "An introduction to the African principles of commercial private international law" delivered at the 77th biennial conference of the International Law Association on 8 August 2016 at the Sandton Convention Centre in South Africa, also appreciated the fact that these are the important models that could be considered for an African Principles on commercial law. However, their paper heavily favoured the Rome I Regulation and the Hague Principles.

[2] The Rome Convention is still in force as regards the relationship between Denmark and the remaining EU member States.

provisions of many countries. Thus, the basic provisions on choice of law in the statutes of most countries are in principle based on the Rome model (Neels, 2012).

Express choice of law. The cornerstone of the Rome I Regulation is the principle of "party autonomy" (Recital 12 of the Rome I Regulation of 2008), as enshrined in Article 3, which states:

"A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or part only of the contract."

This provision allows parties to make an express (Article 3(1) of the Rome I Regulation of 2008) or implied choice of the governing law. According to Recital 11 of the Rome I Regulation, contracting parties may select a neutral law as the applicable law to govern their contract, as the Regulation does not require any connection between the chosen law and either the parties or the subject matter of the contract (Recital 11 of the Rome I Regulation of 2008). In comparison to the position under the common law, the Rome I Regulation seem to affords a broader scope of party autonomy in choice of law. Under the common law – adopted in Ghana – parties' autonomy to select the applicable law is subject to the requirement that the parties' choice must be made *bona fide*. As previously discussed, this *bona fide* requirement serves as an anti-evasion-of-law measure (Lin, 2014, 317), ensuring that the selected legal system is not entirely unconnected to the contract or the parties. Thus, a choice of law that appears to be motivated by an attempt to circumvent the legal system that would otherwise apply may not be upheld by the courts under common law for not being *bona fide* (*Peh Teck Quee v. Bayerische Landesbank Girozentrale* 2000 1 SLR 148).

In contrast, the combined effect of Article 3 and Recital 11 of the Rome I Regulation clearly affirms that parties may choose a legal system that is entirely unconnected to the contract or to themselves. This allows the parties to select the legal system they consider most suitable for their contract, without being constrained to the laws of states with which they or the contract have a connection. As a result, Rome I Regulation confers a greater degree of autonomy on contracting parties regarding the selection of the applicable law. This increased autonomy enhances legal certainty and predictability, as parties can be assured that their choice will be respected without the added uncertainty of a *bona fide* assessment, which characterises the common law approach.

By readily upholding party autonomy in this regard, the Rome I Regulation better fulfils its objective of providing a stable and foreseeable legal framework for determining the applicable law in cross-border contracts. Compared to the common law regime in Ghana, therefore, Rome I offers a more liberal and predictable model of party autonomy in choice of law matters (Recital 12 and Recital 11 of the Rome I Regulations of 2008).

Tacit choice of law. It is well established that, under the common law, a choice of law may be implied from the terms of the contract or the circumstances surrounding it (*Godka Group of Companies v. PS International Ltd* 1999–2000 1 GLR 419). The process of determining an implied choice of the applicable law can be abused by courts as a means to easily fall back on domestic laws (*lex fori*) to ease decision making, while subverting the parties' true intentions. The Rome I Regulation addresses this by restricting courts to imply choice only when it is "clearly demonstrated" by the terms of the contract or the circumstances of the case (Article 3(1) of the Rome I Regulation of 2008). Article 3 of the Rome I Regulation,

therefore, does not allow for tacit choice of law to be readily deduced from parties' agreement. This standard sets a higher threshold, thereby curbing judicial discretion and promoting greater legal certainty and party autonomy.

Unlike the position under Ghanaian common law, there is no requirement that the implied choice must be "clearly demonstrated" before the court may attribute a legal system to the contract based on the presumed intentions of the parties (Carter, 1950, p. 259). Scholars have argued that courts should only infer an implied choice in cases where there is a genuine "actual choice" communicated through means other than an express stipulation (Marshall, 2012, p. 513). Regardless of this, Lord Diplock's declaration in the *Amin Rasheed* case (1984 AC 50 60–5), stating that "it is a requirement at common law to necessarily imply choice in situations where it is not expressly made by the parties," suggests that, compared to the Rome I Regulation, the common law more readily implies choice (Marshall, 2012, p. 516). This approach allows common law courts to deduce the implied choice of applicable law by exercising their discretionary powers. Such judicial discretion under the common law has been criticised for leading to unpredictable outcomes, particularly where judges draw inferences of implied choice without sufficiently clear evidence of the parties' intention (Neels & Fredericks, 2016, p. 179). The Rome I Regulation, by contrast, adopts a more cautious approach. Its requirement that implied choice be "clearly demonstrated" provides greater certainty and predictability and better safeguards party autonomy. It ensures that a court may only imply a choice where the parties have indeed selected an applicable law, albeit not in express terms (Bouwers, 2023, p. 19).

Furthermore, Recital 12 of the Rome I Regulation clarifies the relationship between the choice of forum and the choice of law. It states that an agreement conferring exclusive jurisdiction on a particular court may be one of the factors taken into account in establishing whether a choice of law has been clearly demonstrated. However, the choice of forum alone is not determinative (Neels, 2016, p. 363). While this approach resonates with the position under Ghanaian common law, the latter takes a more robust view, treating a forum selection clause as a "strong indication" that the parties intended the forum's law to govern their contract (*Compagnie Tunisienne de Navigation SA v Compagnie d'Armement Maritime SA* 1970 3 All ER 71 (HL)). Nonetheless, this assumption has lost favour in modern practice, as it is increasingly recognised that parties may choose a particular forum for various reasons unrelated to the governing law of the contract.

Objectively determined choice of law (Objective proper law). The hard and fast rules. Similar to the common law rules applicable in Ghana, the Rome I Regulation provides a framework for objectively determining the applicable law in cases where the parties have not made a choice. However, the Regulation offers a more structured and predictable approach. Article 4(1) of the Rome I Regulation sets out specific rules for eight defined categories of contracts, offering clarity and ease of application[1]. For instance, it stipulates that the law applicable to a contract for the sale of goods is the law of the country where the seller has their habitual residence, while for service contracts, it is the law of the country where the service provider is habitually resident.

[1] Contract for the sale of goods, contract for the provision of services, contract relating to a right in *rem* in immovable property or to a tenancy of immovable property, a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months, franchise contract, distribution contract, contract for the sale of goods by auction, contract concluded within a multilateral system which brings together of facilitates the bringing together of multiple third-party buying and selling interests in financial instruments.

In contrast, the common law approach in Ghana does not adopt such categorisation. Instead, courts are required to determine the applicable law based on the doctrine of the "closest and most real connection". As observed above, this involves an evaluative exercise in which the court considers multiple connecting factors – such as the place of contracting, the place of performance, the domicile or residence of the parties, and the nature of the subject matter – to identify the system of law most intimately connected to the contract.

While this common law method allows for flexibility, it also introduces a significant degree of uncertainty. Different courts may weigh the relevant factors differently, potentially leading to divergent outcomes in similar cases. By contrast, the approach under the Rome I Regulation enhances predictability. Identifying the habitual residence of a seller or service provider, for example, is a more straightforward factual determination. Consequently, parties operating under the Rome I framework are better able to anticipate their legal rights and obligations. Thus, when compared to the Ghanaian common law approach, the Rome I Regulation offers greater legal certainty and facilitates more efficient cross-border contractual relationships.

Characteristic performance rule. Under the Rome I Regulation, when a contract does not fall within any of the eight categories enumerated in Article 4(1), or where the contract involves elements from multiple categories, the applicable law is determined by Article 4(2). This provision introduces the "characteristic performance" test as the guiding principle in such cases. According to Article 4(2), in the absence of a clear classification under Article 4(1), the contract shall be governed by the law of the country in which the party performing the characteristic obligation of the contract has their habitual residence (Marshall, 2012, p. 529). This rule is designed to provide predictability in circumstances where the nature of the contract does not permit direct categorisation under the "hard and fast" rules of Article 4(1).

Although the Regulation does not define the term "characteristic performance," interpretive guidance is found in the Giuliano and Lagarde Report, which accompanied the earlier Rome Convention. Paragraph 23 of the Report describes the characteristic performance as the performance "for which the payment is due … which usually constitutes the centre of gravity and the socio-economic function of the contractual transaction" (Giuliano & Lagarde, 1980, p. 15). Thus, in a contract where one party provides goods or services and the other pays for them, the law of the habitual residence of the performing party, rather than the paying party, will govern the contract. This approach equally upholds the legal certainty required in the world of commerce by making it possible to accurately predict the legal system that will apply in the absence of a choice.

The Rome I Regulation also incorporates two escape clauses under Articles 4(3) and 4(4), which introduce limited flexibility into the framework. Article 4(3) allows deviation from the rules in paragraphs (1) and (2) where "it is clear from all the circumstances of the case" that the contract is "manifestly more closely connected" with another country (Article 4(3) of the Rome I Regulation of 2008). This provision is intended to apply only in exceptional cases where the strict application of the general rules would yield an unreasonable result. Article 4(4), on the other hand, serves as a residual clause, applicable where the law cannot be determined under either Article 4(1) or 4(2). However, this is unlikely to occur often[1]. For instance, in barter contracts – where both parties perform similar obligations and neither can be said to perform

[1] There are two different views on when the escape clause in Article 4(3) can be applied by the courts. First, it is averred that in instances where the place of performance and the place of the conclusion of the contract coincide, then, the contract will be said to be more closely connected to that country (Collins, 2012). On the contrary, the courts in the Netherlands holds that one should only be allowed to deviate from Articles 4(1) and 4(2) if in the particular circumstances of the case the place of residence of the party that has to defect the characteristic performance has no real significance as connecting value (Fredericks & Neels, 2003; Hoge Raad 25 September 1992, 1992 *Nederlandse Jurisprudentie 750* (*Balenpers*)).

the characteristic performance – courts are directed to determine the applicable law based on the closest connection to the contract.

These escape clauses enable the court to exercise discretion, but only in narrowly defined circumstances, thereby preventing arbitrary judicial decision-making and reinforcing the predictability of outcomes. In comparison, although the common law also employs the "closest and most real connection" test, it grants judges broader discretion to weigh various connecting factors without the structured constraints present under the Rome I Regulation. As Symeonides observes, this grants common law judges "considerable discretion" in identifying the objective proper law, which can lead to inconsistent and unpredictable results. (Symeonides, 2011, p. 186).

Overall, the Rome I Regulation enhances legal certainty by offering a detailed and structured framework for determining the applicable law in cross-border contracts. It does so by specifying clear default rules, limiting judicial discretion to exceptional cases, and thereby supporting both legal certainty and the principle of party autonomy. Specifically, the Regulation achieves predictability through either express party choice or, in the absence of such choice, the application of predetermined laws to commonly encountered contract types. Furthermore, the inclusion of narrowly tailored escape clauses in Articles 4(3) and 4(4) ensures that the legal framework remains flexible enough to accommodate atypical scenarios without sacrificing consistency. As Behr notes, this model of "controlled discretion" allows courts to displace the general rules only when it is evident from the circumstances that the contract is more closely connected with a different legal system (Behr, 2011, 255). Comparatively, the Rome I Regulation stands as a superior model in harmonising party autonomy, legal certainty, and judicial flexibility in international contract law.

Recommendation and Conclusion

This study has examined the legal framework governing choice of law in international contracts under Ghanaian common law and compared it with the European Union's Rome I Regulation. The analysis reveals that the Rome I Regulation offers a clearer, more predictable, and autonomy-enhancing framework that better responds to the demands of contemporary commercial practice. It achieves this through well-defined rules for express and implied choice of law, a structured method for determining the applicable law in instances where no choice has been made, and a limited and controlled role for judicial discretion. In contrast, Ghanaian common law continues to rely on outdated rules inherited from pre-20th Century English jurisprudence – rules that England itself has since abandoned. This results in considerable uncertainty, especially when courts are required to infer the parties' intentions or determine the proper law in the absence of an express choice.

Given this divergence, the study recommends that Ghana should consider codifying its rules on choice of law in international contracts, adopting a model similar to the Rome I Regulation. Codification would enhance legal certainty, reduce the scope for inconsistent judicial reasoning, and foster greater confidence in Ghana's legal system among foreign investors and contracting parties. In doing so, Ghana should abandon the *bona fide* requirement that currently limits the parties' ability to choose a law unconnected to the transaction – a restriction that has no equivalent under the Rome I regime. Instead, Ghanaian law should recognise the parties' freedom to select any legal system they deem appropriate, including neutral systems, thereby advancing the principle of party autonomy.

Further, the law should only permit courts to imply a choice of law where it is "clearly" demonstrated by the terms of the contract or the surrounding circumstances. This higher evidentiary threshold, as found in the Rome I Regulation, would prevent courts from too

readily defaulting to the *lex fori* (which encourages forum shopping) and thereby undermining the parties' intentions. In situations where no choice has been made, a revised Ghanaian framework should also adopt a structured and predictable approach for determining the applicable law, mirroring the "hard and fast" rules in Article 4(1) of the Rome I Regulation. Finally, any reform of the law must be accompanied by adequate training for legal practitioners and judges to ensure that the new rules are properly applied and interpreted in line with international best practices.

In conclusion, while Ghana has yet to reform its conflict of laws regime on contractual obligations, the increasing complexity of international trade and its deepening commercial ties – particularly with the European Union – demand a more modern and commercially responsive legal framework. The fact that the United Kingdom, the originator of Ghana's current common law rules, adopted the Rome I Regulation to retain competitiveness in the global economy – and has retained its substantive provisions even after Brexit – provides a compelling precedent. Ghana has the opportunity to align with this global shift, enhance legal certainty, and support its growing role in international commerce by adopting a reformed, codified, and principled approach to choice of law in cross-border contracts.

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Обірі-Коранг П. Реформування підходів до вибору права для договорів міжнародної купівлі-продажу: порівняльне дослідження права Гани та Європейського Союзу. – Стаття.

У статті розглядаються чинні правила міжнародного приватного права, що регулюють вибір права у договорах міжнародної купівлі-продажу у Гані, та оцінюється їхня придатність для підвищення правової визначеності та передбачуваності результатів для договірних сторін і судів. З цією метою порівнюються норми законодавства Гани та Регламенту Європейського Союзу «Рим I» про право, що застосовується до договірних зобов'язань 2008 р. (Рим I/Регламент «Рим I»). Обговорення починається з розгляду того, якою мірою вибір права Гани дозволяє договірним сторонам прямо або опосередковано обирати застосовне право до договорів міжнародної купівлі-продажу. Розглядається також, як законодавство Гани визначає застосовне право у випадках, коли сторони не зробили такого вибору, – об'єктивне визначення застосовного права. Далі у статті порівнюється підхід Гани з підходом Регламенту «Рим I», що є визнаним у світі провідним інструментом для вирішення питань вибору права у міжнародних комерційних операціях. Порівняння двох систем дозволяє оцінити їх ефективність та результативність під час застосування судами для визначення застосовного права до договорів міжнародної купівлі-продажу. Базуючись на проведеному дослідженні, автором запропоновано шляхи вдосконалення правил вибору права у Гані, що спрямовані на підвищення правової визначеності та передбачуваності для договірних сторін.

Ключові слова: Регламент «Рим I», застосовне право у договорах міжнародної купівлі-продажу, Закон Гани про суди 1993 року, об'єктивне право, прямо виражений вибір права, імпліцитний вибір права, загальне право.