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CHAPTER 5

# Opting In to the CISG: Avoiding the *Redline Products* Problems

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## 1. Introduction

While the United Nations Convention on Contracts for the International Sale of Goods (CISG) has been in effect in the United States for more than 25 years, the majority of decisions in which it has been considered in U.S. courts have resulted from its application as the default law in cases in which the parties either have failed to provide a choice of law clause that excludes the Convention, or have included a choice of law clause that implicitly leads to the application of the Convention.[1] Transactions lawyers report that they routinely opt out of the CISG in international sales contracts, largely – even a quarter century after its effective date – because they simply don't know its terms as well as they know domestic legal rules such as the Uniform Commercial Code (UCC).[2]

1. *See, e.g.*, Delchi Carrier S.p.A. v. Rotorex Corp., 71 F.3d 1024 (2d Cir. 1995) (applying the CISG where U.S. and Canadian parties had included no choice of law clause in their sales contract), and St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, GmbH, 2002 WL 465312 (S.D.N.Y.) (not reported in F. Supp. 2d) (when parties chose German law to apply, "the parties concede that pursuant to German law, the U.N. Convention on Contracts for the International Sale of Goods ("CISG") governs this transaction because (1) both the U.S. and Germany are Contracting States to that Convention, and (2) neither party chose, by express provision in the contract, to opt out of the application of the CISG").
2. *See, e.g.*, Peter L. Fitzgerald, *The International Contracting Practices Survey Project*, 27 J.L. & COM. 1, 25 (2008) (observing that although "the CISG was incorporated into U.S. domestic law nearly twenty years ago" it is "still largely unknown and seldom seen in practice today").

The case of *FPM Financial Services, LLC v. Redline Products, LTD*[3] provides an example of a poorly drafted effort to opt in to the CISG in an international contract between a U.S. party and a party in a non-Contracting State, South Africa. The case demonstrates the problems that result from poorly considered choice of law clauses, in a decision which raises, but fails fully to consider, the application of the CISG. One party appeared rather clearly to want the CISG to apply, but apparently failed to gain that result. The case thus provides an opportunity to consider more fully the proper approach to opting in to the CISG. In the process, it also demonstrates some of the many problems generated by the U.S. declaration under Article 95 of the CISG, which prevents the application of the CISG through Article 1(1)(b).

This chapter will address the issues raised by *Redline Products* by using the case to consider more broadly two sets of issues. The first set of issues, considered in section IV, below, arises from the U.S. Article 95 declaration, which prevents the application of the CISG when the sales contract is between a U.S. party and a party with its place of business in a non-Contracting State (such as South Africa), even if the rules of private international law lead to the application of the law of a U.S. state, which includes the CISG. This declaration adds levels of complexity which create significant difficulties in addressing cases such as *Redline Products*, and demonstrates the desirability of U.S. withdrawal of its Article 95 declaration. The declaration makes opting in to the CISG particularly difficult when a transaction involves a party (or parties) from a non-Contracting State.

The second set of issues, considered in section V, below, arises from the problematic (pathological) choice of law clause in the contract which was the focus of the *Redline Products* decision. Addressing those issues requires consideration of the law applicable to the exercise of party autonomy in order to choose the law applicable to an international sales contract. This brings together both the substantive law of the CISG and national law, as well as the relevant choice of law (private international law or PIL) rules. In discussing these matters, we will consider different approaches to governing party choice of law in the United States and the European Union, as well as the approach found in the 2015 Hague Principles on Choice of Law in International Commercial Contracts.[4]

3. Civil Action No. 10-6118 (MAS) (LHG), 2013 WL 5288005, September 17, 2013, (D.N.J.).
4. Hague Conference on Private International Law (approved 19 March 2015), *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=135.

## 2. Redline Products

In *Redline Products*, the seller, Redline Products, was a South African manufacturer of a disposable breathalyzer, which entered into a distribution agreement with FPM, a New Jersey corporation. The case differs from the standard CISG case in a number of ways, including the fact that the focus of the dispute did not involve a simple sales contract, but rather a 2010 "Distribution Agreement," under which the principal question was whether FPM was designated as the exclusive distributor for the breathalyzer in the United States. There was also disagreement over whether Redline violated a separate non-disclosure agreement and a confidentiality clause contained in the Distribution Agreement.

The Distribution Agreement contained both "an integration clause and a modification clause forbidding revision without a written executed supplemental agreement." On the question of choice of law, the court described the contract terms as follows:

> The Distribution Agreement provides that it "shall be deemed made in Cape Town, South Africa and shall be governed by the laws of that country." ... The Distribution Agreement further provides that it "will be governed by the Convention on Contracts (Agreements) for the International Sale of Goods (CISG), and pursuant to Article 1(1)(a) and Article 10 of the CISG and this Agreement will be adjudicated in Bergen County, New Jersey, USA."[5]

Obviously, these two, separate clauses were not given careful consideration in the preparation of the contract. Nor does it appear they were given significant consideration by litigation counsel for either party, or by the Court. Immediately after quoting these provisions in the contract, the opinion shifts to explaining that both sides in the dispute had argued choice of law rules that apply only if the parties have not clearly chosen an applicable law for their contractual relationship.[6] The court conveniently concludes that it "will apply the laws of New Jersey."[7]

5. *Redline Products, supra* note 3.
6. The specific discussion is as follows:

   > Plaintiff further argues that New Jersey, when compared to South Africa, has a more significant interest in the instant claim and that Redline has not established a conflict in law as between New Jersey and South Africa since this action arises in the context of common law and basic contract principles. (Pl.'s Opp'n 9.)

## 3. Opting In to the CISG

The second provision on choice of law in the *Redline Products* contract clearly appears to have been provided by FPM, the New Jersey party, as it included the additional language that "this Agreement will be adjudicated in Bergen County, New Jersey, USA."[8] Thus, one may assume that FPM was attempting to opt in to the CISG in the distribution agreement. By turning to the law of New Jersey, the court appears to have ignored this provision. While the law of New Jersey includes the CISG, that is not what the court applied in its subsequent analysis. Neither did the court go back to the other choice of law clause in the contract, which stated that the Distribution Agreement "shall be deemed made in Cape Town, South Africa and shall be governed by the laws of that country."[9]

The court's approach to the attempts at choice of law found in the contract raises many questions, but the most fundamental for CISG purposes are these:

1) If one party to an international sales contract is located in the United States and the other in a non-Contracting State, can they "opt in" to the CISG through an agreement on applicable law? This requires discussion of CISG Article 1(1) (particularly Article 1(1)(b)) and "opt in" in general, with special attention to the complications created by the U.S. declaration under CISG Article 95. This question is discussed in Section IV, below.
2) If the answer to question 1 is "yes," which the *Redline Products* court appears to assume is the case, how may the parties to such a contract successfully express their intent to opt in to the CISG? This question is addressed in Section V, below.

> Defendant asserts that Plaintiff has not indicated a specific conflict between the CISG and the laws of South Africa, and that no conflict exists. (Def.'s Reply 1.) Defendant, however, states that both South Africa and New Jersey law are essentially the same. (Id.)
>
> "To resolve the choice-of-law question, we must evaluate the respective interests of the two involved states to determine the state that has the most significant interest in governing ..." Erny v. Estate of Merola, 171 N.J. 86, 91 (2002).
>
> As the Parties agree that no conflict exists as between the laws of South Africa and New Jersey, and the Defendant does not rebut Plaintiff's claims regarding the interests of New Jersey in the instant action, the Court will apply the laws of New Jersey. *Redline Products, supra* note 3.

7. *Id.*
8. *Id.*
9. *Id.*

## 4. Opting In to the CISG and the Impact of the U.S. Article 95 Declaration

The facts of the *Redline Products* case suggest that one party, FPM, had intended to opt in to the CISG, but that the court did not consider that effort to have been effective. This raises the question of what is necessary to successfully opt in to the CISG, and, in the United States, it raises the additional question of the effect of the U.S. Article 95 declaration on the drafting of an effective opt in clause.

### 4.1. CISG Article 1 and Opting In without the Article 95 Declaration

In order to understand "opt in" under the CISG, and to prepare to tackle the effect of the U.S. Article 95 declaration on attempts to opt in, it is necessary to describe briefly Article 1 of the Convention, the principal provision that identifies the transactions to which the CISG applies. Article 1 specifies three (or four, depending on how you count) requirements that must be met for the CISG to govern a contract or alleged contract. First, the contract must be one for the "sale of goods."[10] Second, the contract must be "international" in the sense that it is between parties located in "different States."[11] Finally, the contract must have a specified connection to a Contracting State. This final element, which might be called the "nexus" requirement, can be satisfied in alternative ways. It is satisfied if either 1) both parties are located in Contracting States to the CISG (Article 1(1)(a)),[12] or 2) the applicable rules of private

10. This requirement can be subdivided into two requirements (hence the ambiguity about the number of elements required by Article 1): First, the contract must be one for a "sale" (as opposed to, e.g., a "lease"); second, the sale must be of "goods" (as opposed to, e.g., a sale of land or other "non-goods"). It is not at all clear that the distribution agreement in *Redline* qualified as a sale of goods, but the questions raised by that aspect of the case are beyond the scope of this chapter. The following discussion assumes that the distribution agreement constituted a CISG "sale of goods."
11. If a party has places of business in more than one state, CISG Article 10(a) specifies which place of business "counts" for purposes of Article 1. If a party does not have a "place of business," Article 10(b) provides that "reference is to be made to his habitual residence."
12. A "Contracting State" is one that has become bound to the Convention by ratification, accession, approval, acceptance or succession (see UNCITRAL's Status Table for the CISG, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html). Rules governing the time at which the CISG enters into force with respect to a Contracting State are given in Article 99; Article 100 specifies timing rules for determining whether different parts of the Convention apply to a transaction, based on the time the CISG entered into force in the relevant Contracting States.

international law ("PIL") lead to the application of the law of a Contracting State. Thus if either (or both) of the parties to an international sale is *not* located in a Contracting State, the Convention applies to the transaction under Article 1 only if the requirements of Article 1(1)(b) are satisfied – i.e., only if PIL designates the law of a Contracting State.

The basic operation of Article 1(1)(b) is illustrated by the following example:

*Example 1*: Abel, located in a CISG Contracting State that has not made the Article 95 declaration, enters into a contract for the sale of goods with Beta, located in a non-contracting state. The contract does not contain a choice of law provision. A dispute arises and Beta sues Abel in a court in Abel's state. Under the court's PIL rules, the law of Abel's country governs the transaction. Although the CISG does not apply under Article 1(1)(a) (because one of the parties is not located in a Contracting State), the Convention is applicable under Article 1(1)(b).[13] Note that the result would not change even if both parties were located in non-contracting states, provided the litigation occurred in a court in a Contracting State without an Article 95 declaration and the court's PIL rules led to the application of the law of a Contracting State without an Article 95 declaration. A court in such a Contracting State would be treaty-bound to apply the CISG under Article 1(1)(b).

The last statement in Example 1 suggests a second situation worth considering:

*Example 2*: Consider the same facts as Example 1, except the litigation is in a court in Beta's (non-contracting) state. The court's PIL rules lead to the application of the law of Abel's state, a Contracting State without the Article 95 declaration. Because the Convention is the law of Abel's state for international sales transactions, the court in Beta's country would presumably apply the Convention. Note, however, that Beta's state, a non-contracting state to the CISG, is not bound by CISG Article 1(1)(b), and thus the court is not treaty-bound to apply the Convention. It would apply the CISG not as an international instrument, but (as directed by its PIL rules) as the law of Abel's state. This could impact the manner of applying the Convention. For example, if Abel's state has interpreted the Convention differently than other Contracting States, the court in Beta's state may decide it must follow that idiosyncratic interpretation, rather than the consensus "international interpretation" outside of Abel's state. The Belgian Court of Cassation, for example, has held that the CISG incorporates the "hardship" doctrine stated in the UNIDROIT Principles of International Commercial Contracts; application of this doctrine may lead to court-imposed "adapted" contract terms never agreed to by the parties.[14] The authors of this

13. On the other hand, if the court's PIL rules designated the law of Beta's state, the court would apply that state's law rather than the Convention.
14. See Hof van Cassatie, Belgium, 19 June 2009 (Scafom International BV v. Lorraine Tubes S.A.S.), English translation available at http://cisgw3.law.pace.edu/cases/090619b1.html (adopting Articles 6.2.1 through 6.2.3 of the UNIDROIT Principles of

chapter believe this position violates Article 7(2) of the Convention.[15] If the PIL analysis of the court in Beta's non-CISG-contracting-state jurisdiction led to the application of Belgian law, presumably it would apply this (controversial) position of the Belgian Cassation Court – the highest Belgian court with jurisdiction on matters governed by the CISG – as a matter of Belgian law.

The parties' choice of governing law can impact the operation of Article 1(1)(b). The 3rd (English) edition of Schlechtriem & Schwenzer's Commentary on the CISG gives the example of two parties located in non-Contracting States who choose "Swiss law" to apply to their international sales transaction; the commentary concludes that "the CISG applies on account of Article 1(1)(b) as part of Swiss law."[16] [For purposes of the discussion below, this will be referred to as "*Example 3*."] Note that, as long as the tribunal honored the parties' choice of Swiss law, the Convention would apply regardless of the location of the tribunal: courts of a Contracting State without an Article 95 declaration would be treaty-bound to apply the CISG as an international instrument under Article 1(1)(b); courts in a non-contracting state would also apply the CISG because that is Swiss law for the transaction.[17] The result would not change if one of the parties was located in a CISG Contracting State and the other in a non-contracting state, provided the parties chose Swiss law. Finally, note that, if the tribunal's PIL rules would have led to the application of the law of a non-contracting state absent the parties' choice of

International Commercial Law, *available at* http://www.unilex.info/dynasite.cfm ?dssid=2377&dsmid=14311, as principles supplementing the CISG).

15. See Harry M. Flechtner, *The Exemption Provisions of the Sales Convention, Including Comments on "Hardship" Doctrine and the 19 June 2009 Decision of the Belgian Cassation Court*, 59 Annals of the Faculty of Law in Belgrade: Belgrade Law Review 84-101 (2011), available online in SSRN as University of Pittsburgh Legal Studies Research Paper No. 2011-09, http://ssrn.com/ abstract=1785545, and *available at* http://www.ius.bg.ac.rs/Anali/Annals%202011/Annals%202011%20p%20084-101.pdf; Harry M. Flechtner, *Uniformity and Politics: Interpreting and Filling Gaps in the CISG, in* Festschrift für Ulrich Magnus 193-207 (Peter Mankowski & Wolfgang Wurmnest eds.) (Sellier European Law Publishers, forthcoming 2014); chapter available online in SSRN as U. of Pittsburgh Legal Studies Research Paper No. 2014-16, http://ssrn.com/ abstract=2426565.
16. Ingeborg Schwenzer & Pascal Hachem, *Article 6* 32, *in* Schlechtriem & Schwenzer, Commentary on the UN Convention on International Sales of Good (CISG) at 117 (Ingeborg Schwenzer ed., 3rd ed. 2010). The result presumes that the tribunal will enforce the parties' choice of Swiss law.
17. In this case (as discussed in Example 2), however, the Convention would apply as a matter of Swiss national law (because Switzerland would apply the Convention via Article 1(1)(b)) rather than as an international instrument.

Swiss law, the parties' choice of law has the effect of making the Convention applicable to a transaction to which it otherwise would not apply – what is called "opting in" to the CISG.[18] None of the above would change if the parties had chosen the law of a Contracting State other than Switzerland, provided that state had not made an Article 95 declaration.

### 4.2. The U.S. Article 95 Declaration

As shown above, the general operation of Article 1(1)(b) has complications, but is comprehensible and predictable in result. Add an Article 95 declaration (like that of the United States) into the mix, however, and things quickly become complex.

Part IV of the Convention ("Final Provisions," Articles 89-101) includes several articles specifying "declarations" that Contracting States are authorized to make. These permitted declarations are statements by a Contracting State announcing provisions or parts of the Convention to which the declaring state does not intend to be bound, or placing limits on the applicability of the CISG with respect to that state. Article 98 of the Convention attempts to make the authorized declarations specified in Articles 92-96 the exclusive limitations a Contracting State can place on the legal effect of the CISG: Article 98 provides, "No reservations are permitted except those expressly authorized in this Convention." Most Contracting States have ratified the Convention without any declarations, but the United States is not one of them: Upon ratification, the U.S. declared, as permitted by CISG Article 95, that it would not be bound by Article 1(1)(b) of the Convention.[19]

Because of its Article 95 declaration, the U.S. is treaty-bound to apply the CISG only under Article 1(1)(a) – i.e., only to international sales transactions in which both parties are located in Contracting States. The exact effects of the Article 95 declaration and its impact on attempts to opt in to the CISG, as in the *Redline* case, are unclear in a number of situations. Let us begin, however, with circumstances in which the effect of the U.S. declaration is reasonably certain.

18. The discussion of the example in the Schlechtriem Schwenzer commentary occurs in a section designated "Opting in to the CISG." See *id.* at 116. If the tribunal's PIL rules would have led to Swiss law even in the absence of the agreement on choice of law, the parties' choice of Swiss law has no effect other than to eliminate (or at least reduce) uncertainty concerning the outcome of a PIL analysis.
19. The UNCITRAL Status Table for the CISG, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html), lists the following states, in addition to the U.S., that have the Article 95 declaration: Armenia, China, the Czech Republic and Slovakia (both of whom succeeded to the Article 95 declaration originally made by Czechoslovakia), Saint Vincent and the Grenadines, and Singapore.

*Example 4*. Suppose that, in Example 1 above, Abel was located in the United States. If the dispute in that example were litigated in a U.S. court and the court's PIL analysis led to the application of U.S. law, the court would apply U.S. (non-uniform) domestic sales law (likely, Article 2 of our Uniform Commercial Code ("U.C.C.")[20]) rather than the CISG: the United States and its courts are treaty-bound to apply the CISG only when both parties are located in Contracting States, and it is clear that U.S. courts will honor the Article 95 declaration by applying U.S. domestic sales law in this situation.[21]

If the litigation occurred in a court of a Contracting State without the Article 95 declaration and the court's PIL rules pointed to the application of U.S. law, the result is ambiguous. The court conducting the litigation *is* treaty-bound by Article 1(1)(b), and thus it must apply the Convention if "the rules of private international law lead to the application of the law of a Contracting State." The court therefore could apply the Convention on the theory that the state whose law is designated by its PIL rules – i.e., the United States – is a Contracting State (albeit one with an Article 95 declaration). This, in fact, is the approach advocated by the CISG Advisory Council[22] – a private but prestigious and highly influential group whose goal is to promote internationally sound interpretation of the CISG as a means to promote its uniform application.[23]

On the other hand, a court in a Contracting State without the Article 95 declaration whose PIL analysis led to the application of U.S. law might reason that, since U.S. courts would apply U.S. domestic law rather than the Convention, it should do the same. As the CISG Advisory Council admits, a "significant number" of scholars endorse this position.[24] Indeed, Germany (which did not make an Article 95 declaration) anticipated this ambiguous

20. In the United States, contract law has traditionally been governed by state rather than federal law. Thus the U.C.C. is adopted as state law by the individual states. Every U.S. state except Louisiana has adopted the sales-of-goods portion (Article 2) of the U.C.C., although many (perhaps most) have made changes (mostly minor) to the text of the model law. In other words, the Uniform Commercial Code is not truly uniform in the U.S. Thus the U.S. court's PIL analysis would have to determine not just that U.S. law was applicable to the transaction, but also which particular state's sales law governed.
21. See CISG Advisory Council Opinion No. 15, *Reservations under Articles 95 and 96 CISG* (21-22 October 2013) [hereinafter "CISG-AC Opinion No. 15"] 3.9, *available at* http://www.cisg.law.pace.edu/cisg/CISG-AC-op15.html. The Advisory Council opinion argues that courts in a state that has made an Article 95 declaration, while not treaty-bound to apply the CISG in a situation like Example 4, are nevertheless not precluded from applying the Convention if, for example, the parties chose the CISG as applicable law. See 3.7 and 3.8 of CISG-AC Opinion No. 15. That situation is discussed below.
22. See CISG-AC Opinion No. 15, *supra* note 21, 3.14 and 3.15.
23. See the homepage of the CISG Advisory Council at http://www.cisgac.com/.
24. See CISG-AC Opinion No. 15, *supra* note 21, 3.16.

situation, and made an interpretative declaration that it would not apply the CISG under Article 1(1)(b) when its PIL led to the application of the law of a state that had made an Article 95 declaration.[25] Furthermore, the opposite approach – the view that courts in Contracting States must apply the CISG if PIL leads to the application of the law of an Article 95 declaring state – results in the anomaly that different (and possibly outcome-determinative) law would apply depending on the choice of forum. For example, Article 2 of the U.C.C. (U.S. domestic sales law for 49 of the 50 states) imposes a writing requirement on contracts for the sale of goods if the price is $500 or more.[26] CISG Article 11, in contrast, eliminates any writing requirement for contracts governed by the Convention.[27] That means that, where PIL led to the application of U.S. law, an attempt to enforce an oral international sales contract in a U.S. court might fail (if the price was $500 or more) whereas the same contract (with the same PIL analysis) would be perfectly enforceable in the court of a Contracting State without the Article 95 declaration. That result seems to violate one of the purposes of the Convention – to reduce the instances in which applicable law varies with the forum.

In litigation over a sale involving at least one party from a non-Contracting State, a U.S. court faces a kind of mirror-image issue if the court's PIL rules lead to the application of the law of a Contracting State that has *not* made an Article 95 declaration. In this situation the U.S. court is not treaty-bound to apply the CISG under Article 1(1)(b) because of the U.S. Article 95 declaration; on the other hand, the state whose law is designated by PIL *would* apply the CISG. Presumably U.S. courts would apply the CISG in this situation[28] – but possibly, as in Example 2 above, not as an international

25. See footnote e (applicable to Germany) in UNCITRAL's Status Table for the CISG, *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html). See also the discussion of Germany's declaration in CISG-AC Opinion No. 15, *supra* note 21, 3.17. Under the German interpretative declaration, which has also been enacted as German domestic law, the U.S. is treated as a non-contracting state for purposes of Article 1(1)(b).
26. See U.C.C. § 2-201.
27. As provided in Article 12, CISG Article 11 is subject to the possibility that one or both parties may be located in a state that has made another declaration – the one authorized by Article 96. Thankfully, an exploration of the complexities and issues created by the Article 96 declaration is beyond the scope of this discussion.
28. CISG-AC Opinion No. 15 states that "[a]t least three U.S. District Courts have ... held that the *only* circumstance in which the CISG can be applied by a U.S. court is if all the parties to the contract are from Contracting States." CISG-AC Opinion No. 15, *supra* note 21, 3.9 and cases cited n.31. In none of the cited cases, however, did the

instrument but as the (domestic) law of the designated state. There is, however, at least one significant difference between this situation and Example 2: unlike the court in a non-contracting state in Example 2, the U.S. court is bound by Article 7(1) of the CISG; thus it is treaty-bound to apply the Convention with regard for "its international character" and for "the need to promote uniformity in its application and the observance of good faith in international trade." Should this lead the court to ignore non-international/non-uniform applications of the CISG by courts in the state designated by its PIL analysis, or would applying the CISG in a different manner than does the designated state violate the U.S. court's PIL rules? For example, if a transaction involves a party from a non-contracting state and the parties have chosen Belgian law, should the U.S. court apply the CISG as interpreted in Belgium (including, for example, the decision of the Belgian Cassation court adopting the hardship rules of the UNIDROIT Principles[29]) even if the U.S. court was convinced that the Belgian interpretation did not reflect the Convention's international character and the need to promote its uniform application? Or should the U.S. court reject Belgian interpretations that the court decides do not comport with CISG Article 7(1)?

In short, in the situations described above, the U.S. Article 95 declaration creates dilemmas and uncertainties for both U.S. courts and for courts in Contracting States that have not made the Article 95 declarations. Those uncertainties are greatly compounded if a U.S. party wants to opt in to the CISG in a transaction with a party located in a non-Contracting State – the situation in the *Redline* case.

### 4.3. Opting in to the CISG under the Article 95 Declaration

Absent a choice of law clause, it is highly unlikely the distribution agreement in *Redline* would have been governed by the CISG. The Convention would not be applicable under Article 1(1)(a) because the South African seller was not located in a Contracting State. If PIL rules pointed to the law of South Africa, no tribunal would apply the Convention because South Africa is not a CISG Contracting State. If PIL rules pointed to U.S. law and the matter was being litigated in a South African Court (or the court of any other non-Contracting State) or a U.S. Court (or the court of any other Contracting State with an Article 95 declaration), or a German court, the CISG would not govern. Only in the highly unlikely scenario that the matter (involving a dispute

U.S. court's PIL analysis lead to the application of the law of a Contracting State without an Article 95 declaration.

29. See the text accompanying *supra* notes 14-15.

between a U.S. and a South African party) were litigated before a court in a CISG Contracting State without an Article 95 declaration (other than Germany) is there any possibility that the CISG would be applied – and then only if the court adopted the view (contrary to Germany's position) that it was bound to apply the CISG under Article 1(1)(b) because its PIL rules led to the application of U.S. law and (despite its Article 95 declaration) the United States is a Contracting State.[30]

If the United States had not made the Article 95 declaration, the parties in *Redline* could have opted in to the CISG[31] simply by choosing U.S. law.[32] With the U.S. Article 95 declaration, however, such a choice of law clause becomes ambiguous, depending on how the effect of the parties' choice of law clause is viewed.

The choice of law clause could be viewed as making U.S. law applicable *as a matter of private international law* – i.e., honoring the parties' choice of law could be seen as a rule of private international law. That would suggest that, if the parties in *Redline* had chosen U.S. law, a U.S. court would apply U.S. domestic sales law rather than the CISG because of the U.S. Article 95 declaration, just as the court would if the parties had no choice of law clause but PIL analysis led to the application of U.S. law (see *Example 4* above).

If U.S. courts took the view just described (that honoring a choice of U.S. law was a matter of PIL, and thus should not lead to application of the CISG unless both parties were located in Contracting States), Germany (with its "understanding" that it would not apply the CISG under Article 1(1)(b) when its PIL rules led to the application of the law of an Article 95 declaring state[33]) would presumably follow suit, and German courts would apply U.S. domestic law rather than the CISG. The same result would likely apply in other States

30. See the text accompanying *supra* notes 22-27.
31. This discussion assumes that the contract between the parties in *FPM* was a contract for the sale of goods under the CISG. See *supra* note 10.
32. This assumes the parties' choice of law would be honored, a matter discussed in Part V *infra*. It also assumes the parties were content to have U.S. law govern all aspects of the transaction, including those beyond the scope of the CISG. In other words, U.S. domestic law would "supplement" or complete the legal regime governing the transaction. One possible interpretation of the confusing choice of law provisions in the *Redline* distribution agreement is that the parties wanted the CISG to govern their transaction, but wished to designate South African domestic law for matters beyond the scope of the CISG. Splitting the governing law between the CISG and the domestic law of a non-contracting state would be complicated even without the U.S. Article 95 declaration.
33. See the text accompanying *supra* note 25.

with Article 95 declarations, provided they too adopted the view that enforcement of a choice of law clause was a rule of PIL. Courts in non-contracting states surely would not apply the CISG if U.S. courts would not do so. And, if they viewed enforcement of choice of law clauses as a PIL rule, courts in Contracting States without an Article 95 declaration (other than Germany) would face the dilemma described previously[34]: Should they apply the CISG because they are treaty-bound to apply the Convention when PIL rules leads to the application of the law of a Contracting State (and the U.S. is a Contracting State)? Or should they refuse to apply the CISG because the law designated by the choice of law clause would not lead to application of the CISG by U.S. courts?

Consider also the effect of the U.S. Article 95 declaration if the litigation in Example 3 (two parties located in non-contracting states agreeing to apply the law of a Contracting State without an Article 95 declaration – Switzerland) took place in a U.S. court. It is quite clear that a court in any Contracting State without an Article 95 declaration would apply the CISG, as an international instrument, provided the court honored the parties' choice of law: Applying the CISG would be required either under Article 1(1)(b) or (as discussed below) as a matter of direct application of the law the parties chose. A U.S. court, however, is not bound by Article 1(1)(b) and does not have a treaty obligation to apply the Convention when one or both parties are in non-contracting states. Thus if honoring the parties' choice of law were viewed as a PIL rule, the U.S. court would not be bound to apply the Convention. Nevertheless, because Swiss law for international sales transactions is the CISG (even when one or both parties are not in Contracting States), the U.S. court would presumably apply the CISG as a matter of Swiss national law. The U.S. court, however would face the question whether it must apply the CISG as interpreted in Switzerland, even if that interpretation does not (in the U.S. court's view) comport with the obligation in CISG Article 7(1) to apply the Convention with regard for its international character and the need to promote uniformity in its application and the observance of good faith in international trade.[35]

There is, however, an alternative analysis to the foregoing. Contracting parties' choice of a law might be viewed as making that law "directly" applicable to a transaction, rather than triggering a PIL rule honoring the parties' choice. If one accepts that view, then agreement on the choice of applicable law in an international sales transaction might constitute a third (unexpressed) method of making the CISG applicable to a transaction, in addition to the two

34. See the text accompanying *supra* notes 22-27.
35. See the discussion of this dilemma in the text accompanying *supra* notes 28-29.

methods described in Article 1(1) of the Convention (i.e., application because both parties are located in Contracting States under Article 1(1)(a), and application because PIL rules lead to the application of the law of a Contracting State under Article 1(1)(b)).

The question whether the parties' choice of law makes the chosen law directly applicable to the transaction or "indirectly" applicable via PIL does not matter if the parties to an international sales transaction choose the law of a Contracting State that has not made the Article 95 declaration and the court hearing the dispute is located in a Contracting State without the Article 95 declaration: the court, being bound by Article 1(1)(b), must apply the Convention under either view.[36]

Now suppose the parties in *Redline* – one located in the U.S., a CISG Contracting State with an Article 95 declaration, and the other located in South Africa, a non-contracting state – had chosen U.S. law to govern their transaction, and the court adopted the view that the parties may make the CISG directly applicable to their transaction by means of a choice of law provision. On these assumptions, the fact that the U.S. is not bound by Article 1(1)(b) would *not* prevent even a U.S. court from applying the CISG, because the Convention would be applicable directly rather than as the result of PIL rules.

However, any court adopting the view that a choice of law clause makes the chosen law directly applicable, rather than applicable through PIL rules, faces a difficulty interpreting parties' choice of "U.S. law" for an international sales contract. A choice of law clause designating the law of a Contracting State has, with few exceptions, been interpreted as designating the CISG, unless the parties affirmatively express an intent to choose the state's domestic sales law rather than the CISG; this interpretation is based on the view that the CISG is part of the designated state's law.[37] Applying this view, the choice of U.S. law, without an expression that the parties intend U.S. domes-

36. The differing views also, presumably, would not matter to a court in a non-contracting state, which would apply the CISG as the domestic law of the chosen state under either view.

37. See *Article 6* 11 of the UNCITRAL Digest of Case Law on the United Nations Convention for the International Sale of Goods 2012 Edition, 30 J.L. & COM. (Special Edition, 2012), available online at http://www.uncitral.org/pdf/english/ clout/CISG-digest-2012-e.pdf [hereinafter "2012 UNCITRAL CISG Digest"]; Harry M. Flechtner, *The Globalization of Law as Documented in the Law on International Sales of Goods, in* Nieuw Internationaal Privaatrecht: Meer Europees, Meer Globaal 541 (XXXVe Postuniversitaire Cyclus Willy Delva 2008-09) (J. Erauw & P. Taelman eds.) (Kluwer, 2009).

tic sales law rather than the CISG, should be interpreted as designating the CISG as applicable law.

The cases adopting this interpretation of clauses that designate the law of a Contracting State, however, have involved either the choice of the law of a Contracting State without an Article 95 declaration, or the choice of an Article 95-declaring state (the U.S.) where both parties are located in Contracting States (and thus the Article 95-declaring state would apply the CISG even without the choice of law clause). In a situation like *Redline*, however, the U.S. would not have applied the CISG absent the choice of law clause. Surely it is plausible to argue that, because of the U.S. Article 95 declaration, the law of the United States for an international sales transaction where both parties are *not* located in Contracting States is domestic U.S. sales law, not the CISG; and that, therefore, the choice of U.S. law in such situations should not be interpreted to lead to the CISG.[38]

Perhaps consideration of the complications created by the U.S. Article 95 declaration was behind the parties' choice in *Redline* to attempt to opt in to the Convention not by designating U.S. law or the law of any other Contracting State, but rather by providing that their contract was "governed by the Convention on Contracts (Agreements) for the International Sale of Goods (CISG) ..." That certainly makes clear the parties' intention to make the CISG applicable to their transaction – although exactly how and in what capacity is unclear. If the intention was to make the CISG applicable as *law*, based on the fact that the Convention is law in the United States (where the buyer was located), we run into the ambiguities and issues outlined previously: if the U.S. court (where the matter was being litigated) viewed the parties' choice of the CISG to be a matter governed by PIL, the U.S. Article 95 declaration might block the application of the Convention; if the U.S. court viewed the parties' choice of the CISG as making the CISG applicable direct-

38. This means that the same choice-of-U.S.-law language would be interpreted to lead to the applicability of different U.S. sales law (the CISG or U.S. domestic sales law), depending on whether both parties were located in CISG Contracting States or not. That may not be terribly disturbing, however. The interpretation of contractual language will frequently change depending on the background and context of the language. Consider choice of law clauses in international sales contracts between U.S. parties and parties located in another Contracting State; if the clauses designate "U.S. law" but expressly opt out of the CISG, the transaction will be governed by U.S. domestic sales law – but (because U.S. domestic sales law is state law) the particular U.S. domestic law that will apply (e.g., Louisiana law, Article 2 of the U.C.C. as enacted in Pennsylvania, Article 2 of the U.C.C. as enacted in Massachusetts) will vary depending (most likely) on the state where the U.S. party was located.

ly (rather than through PIL rules), then the court would presumably apply the CISG.

There is, however, another possible approach to the clause in *Redline*. Recall that, confusingly, the distribution agreement in the case, in addition to specifying that it was governed by the CISG, also provided that the contract was governed by South African law; since South Africa is not a Contracting State to the Convention, this clause could not possibly lead to application of the CISG. It may be possible to reconcile these two provisions. The parties may have intended South African law to be the law governing their contract, and then to have the CISG apply to the contract not as law, but as contractually-incorporated provisions of an instrument that does not have the status of law – what have been labelled "rules of law" rather than "law." This distinction is discussed in Part V below,[39] and analysis of the *Redline* clause as an attempt to incorporate the CISG as "rules of law" rather than "law" follows that discussion.[40]

## 5. Opting In to the CISG When the Convention Allows It: Complying With the Applicable Law on Choice of Law[41]

It is clear from Article 6 of the CISG that parties to a contract that would be governed by the CISG through the default rules of Article 1[42] "may exclude

39. See the text accompanying *infra* notes 66-70.
40. See the text following *infra* note 70.
41. Portions of this section are developed from Ronald A. Brand, *Transaction Planning Using Rules on Jurisdiction and the Recognition and Enforcement of Judgments, 358 Recueil des Cours* Collected Courses of the Hague Academy of International Law 9, 152-190 (2013).
42. CISG, Art. 1:
    (1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States:
        (a) when the States are Contracting States; or
        (b) when the rules of private international law lead to the application of the law of a Contracting State.
    (2) The fact that the parties have their places of business in different States is to be disregarded whenever this fact does not appear either from the contract or from any dealings between, or from information disclosed by, the parties at any time before or at the conclusion of the contract.
    (3) Neither the nationality of the parties nor the civil or commercial character of the parties or of the contract is to be taken into consideration in determining the application of this Convention.

the application of [the] Convention or, subject to article 12, derogate from or vary the effect of any of its provisions."[43] Thus, as is often the case, parties may clearly opt out of the CISG for their international sales contracts, or derogate from any CISG provision with the express exception of Article 12.[44] Nonetheless, decisions generally have held that the intention to opt out of the CISG must be explicit.[45] Thus, for example, a clause stating that "this contract and any disputes arising out of or related to it shall be governed by the law of the State of Pennsylvania," does not opt out of the CISG.[46] The CISG, as a treaty to which the United States is a Contracting State, is the "Supreme Law of the Land" under Article VI of the United States Constitution,[47] and preempts state law when it applies by its terms. Thus, "the law of the State of Pennsylvania," includes the CISG whenever the CISG is applicable by its terms. By choosing the law of Pennsylvania, the parties also provide that any gaps, for which substantive law rules are not provided in the CISG, will otherwise be governed by Pennsylvania domestic law, but that point is only reached after looking at the clear terms of the CISG, and then filling internal gaps by implication through the application of "the general principles on which [the CISG] is based."[48]

What is not so clear from the Convention text is whether and how parties may opt in to the CISG. If both parties to an international sales contract have their places of business in different Contracting States, and the CISG would thus provide the default law for their contract, they may make that result clear through a clause such as "this contract and any and all disputes arising out of or related to it shall be governed by the law of the State of Pennsylvania, including the United Nations Convention on Contracts for the International

43. *Id.* Art. 6.
44. There are, however, other CISG provisions out of which (despite the fact they are not expressly identified in Article 6 as exceptions from the party-derogation rule) the parties may not contract. For example, CISG Article 28 (which permits courts to apply limitations on specific performance in the law of the forum) and the Final Provisions in Part IV of the Convention (Articles 89-101).
45. *See, e.g.*, St. Paul Guardian Ins. Co. v. Neuromed Medical Systems & Support, GmbH, 2002 WL 465312 (S.D.N.Y.) (requiring that the parties choose "by express provision in the contract, to opt out of the application of the CISG"). See also the discussion in *Article 6* 9 of the 2012 UNCITRAL CISG Digest.
46. Although this clause does not opt out of the CISG, this presumes (as discussed in the next text paragraph) that the CISG would be applicable without the clause despite the U.S. Article 95 declaration – i.e., that both parties are located in Contracting States, as discussed in Part IV.
47. U.S. Const. art. VI.
48. CISG, Art. 7(2).

Sale of Goods." Such a provision not only makes explicit the application of the CISG, but also provides that Pennsylvania law will be the gap-filler should neither the express terms nor the general principles on which the CISG is based generate an applicable legal rule.

The *Redline Products* case raises two additional questions about the ability of parties to opt in to the CISG. First, may they do so if the Convention would not, in accordance with Article 1, provide the default law applicable to the Contract? In other words, what happens if both parties have their places of business in non-contracting states? May they choose the CISG as the applicable law? Or, as in *Redline Products*, when one party has its place of business in a Contracting State, and the other does not, may they expressly opt in to the CISG, and, if they do so, does the CISG apply as law or only as rules otherwise chosen by the parties.

If the parties may, under the CISG, opt in to its provisions, the next question is whether any other law affects their ability to do so. This is the party autonomy question and it is regulated, at least in part, outside the CISG. For this analysis we must turn to other sources of law; sources that may provide different rules in different countries.

### 5.1. Party Autonomy for Choice of Law in the United States and the European Union

The law of the United States on party autonomy for choice of law evolved throughout the twentieth century. Thus, in the First Restatement of Conflict of Laws, prepared in the early 1930's, section 332, titled "Law Governing Validity of Contract," made no reference to a law chosen by the parties, and only provided a list of those issues in respect of which "[t]he law of the place of contracting determines the validity and effect of a promise."[49] This was re-

49. Restatement, Conflict of Laws § 332 (1934). *See* Symeon C. Symeonides, *The First Conflicts Restatement Through the Eyes of Old: As Bad as its Reputation?*, 32 S. ILL. U. L.J. 72-73 (2007) (noting that, the First Restatement's lack of adherence to the concept of party autonomy did not reflect early American cases that supported the concept, but was probably a result of the political and legal convictions of Joseph H. Beale, who largely determined the course of the First Restatement). Commentators dealing with the history of choice of law in the United States tend to focus on choice of forum, assuming that the development of judicial respect for both choice of forum and choice of law clauses has been parallel. *See, e.g.*, Linda S. Mullinix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 42 FORDHAM L. REV. 291, 293 (Dec. 1988, No. 3) ("The ability of prospective litigants to choose in advance both the court that will hear the case and the law that will govern the dispute now enjoys widespread approval in federal courts. This was not always so. Indeed, the

placed in the early 1970's in the Second Restatement by sections 186 and 187, which specifically authorize party autonomy, with limitations:

§ 186. Applicable Law
Issues in contract are determined by the law chosen by the parties in accordance with the rule of § 187 and otherwise by the law selected in accordance with the rule of § 188 [Law Governing in Absence of Effective Choice by the Parties].

§ 187. Law of the State Chosen by the Parties
(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
   (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
   (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law.[50]

Thus, when parties could have written specific rules into the contract, achieving the same result by selecting the law of a particular state will be allowed. Moreover, § 187(2) makes clear that the parties' choice of law will govern, even when the issue is not one for which the parties could have written an explicit provision into their contract, unless either (a) there is lack of either a "substantial relationship" between the parties, or their transaction, and the chosen state, or another "reasonable basis" for their choice of law, or

current doctrine of consensual adjudicatory procedure represents a wholesale abandonment of a 100-year taboo against party autonomy in procedural matters," citing *Home Ins. Co. of New York v. Morse*, 77 U.S. 445, 451 (1874), which dealt only with choice of forum clauses in stating that "agreements in advance to oust the courts of the jurisdiction conferred by law are illegal and void."). *Compare* Eugene F. Scoles & Peter Hay, *Conflict of Laws* 659 (2d ed. 1992) ("Historically, party autonomy has support in the caselaw dating back well into the nineteenth century," citing *Pritchard v. Norton*, 106 U.S. 124 (1882) (implied choice of law based on intent of the parties) and *Dolan v. Mutual Reserve Fund Life Association*, 173 Mass. 197, 53 N.E. 398 (1899) (honoring express choice of law by the parties)).

50. Restatement (Second) Conflict of Laws §§ 186, 187 (1971).

(b) application of the chosen law "would be contrary to a fundamental policy of a state which has a materially greater interest" in the dispute. This heightened respect for the chosen law gives the choice of law clause effect beyond simple incorporation by reference of external rules and signifies special respect for the fact that it is the law of a particular sovereign unit that is chosen in this manner.

While the Second Restatement approach supports party autonomy, it does set forth some limitations on that autonomy. Mandatory rules of the forum (*i.e.*, the law that determines issues which the parties could not have resolved by an explicit provision in their agreement) may be applied, unless there is a substantial relationship between the parties or the transaction and the state of the chosen law. Moreover, even if there is a substantial relationship to the state of the chosen law, public policy may intervene. Thus, if "the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state," the chosen law may be trumped by the law of the state with the materially greater interest.

For sales contracts, the rule on party autonomy in selecting the law governing contractual relationships is found in the Uniform Commercial Code (UCC). While there was an attempt to bifurcate the UCC rule in the early twenty-first century, with differing approaches for business and consumer contracts, this attempt failed,[51] and the rules are the same for both categories of contracts. Section 1-301 provides as follows:

§ 1-301. Territorial Applicability; Parties' Power to Choose Applicable Law

(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties,

(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), [the Uniform Commercial Code] applies to transactions bearing an appropriate relation to this state.

(c) [listing UCC provisions that specify applicable law and from which derogation is allowed only if the specified law authorizes it]

Thus, the substantial relationship test of the Restatement becomes a reasonable relationship test in the UCC. This semantic difference seldom results in a practical difference in outcome. Courts generally seek some relationship be-

51. *See* Brand, *supra* note 41, at 160-163.

tween the chosen law and the transaction.[52] There is a general concern that parties to purely local transactions not be allowed to avoid local law.[53] Thus, the relationship requirement will likely not be satisfied if the place of contract formation and the place of performance are in the same place, and a different state's law is chosen.[54] The parties are free, however, to select the law of the state that is the domicile of one of them and either the place of the performance or the place of formation of the contract.[55] The alternate test under Restatement section 187(2)(a), supporting party choice upon the finding of a "reasonable basis for the parties' choice," will result in upholding their choice despite the relevant relationship if, for example, the law chosen is particularly well-developed in the type of transaction involved, or if the parties have more familiarity with the chosen law.[56]

The European Union's Regulation No 593/2008 on the law applicable to contractual obligations (Rome I),[57] now governs choice of law in the courts of EU Member States. The basic rule of the Rome I Regulation is found in Article 3(1), which states, "[a] contract shall be governed by the law chosen by the parties."[58] Unlike the rules in the United States, the Rome I Regulation contains no requirement of a connection with the state whose law is chosen. A further difference is found, however, in the rather more substantial limitations on party autonomy under the Rome I Regulation.

U.S. law on party autonomy for choice of law in contracts can be seen as rather fragmented, having its source largely in case law at the state level. In contrast, the Rome I Regulation centralizes the source of the law at the EU level, and provides it in the form of a carefully written code-type regulation. While both begin with the assumption of party autonomy for choice of law,

52. *See, e.g.*, Eugene F. Scoles, Peter Hay, Patrick J. Borchers & Symeon C. Symeonides, Conflict of Laws, § 18.6 (4th ed. 2004); Armstrong v. Accrediting Council for Cont. Educ. & Trng, Inc., 177 F.3d 1036 (D.C. Cir. 1999) ("substantial nexus to this transaction"); Consolidated Jewelers, Inc. v. Std. Financial Corp., 325 F.2d 31, 34 (6th Cir. 1963) (share a "vital element"); Owens v. Hagenbeck-Wallace Shows Co., 58 R.I. 162, 192 A. 163-64 (1937) ("real relation").
53. Scoles et al., *supra* note 52, at § 18.6; Crawford v. Seattle, Renton & So. Railway Co., 86 Wash. 628, 150 P. 1155, 1157 (1915). *But see* Waytt v. Fulrath, 16 N.Y.3d 169, 264 N.Y.S.2d 233, 211 N.E.2d 637 (1965).
54. Scoles et al., *supra* note 52, at § 18.6-18.10.
55. *Id.*
56. Scoles et al., *supra* note 52, at § 18.9.
57. Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), O.J. Eur. Union, L 177/6, 4 July 2008.
58. *Id.* art. 3(1).

far more limitations on this basic rule are found in the Rome I Regulation than in the U.S. rules on choice of law. In the United States, the principal limit on party autonomy in choice of law is public policy.[59] But public policy is not much of a limitation in this process. When the effort was made to amend the UCC rule on choice of law, the comment to the now-rejected § 1-301 included the following (which remains instructive despite the rejection of the amended statutory language):

> Under the fundamental policy doctrine, a court should not refrain from applying the designated law merely because this would lead to a result different than would be obtained under the local law of the State or country whose law would otherwise govern. Rather, the difference must be contrary to a public policy that is so substantial that it justifies overriding the concerns for certainty and predictability underlying modern commercial law as well as concerns for judicial economy generally. Thus, application of the designated law will rarely be found to be contrary to a fundamental policy of the State or country whose law would otherwise govern when the difference between the two concerns a requirement, such as a statute of frauds, that relates to formalities, or general rules of contract law, such as those concerned with the need for consideration.[60]

The Rome I Regulation takes a much different approach.[61] While Article 3 states the rule of party autonomy, limitations on that rule are found in at least nine articles (3, 5, 6, 7, 8, 9, 11, 13, and 21), with further elaboration of these limitations provided in many of the 46 recitals preceding the Regulation text. Thus, while the Regulation is set forth in the format of a civil law text, it is

59. *See, e.g.*, Philip J. McConnaughay, *The Scope of Autonomy in International Contracts and Its Relation to Economic Regulation and Development*, 39 Colum. J. Transnat'l L. 595, 597-98 (2001):

    > Traditionally, the scope of this autonomy has been confined to matters that otherwise would be governed by private law, which in the context of commerce essentially means the main body of contract law. Within this context, parties to international contracts are free to designate the law or principles that will govern their transaction to the exclusion of all otherwise applicable law. They are also free to arbitrate privately any disputes that might arise among them to the exclusion of otherwise compulsory public court litigation. Matters governed by public law, such as antitrust, securities, and environmental laws, traditionally have been outside the scope of private autonomy of contract. Public law typically has applied irrespective of private choice, and claims arising under public law traditionally have been subject to resolution exclusively in the courts of the nation supplying the law. (Footnotes omitted).

60. UCC § 1-301 (2001 Draft Revisions), cmt 6.
61. Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 51 O.J.E.U. L177/6 (2008) [hereinafter Rome I Regulation].

arguably at least as confusing as the fragmented, state-by-state, common law approach in the United States. Understanding the limitations on party autonomy requires the delineation of "provisions of law which cannot be derogated from by agreement," "overriding mandatory provisions," and "public policy," and may be summarized as follows:

1) in a case that is *purely domestic* to a country other than the country whose law has been chosen, the mandatory rules of that other country may be applied (Article 3(3));
2) in a case that is *purely European*, the mandatory rules of Community law may be applied (Article 3(4));
3) the "overriding" mandatory rules of the *law of the forum* may be applied in every case (Article 9(2)); and
4) the "overriding" mandatory rules of the *law of the country which is the place of performance* of the contractual obligations may be applied when those rules "render the performance of the contract unlawful" (Article 9(3)).

## 5.2. The Hague Principles on Choice of Law in International Commercial Contracts

In March of 2015, the Hague Conference on Private International Law completed its Principles on Choice of Law in International Commercial Contracts.[62] Neither a convention nor a model law, the Principles are a new soft law approach by the Hague Conference. The Preamble to the Principles states their purposes as follows:

1. This instrument sets forth general principles concerning choice of law in international commercial contracts. They affirm the principle of party autonomy with limited exceptions.
2. They may be used as a model for national, regional, supranational or international instruments.
3. They may be used to interpret, supplement and develop rules of private international law.
4. They may be applied by courts and by arbitral tribunals.[63]

Article 2 of the Hague Principles contains the basic rule of party autonomy, following the Rome I example of avoiding any requirement of a nexus between the transaction and the chosen law:

62. Hague Conference on Private International Law, Principles on Choice of Law in International Commercial Contracts, *available at* www.hcch.net/index_en.php?act=conventions.text&cid=135.
63. *Id.* preamble.

Article 2 – Freedom of choice
1. A contract is governed by the law chosen by the parties.
2. The parties may choose–
   a) the law applicable to the whole contract or to only part of it; and
   b) different laws for different parts of the contract.
3. The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity or the rights of third parties.
4. No connection is required between the law chosen and the parties or their transaction.[64]

Article 3 then follows, stating that,

[t]he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.[65]

Thus, parties may choose not only law created by sovereign authority, but other sets of rules created by non-sovereign bodies, so long as the set of rules has "general recognition beyond a national level."[66] Paragraph 3.5 of the commentary specifically acknowledges that the term "rules of law" may refer to the CISG if the right type of choice of law (or perhaps "choice of rules of law") clause is used:

3.5 International treaties and conventions may be considered a generally accepted source of "rules of law" when those instruments apply solely as a result of the parties' choice of law. For example, the CISG may be designated by the parties as "rules of law" governing their contract in situations where the CISG would not otherwise apply according to its own terms (see Art. 1 CISG). In other words, the parties may designate the substantive rules of

64. *Id.* Art. 2.
65. *Id.* Art. 3. The Rome I Regulation does not make the "law/rules of law" distinction, and, in Recital 13, provides that "[t]his Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." Rome I Regulation, *supra* note 61. This has been interpreted not to allow choosing what the Hague Principles describe as "rules of law" under the Regulation. *See, e.g.*, Helmut Hess, *Party Autonomy*, *in* Rome I Regulation: The Law Applicable to Contractual Obligations in Europe 1, 2 (Franco Ferrari & Stefan Leible eds., 2009) ("The parties may agree on the application of an entirely 'neutral' law. The only restriction which applies is, at least in proceedings before state courts, that the law chosen must be 'law' in a technical sense and not just general principles or any other set of non-binding rules.").
66. Hague Principles on Choice of Law for International Commercial Contracts, full text and commentary, comment 3.4, *available at* http://www.hcch.net/index_en.php?act=conventions.text&cid=135.

the CISG as a free-standing set of contract rules and not as a nationalised version of the CISG attached to the law of a CISG Contracting State. Following such a choice, the CISG applies as "rules of law", without consideration of any State declarations or reservations that might otherwise intervene if the CISG were applied as a ratified treaty or as part of State law. Model choice of law clauses proposing a designation of the CISG as "rules of law" are available (see, e.g., the model clause suggested by the Chinese European Arbitration Centre (CEAC)).

In the *Redline Products* case, it may have been that FPM intended its choice of law provision to select the CISG as "rules of law," rather than as "law" in the terminology of the Hague Principles.[67] That would seem to be the result under the commentary to the Principles, but it is difficult to determine just how that commentary would have been applicable (even if it had been completed prior to the decision in the *Redline Products* case), other than – as indicated in the preamble to the Principles – "to interpret, supplement and develop rules of private international law."[68]

If the intent in *Redline Products* was to incorporate the CISG as "rules of law," and if the commentary to the Hague Principles is followed, then the language of comment 3.5 that "the CISG applies as "rules of law," "without consideration of any State declarations or reservations that might otherwise intervene if the CISG were applied as a ratified treaty or as part of State law," would have particular significance.[69] However, it is difficult to understand just how a set of soft law "principles," which is not "law" – but, at best, even under its own terms, "rules of law" – could then override the otherwise applicable choice of law rules (private international law rules), which clearly are "law." This is a semantic conundrum that is not solved by either the text or the commentary in the Hague Principles. If the commentary were to be followed, then the application of an Article 95 declaration, as discussed above, would have very different meaning when considered in conjunction with a "choice" clause – which we seem no longer to be able to refer to as a "choice

67. The choice of the term "rules of law," in a provision that has already used the term "law" to refer to something different is a regrettable and confusing one. If "law" is created by a sovereign, then it would seem that anything else that is "law" would have to have the same characteristic. If "rules of law" is something different than "law," then it should not be referred to as "law" in any manner. Rules found in law are rules of law. Thus, the same term can mean two very different things under the Hague Principles. While the term may have had earlier generation to apply as it does in the Hague Principles, this is an unfortunate perpetuation of a very ambiguous and confusing terminology.
68. Hague Principles, *supra* note 62, preamble.
69. *See supra* notes 30-40 and accompanying text.

of law" clause because the choice may also be of "rules of law."[70] The purpose of this distinction is perhaps laudable, but the language chosen in the Hague Principles seems less than ideal.

At any rate, the distinction between applying the CISG as "rules of law" rather than law only adds to the many complications (discussed in Part IV above) facing the parties in *Redline Products* in their (presumed) attempt to opt in to the CISG. If the U.S court viewed the *Redline Products* parties' agreement that their contract was "governed by the Convention on Contracts (Agreements) for the International Sale of Goods (CISG) ..." as incorporating the CISG as "rules of law" rather than law, the provisions of the CISG would be incorporated as contractual terms, but (at least in the courts of many states) would be subject to the provisions of actual applicable law. This would create a whole new level of challenges.

Suppose, for example that the choice of law clause in *Redline Products* was interpreted to designate the CISG as "rules of law" that thereby were incorporated into the Distribution Agreement as terms of the contract, but the actual law applicable to the contract, under the PIL rules of the U.S. forum hearing the case, was that of the United States – specifically Article 2 of the U.C.C. as adopted by a particular U.S. state (such as New Jersey). If the *Redline Products* parties had incorporated a price-delivery term such as "F.O.B." into their contract without specifying any particular definition of the term, the demonstrably non-international U.C.C. definition of that term (found in U.C.C. § 2-319(1)) would be applicable, rather than an international meaning such as that found in the INCOTERMS promulgated by the International Chamber of Commerce.

Or consider the critical question of the obligations imposed on the seller concerning the quality of the goods required by the contract. U.C.C. § 2-316(2) requires that attempts to exclude the so-called "implied warranty of merchantability" provided by U.C.C. § 2-314 (an obligation to deliver goods that are, inter alia, "fit for the ordinary purposes for which such goods are used") must specifically mention the term "merchantability" and, if the disclaimer is written, it must be "conspicuous." The CISG provides for a seller's quality obligation similar to the implied warranty of merchantability: CISG Article 35(2)(a) states that, unless the parties agree otherwise, the seller must deliver goods "fit for the purposes for which goods of the same description would ordinarily be used." Normally, any language sufficient to indicate the

70. Again, the use of the terms "law" and "rules of law" make it difficult to know if what we are now using is a "choice of law" clause, a "choice of rules of law" clause, or some other semantic variation – an additional regrettable result of the choice of terms.

parties did not intend the Article 35(2)(a) obligation to apply would be sufficient, under the CISG, to exclude it. If, however, the CISG were applicable as mere "rules of law" and U.C.C. Article 2 was the applicable law, exclusion of the Article 35(2)(a) obligation might require contract language that mentions "merchantability" (a term that does not appear in the text of the U.C.C.) and, if the exclusion was in writing, was "conspicuous" (a term neither mentioned nor defined in the CISG).

### 5.3. Limitations on Party Autonomy for Choice of Law

It has already been noted that, in the United States, there must be a substantial relationship between the state whose law is chosen and the transaction under the Restatement,[71] and a reasonable relationship under the Uniform Commercial Code.[72] No such relationship is required under either the Rome I Regulation[73] or the Hague Principles.[74] Moreover, particularly under the Rome I Regulation (and in the Hague Principles as well), mandatory rules and public policy may prevent full respect for the law chosen by the parties in an international sales contract. These are, however, not the only limitations on party autonomy to choose the law applicable to an international commercial contract.

In determining how other law[75] affects the ability to exercise party autonomy in choice of law it is first necessary to understand what question is being addressed. Generally, like choice of forum clauses,[76] there are four basic issues regarding the choice of law clause, and each of them raises distinct questions and may be governed by distinct law. Each of them should receive consideration in drafting a coherent and effective choice of law clause for an international sales contract. These four issues are:

1) *Consent*, which determines the existence of the choice of law agreement (*i.e.*, whether the parties have consented to the choice of law), and normally will be determined by finding the intent of the parties in accordance with the applicable law of contract formation;

71. *Supra* notes 49-59 and accompanying text.
72. *Supra* note 60 and accompanying text.
73. *Supra* note 61 and accompanying text.
74. Hague Principles, *supra* note 62, art. 2.4.
75. I would normally use "rules of law" here, but now am compelled not to do so given the specific definition of that term in the Hague Principles.
76. For discussion of the parallel issues when considering choice of forum, see Ronald A. Brand, *Consent, Validity, and Choice of Forum Agreements in International Contracts*, Liber Amicorum Hubert Bocken 541 (I Boone, I. Claeys & L. Lavrysen eds., Die Keure, 2009).

2) *Formal validity*, which may be determined by compliance with formalities required by the applicable law (*e.g.*, a requirement that such agreements be in writing);
3) *Substantive validity*, which is determined by compliance with limitations on party autonomy that may exist in the applicable law in the form of mandatory rules; and
4) *Scope*, which is determined by rules intended to find the intent of the parties.

The first of these four inquiries deals with the existence of the choice of law clause, while the following three deal with the effectiveness of the language to which the parties have agreed.

*5.3.1. Consent*

Questions of validity and scope arise only if there is an agreement on choice of law. Thus, the question of existence must always precede questions of validity and scope. While instruments such as the Rome I Regulation and the Hague Principles are intended to govern choice of law agreements, they really can have no effect until there is determined to be an agreement. The question of consent would appear, then, to be governed by the otherwise applicable law on contract formation. Nonetheless, both the Rome I Regulation and the Hague Principles provide that the law selected in a purported choice of law clause will govern the existence of that clause. Article 10 of the Rome I Regulation states:

1. The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.
2. Nevertheless, a party, in order to establish that he did not consent, may rely upon the law of the country in which he has his habitual residence if it appears from the circumstances that it would not be reasonable to determine the effect of his conduct in accordance with the law specified in paragraph 1.[77]

Article 6 of the Hague Principles clearly was influenced by the Rome I Regulation in this regard, and reads:

Article 6 – Agreement on the choice of law and battle of forms
1. Subject to paragraph 2–
   a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;
   b) if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the pre-

77. Rome I Regulation, *supra* note 61, Art. 10.

vailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law.

2. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

In each case, this rule both exhibits circular logic and risks the misuse of overweening bargaining power by a party that unilaterally imposes a choice of law clause and then effectively prevents the other party from arguing lack of consent by reference to the law that would otherwise apply to the question of party consent. On the first point, it does not make sense to apply a choice of law clause unless and until the clause has been determined to exist, and that requires a determination of consent by both parties. On the second point, paragraph 2 of each provision appears to be intended to offer some relief from the possibility of misuse of bargaining power, but to date no case appears to have demonstrated the effectiveness *vel non* of that provision in the Rome I Regulation. In the related area of choice of forum, both the U.S. Supreme Court and the U.K. House of Lords have ruled that the question of consent is to be governed by the law of contract formation determined to be applicable according to the conflict of laws rules of the forum court, and not by the law of the putative chosen forum.[78]

One can only hope that the bootstrap approach to choice of law clause existence under these two instruments will not prevent a real inquiry into the existence of agreement on the part of the parties, just as any other contract clause would require similar interpretation of the intent of the parties if any question were raised. At the transaction planning stage for any international sales contract, it is best to make clear, both in the language of the choice of law clause and otherwise,[79] the consent of both parties to the choice of law clause. This obviously was not made clear in the *Redline Products* contract.

### *5.3.2. Formal Validity*

Both the Rome I Regulation and the Hague Principles have rules on formal validity, and – if they are the applicable law (which raises again the "law" versus "rules of law" question in determining when the Hague Principles may be

78. First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 942 (1995) ("who – court or arbitrator – has the primary authority to decide whether a party has agreed to arbitrate can make a critical difference to a party resisting arbitration"); Premium Nafta Products, Ltd. v. Fili Shipping Co. Ltd., [2007] UKHL 40.

79. See CISG Arts. 8 on determining intent of the parties and 9 on the application of what Americans would call course of performance and usage of trade.

properly applied) – they will govern the question of formal validity. Unlike instruments such as the New York Convention, which govern questions of choice of forum, however, neither instrument expressly requires that the agreement to choice of law be in writing.[80] Rather than provide a single all-encompassing rule, Article 11 of the Rome I Regulation provides five paragraphs of subsidiary choice of law rules, most of which allow validity rules of countries other than the country of the law chosen in the agreement to pre-empt the validity of the agreement.[81] This may go some distance to temper the application of the "chosen" law to the question of consent under Article 10, but it also creates a series of additional analytical calculations that must be made to consider the ef-

80. The requirement of Article II of the New York Convention that an agreement to arbitrate, in order to be recognized and enforced under the Convention, must be in writing has raised a myriad of problems in an age of electronic communications. United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards. *See, e.g.*, Gary B. Born, I International Commercial Arbitration § 5.02[A] (2nd ed. 2014).

81. Rome I Regulation, *supra* note 61, Art. 11:
Article 11 – Formal validity
1. A contract concluded between persons who, or whose agents, are in the same country at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation or of the law of the country where it is concluded.
2. A contract concluded between persons who, or whose agents, are in different countries at the time of its conclusion is formally valid if it satisfies the formal requirements of the law which governs it in substance under this Regulation, or of the law of either of the countries where either of the parties or their agent is present at the time of conclusion, or of the law of the country where either of the parties had his habitual residence at that time.
3. A unilateral act intended to have legal effect relating to an existing or contemplated contract is formally valid if it satisfies the formal requirements of the law which governs or would govern the contract in substance under this Regulation, or of the law of the country where the act was done, or of the law of the country where the person by whom it was done had his habitual residence at that time.
4. Paragraphs 1, 2 and 3 of this Article shall not apply to contracts that fall within the scope of Article 6. The form of such contracts shall be governed by the law of the country where the consumer has his habitual residence.
5. Notwithstanding paragraphs 1 to 4, a contract the subject matter of which is a right in rem in immovable property or a tenancy of immovable property shall be subject to the requirements of form of the law of the country where the property is situated if by that law:
   (a) those requirements are imposed irrespective of the country where the contract is concluded and irrespective of the law governing the contract; and
   (b) those requirements cannot be derogated from by agreement.

fectiveness of what might otherwise be a rather simple choice of law agreement. Article 5 of the Hague Principles avoids the complexity of this aspect of the Rome I Regulation by stating that "[a] choice of law is not subject to any requirement as to form unless otherwise agreed by the parties."[82]

### *5.3.3. Substantive Validity*

The rules of substantive validity of the Rome I Regulation and Hague Principles have been discussed in part V.A. above. This is the point at which the Rome I Regulation becomes particularly complex, and requires considerable attention in drafting a clause that will not run afoul of any of the potentially applicable mandatory rules that would prevent the choice of law clause from being valid. Luckily, most protective rules that would serve to invalidate a choice of law clause on grounds of incapacity or similar event are not likely to influence international sales contracts, and most rules based on local interest (*e.g.*, immovable property being governed by the law of the country in which it is located), will similarly not be triggered.

While the Rome I Regulation places substantive validity limitations on choice of law in numerous other articles, which require the delineation of rules which cannot be derogated from by agreement, overriding mandatory rules, and public policy,[83] the Hague Principles deal with this in a single article, with overriding impact for the law of the forum:

> Article 11 – Overriding mandatory rules and public policy (ordre public)
> 1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.
> 2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law.
> 3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (ordre public) of the forum.
> 4. The law of the forum determines when a court may or must apply or take into account the public policy (ordre public) of a State the law of which would be applicable in the absence of a choice of law.
> 5. These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so.[84]

82. Hague Principles, *supra* note 62, Art. 5.
83. *See supra* note 61 and accompanying text.
84. Hague Principles, *supra* note 62, Art. 11.

The focus in this provision on the law of the forum counsels in favor of clear coordination of the choice of forum and choice of law clauses, so that both lead to the same source.

*5.3.4. Scope*

The scope of a choice of law clause will normally be a matter of interpretation of party intent, and thus will be governed by the rules of the applicable substantive contract law. In the CISG, this would be Article 8 on determining the intent of the parties, and Article 9 on the use of course of performance and usage of trade to demonstrate party intent.

Both the Rome I Regulation, in Article 12, and the Hague Principles, in Article 9, provide rules that create an apparent presumption of broad scope of the choice of law clause. In the Rome I Regulation, this is done by reference to the "applicable law," which is determined by Article 3 in the choice of law clause. In the Hague Principles, this is necessarily an easier matter because the instrument is intended only to deal with clear party choice of law, and not with default rules in the absence of clear choice. Thus, under Article 12(1) of the Rome I Regulation, the choice of law clause will be assumed to include within its scope:

(a) interpretation;
(b) performance;
(c) within the limits of the powers conferred on the court by its procedural law, the consequences of a total or partial breach of obligations, including the assessment of damages in so far as it is governed by rules of law;
(d) the various ways of extinguishing obligations, and prescription and limitation of actions;
(e) the consequences of nullity of the contract.[85]

Similarly, under Article 11(1) of the Hague Principles, the choice of law clause will be presumed to cover, but not be limited to:

a) interpretation;
b) rights and obligations arising from the contract;
c) performance and the consequences of non-performance, including the assessment of damages;
d) the various ways of extinguishing obligations, and prescription and limitation periods;
e) validity and the consequences of invalidity of the contract;
f) burden of proof and legal presumptions;
g) pre-contractual obligations.

85. Rome I Regulation, *supra* note 61, Art. 12(1).

In most events, parties to an international sales contract will want their choice of law clause to have broad scope. When that clause has the purpose of opting in to the CISG, that scope will be reasonably clear, and will be delineated by the Convention terms. The choice of a gap-filling additional law is the preferred approach, extending further both the scope and therefore the clarity of the clause.

## 6. Conclusion

It would seem that the twentieth-century move toward expanded party autonomy in international contracts, combined with treaties such as the CISG which provide substantive rules designed for such contracts, would make it easy for parties to designate appropriate governing law by opting in to the provisions of such treaties. The *Redline Products* case, however, provides an example of why careful contract drafting remains of key importance. As our discussion demonstrates, opting in to the CISG is complicated by the U.S. Article 95 declaration, and also requires attention to the law applicable to questions of consent, formal validity, substantive validity, and scope of the choice of law clause.

Discussion of the *Redline* case demonstrates some of the complex issues and uncertainty created by the U.S. Article 95 declaration when parties attempt to opt in to the CISG.[86] One thing is unambiguously clear, however: the U.S. Article 95 declaration substantially complicates an already-complex set of issues concerning the effect of the parties' choice to opt in to the CISG. The benefits to the United States of the Article 95 declaration are elusive. In the U.S. State Department's 1983 Letter of Submittal recommending approval of the CISG by the U.S. Senate,[87] two rationales for the Article 95 declaration were advanced: 1) the declaration would "promote maximum clarity in the rules governing the applicability of the Convention" by eliminating applicability based on PIL, which is subject to "uncertainty and international disharmony"; 2) eliminating Article 1(1)(b) through the declaration was de-

86. As indicated in *supra* note 10, this chapter has not even addressed the issues raised by the possibility that the distribution agreement in *Redline* did not constitute a "sale of goods" under the CISG. The question whether parties may opt in to the CISG, either as law or as "rules of law," for transactions of a type outside the intended substantive sphere of the treaty is a matter we leave to others.
87. S. Treaty Doc. No. 98-99, 98th Cong., 1st Sess. Appendix B, *available at* http://www.cisg.law.pace.edu/cisg/biblio/reagan.html.

sirable because Article 1(1)(b) "would displace our own domestic law more frequently than foreign law." If either rationale was strong in 1983, neither justifies retaining the declaration today.

First, while the Article 95 declaration may eliminate the applicability of the CISG through private international law analysis, it does not eliminate resort to disharmonious and uncertain PIL in transactions involving an international sale with a party from a non-Contracting State. The law applicable to the transaction must still be determined despite the declaration, and PIL is the means for doing that. The only effect of the Article 95 declaration is, perhaps,[88] to change the law that will apply if PIL analysis leads to the application of U.S. law – i.e., U.S. domestic sales law rather than the CISG will govern. The discussion above demonstrates that the PIL analysis is, in fact, far more complex with an Article 95 declaration than without it.

Second, it is true that the Article 95 declaration reduces the instances in which the CISG displaces U.S. domestic law for international sales, as the State Department letter indicates. At first glance, this has the apparent advantage of making domestic U.S. law apply when the only other choice is the domestic law of a non-Contracting State. Upon further consideration, however, this is not so much an argument in favor of the Article 95 declaration, as an argument against ratifying the CISG at all. If U.S. domestic law is preferable for international transactions, why should the United States join a treaty that strips its citizens of that advantage, even if the "damage" is limited to transactions in which the other party is located in a CISG Contracting State? With the success of the CISG, and the number of trading partners that are now Contracting States, the displacement rationale is both less likely to surface, and presents a more problematic PIL analysis when it does.

The inevitable conclusion, it appears to both co-authors of this chapter, is that the United States should withdraw the declaration. Doing so, however, is not sufficient to make opting in to the CISG a simple process. The developing law of choice of law, primarily outside the United States but also with U.S. involvement in the Hague Conference on Private International Law, requires careful attention to drafting a choice of law clause that is clear in terms of both its existence and its effectiveness. This, in turn, requires a clear understanding of the law applicable to questions of consent, formal validity, substantive validity, and scope of choice of law clauses. These are fundamental questions to all choice of law clauses, and not just those by which parties opt in to the CISG.

88. See the text accompanying *supra* notes 22-27.