

THE CISG AND THE CHOICE OF LAW: TWO WORLDS APART?

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I. PARTY AUTONOMY AND CISG CONTRACTS

The principle of party autonomy,¹ despite the controversy surrounding its theoretical foundation,² is one of the cornerstones³ of contemporary conflict of laws.⁴ The freedom to choose the applicable law is seen as an essential component of the liberal model of market regulation⁵ as well as a tool “of private ordering intended to reduce the risks of international transactions.”⁶ Granting litigants the possibility to select the governing law to their relationship⁷ promotes legal predictability,⁸ thereby reducing costs associated with uncertainty,⁹ and is justified on grounds of commercial

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¹ On the idea that the origin of the doctrine of party autonomy can be traced back to the scholarship of Pasquale Stanislao Mancini see YUKO NISHITANI, *MANCINI UND DIE PARTEIAUTONOMIE IM INTERNATIONALEN PRIVATRECHT: EINE UNTERSUCHUNG AUF DER GRUNDLAGE DER NEU ZUTAGE GEKOMMENEN KOLLISIONSRECHTLICHEN VORLESUNGEN MANCINIS* 190 (2000).

² See Jürgen Basedow, *The Law of Open Societies—Private Ordering and Public Regulation of International Relations*, 360 RECUEIL DES COURS 164 (2013); see also Alex Mills, *Rethinking Jurisdiction in International Law*, 83 BRIT. Y.B. INT’L L. 187, 231 (2014).

³ GABRIELLA CARELLA, *AUTONOMIA DELLA VOLONTÀ E SCELTA DI LEGGE NEL DIRITTO INTERNAZIONALE PRIVATO* (Cacucci 1999); see generally Stephan Leible *Parteiautonomie im IPR—Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung*, 1, 495 (2004).

⁴ Throughout this article the terms “private international law,” “conflict of laws” and “choice of law” will be used interchangeably to refer to the rules dealing with the question of the applicable law.

⁵ Horatia Muir Watt, “Party Autonomy” in *International Contracts: From the Makings of a Myth to the Requirements of Global Governance*, 3 EUR. REV. CONT. L. 250, 254 (2010).

⁶ Basedow, *supra* note 2, at 35.

⁷ Jan-Japp Kuipers, *Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice*, 10 GERMAN L.J. 1505, 1518–19 (2009).

⁸ George A. Zaphiriou, *Choice of Forum and Choice of Law Clauses in International Commercial Agreements*, 3 MD. J. INT’L L. 311 (1978).

⁹ Erik Jayme, *Rechtssicherheit und Vorhersehbarkeit als Grundwerte des Internationalen Privatrechts—Betrachtungen zum Lebenswerk von Karl Firsching*, in *GERECHTIGKEIT IM INTERNATIONALEN PRIVATRECHT IM WANDEL DER ZEIT* 33 (Peter Gottswald et al. eds., 1992); UGO

convenience.¹⁰ This is because autonomy protects the expectations of those involved in the transaction,¹¹ who are assumed to be the “rational maximizers of their own welfare and have idiosyncratic knowledge about their preferences unavailable to anybody else.”¹² From this perspective, the recognition of party autonomy as a relevant connecting factor clearly represents the reconceptualized private international law vis-à-vis the classical state-focused paradigm.¹³

VILLANI, LA CONVENZIONE DI ROMA SULLA LEGGE APPLICABILE AI CONTRATTI 66 (Bari Carucci ed., 2d ed. 2000); Francesca C. Villata, *La legge applicabile ai “contratti dei mercati regolamentati” nel regolamento Roma I*, in LIBER FAUSTO POCAR—VOL. II: NUOVI STRUMENTI DEL DIRITTO INTERNAZIONALE PRIVATO 977 (2009); Angelo Davi & Alessandra Zanobetti, *Autonomia delle parti e certezza del diritto nei Principi dell’Aja sulla scelta della legge applicabile ai contratti commerciali internazionali*, 31 DIRITTO DEL COMMERCIO INTERNAZIONALE 881, 907 (2017).

¹⁰ Erin A. O’Hara & Larry E. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1153 (2000); C.G.J. Morse, *The EEC Convention on the Law Applicable to Contractual Obligations*, 2 Y.B. EU. L. 107, 116 (1982).

¹¹ Davi & Zanobetti, *supra* note 9, at 891.

¹² For this expression, see Gisela Rühl, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency*, in CONFLICT OF LAWS IN A GLOBALIZED WORLD 153, 177 (2007).

¹³ Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT’L L. 381, 413 (2008) (“The justification of party autonomy has to start by recalibrating the problem of conflicts. The issue is not, as most theories suggest, a struggle between states for the application of their respective laws. It is important to move beyond that idea and instead think about when and why conflict problems start in the first place: conflicts of laws begin with a dispute between individuals.”); *see also* Mills, *supra* note 2, at 187.

Party autonomy¹⁴ appears¹⁵ to be, in particular, “the bedrock and the pivot of international cross-border contracts”¹⁶ and finds its “alter ego” in the principle of freedom of contract.¹⁷ The primary role of party autonomy in matters of contractual obligations has been clearly embraced in various national legal systems¹⁸ and in important regional instruments, like the Rome

¹⁴ For the classification of party autonomy as a “principle of law recognized by civilized nations” within the meaning of Article 38 of the Statute of the International Court of Justice, see RICHARD PLENDER & MICHAEL WILDERSPIN, *THE EUROPEAN PRIVATE INTERNATIONAL LAW OF OBLIGATIONS* 131 (Sweet & Maxwell eds., 3d ed. 2009).

¹⁵ It should be noted that, after originally having been limited to contractual obligations, party autonomy is now also recognized in areas such as torts, succession and family law. See Hague Conference on Private International Law [hereinafter HCCH], Protocol on the Law Applicable to Maintenance Obligations, art. 7 (Nov. 23, 2007), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=133>; see also HCCH, Protocol on the Law Applicable to Maintenance Obligations, art. 8 (Nov. 23, 2007), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=133>; see also HCCH, Convention on the Law Applicable to Certain Rights in Respect of Securities held with an Intermediary, art. 4 (July 5, 2006), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=72>; see also HCCH, Convention of 1 August 1989 on the Law Applicable to Succession to the Estates of Deceased Persons, art. 5 (Aug. 1, 1989), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=62>; see also HCCH, 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, art. 7 (Dec. 22, 1986), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=61>; see also HCCH, Convention of 14 March 1978 on the Law Applicable to Agency, art. 5 (Mar. 14, 1978), <https://www.hcch.net/en/instruments/conventions/full-text/?cid=89>.

¹⁶ See FRANCO FERRARI & FRANCESCA RAGNO, *CROSS-BORDER LITIGATION IN EUROPE: THE BRUSSELS I RECAST REGULATION AS A PANACEA?* 98 (Franco Ferrari & Francesca Ragno eds., 2015) (discussing Peter Mankowski, *The Role of Party Autonomy in the Allocation of Jurisdiction in Contractual Matters*, in *CROSS BORDER LITIGATION IN EUROPE: THE BRUSSELS I RECAST REGULATION AS A PANACEA?* (Franco Ferrari & Francesca Ragno eds., 2015)). See also ADRIAN BRIGGS, *AGREEMENTS ON JURISDICTION AND CHOICE OF LAW* 481 (2008); Fausto Pocar, *La protection de la partie faible en droit international privé*, 188 *RECUEIL DES COURS* 372 (1984).

¹⁷ Peter Nygh, *Contractual autonomy and its limits*, 251 *RECUEIL DES COURS* 297 (1995).

¹⁸ For the United States, see RESTATEMENT (SECOND) OF CONFLICT OF LAWS: LAW OF THE STATE CHOSEN BY THE PARTIES § 187.2 (AM. LAW INST. 1969); see also U.C.C. § 1-301 (AM. LAW INST. & UNIF. LAW COMM’N 2001); see also LA. CIV. CODE art. 3540 (1992). For other jurisdictions, see generally Zhonghua Remnin Gongheguo Shewai Minsi Guanxi Falü Syiyong Fa [Law on People’s Republic of China Applicable to Foreign-related Civil Relations] (promulgated by the Standing Comm. Nat’l People’s Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 3 (China); see also Act Governing the Choice of Law in Civil Matters Involving Foreign Elements, art. 20 (June 6, 1953) (Taiwan, Republic of China), <https://law.moj.gov.tw/ENG/LawClass/LawHistory.aspx?pcode=B0000007>; see also Hō no tekiyō ni kansuru tsūokuhō [Act on the General Rules for Application of Laws], Law No.10 of 1898, art. 7 (Japan); Act on Private International Law, Act No. 6465 Apr. 7, 2001, amended by Act No. 13759, Jan. 19, 2016, art. 25 (S. Kor.), translated in Korea Legislation Research Institute online database, http://elaw.klri.re.kr/eng_service/lawView.do?hseq=37432&lang=ENG; see also LEGGE FEDERAL SUL DIRITTO INTERNAZIONALE PRIVATE (LDIP), CODICE CIVILE [CC], [Federal Law on the Rights of Private International Law], Dec. 18, 1987, RS 291, art. 116 (Switz.) [hereinafter LDIP].

I Regulation¹⁹ and the Inter-American Convention on the Law Applicable to International Contracts, signed in Mexico City in 1994 (“Mexico Convention”).²⁰ In recent time, party autonomy’s paramount importance in the realm of choice of law²¹ has also been authoritatively recognized in the very first global legal instrument dealing with choice of law in international commercial contracts, namely the Hague Principles on Choice of Law in International Commercial Contracts (“Hague Principles”).²² This instrument, which was clearly designed to complete the Hague Convention on choice of court agreements,²³ and constitutes the first non-binding legal instrument produced by the Hague Conference, aims at promoting party autonomy and ensuring that the law chosen by the parties has the widest scope of application, subject to clearly defined limits.²⁴

¹⁹ Commission Regulation 593/2008 of June 17, 2008, on the Law Applicable to Contractual Obligations (Rome I), art. 3, 2008 O.J. (L 177) [hereinafter Rome I]. For a comprehensive comment on this provision, see GRAF-PETER CALLIESS, *ROME REGULATIONS: COMMENTARY ON THE EUROPEAN RULES OF THE CONFLICT OF LAWS 76* (Graf-Peter Calliess ed., 2d ed. 2015).

²⁰ Organization of American States, Inter-American Convention on the Law Applicable to International Contracts, art. 7, Mar. 17, 1994, O.A.T.S. 78 (also known as the “Mexico Convention”). For more on this Convention, see generally Diego P. Fernández Arroyo, *La Convention interaméricaine sur la loi applicable aux contrats internationaux: certains chemins conduisent au-delà de Rome*, in 84 *REVUE CRITIQUE DE DROIT INTERNATINAL PRIVÉ* 178 (1995); Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 *AM. J. COMP. L.* 381 (1994).

²¹ Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 *AM. J. COMP. L.* 873, 875 (2013).

²² HCCH, Principles on Choice of Law in International Commercial Contracts, Mar. 19, 2015, <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135>. For further details on these Principles, see generally Jürgen Basedow, *The Hague Principles on Choice of Law: Their Addressees and Impact*, 22 *UNIFORM L. REV.* 304 (2017); see also Katherina Boele-Woelki, *Party Autonomy in Litigation and Arbitration in View of the Hague Principles on Choice of Law in International Commercial Contracts*, in 379 *RECUEIL DES COURS* 53 (2015); see also Daniel Girsberger & Neil B. Cohen, *Key Features of the Hague Principles on Choice of Law in International Commercial Contracts*, 22 *UNIFORM L. REV.* 316 (2017); Davi & Zanobetti, *supra* note 9, at 881; Andreas Schwartze, *New Trends in Parties’ Options to Select the Applicable Law? The Hague Principles on Choice of Law in International Contracts in a Comparative Perspective*, 12 *U. ST. THOMAS L.J.* 87 (2015).

²³ Hans van Loon, *The 2005 Hague Convention on Choice of Court Agreements—An Introduction*, 18 *ANNALS FAC. L. U. ZENICA* 11, 12 (2016) (Both instruments have the goal of “removing obstacles to productive commercial relations, which are best served by party autonomy, at least in the relations between parties of more or less comparable economic bargaining power, and as long as strong public interests are respected.”).

²⁴ HCCH, Principles on Choice of Law in International Commercial Contracts, *supra* note 22, at pmbl. ¶ 1.

The large recognition of party autonomy around the globe has progressively determined that choice of law agreements nowadays are a powerful tool of transaction planning.²⁵ It is therefore a common occurrence that international sales contracts (potentially) governed by the CISG contain a *pactum de lege utenda*.²⁶ Since a scrutiny on such agreements is in some instances required in order to determine the very same applicability of the CISG, the question that arises is how this scrutiny should be conducted. In this Article, this conundrum will be investigated by stressing the particular nature of a choice of law agreement and its autonomous standing *vis-à-vis* the international sales contract in which it is incorporated. This will draw attention to the private international law of the forum as the reference system to be relied upon. In this perspective, and with the aim of understanding the practical implications of a conflict of laws approach, an analysis will be conducted on the relevant provisions of the Rome I Regulation, which is the regime to be employed by the courts of the majority of EU Member States.

II. THE CHOICE OF LAW AGREEMENT AS A FACTOR TRIGGERING OR EXCLUDING THE APPLICABILITY OF THE CISG

The most obvious case in which a choice of law agreement bears an effect on the applicability on the CISG occurs pursuant to Article 1(1)(b). As is well known, this criterion,²⁷ which denotes the constructive interaction

²⁵ See RONALD A. BRAND, TRANSACTION PLANNING USING RULES ON JURISDICTION AND THE RECOGNITION AND ENFORCEMENT OF JUDGMENTS 194–95 (2014).

²⁶ STEFAN KRÖLL, LOUKAS A. MISTELIS, MARIA DEL PILAR PERALES VISCASILLAS, UN CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG) 104 (2d ed. 2018) (“More than 80% of international contracts will normally contain a choice of law clause. In this way the parties may purport to opt out of the CISG and subject their contract to another law.”).

²⁷ See Christophe Bernasconi, *The Personal and Territorial Scope of the Vienna Convention on Contracts for the International Sale of Goods*, 46 NETH. INT’L L. REV. 137 (1999); Petra Butler & Bianca Mueller, *Article 1 CISG—The Gateway to the CISG*, 21 CISG & LATIN AM. 379 (2016); Isaak I. Dore, *Choice of Law Under the International Sales Convention: A U.S. Perspective*, 77 AM. J. OF INT’L L. 521 (1983); Franco Ferrari, *CISG Article 1(1)(b) and Related Matters: Brief Remarks on the Occasion of a Recent Dutch Court Decision*, NEDERLANDS INTERNATIONAAL PRIVAATRECHT 317 (1995); H. PÜNDER, *Das Einheitliche UN-Kaufrecht—Anwendung kraft kollisionsrechtlicher Verweisung nach Art 1 Abs 1 lit b UN-Kaufrecht*, RECHT DER INTERNATIONALEN WIRTSCHAFT 869 (1990); Peter Winship, *Private International Law and the U.N. Sales Convention*, 21 CORNELL INT’L L.J. 487 (1988), for information on this criterion.

between the uniform regime and private international law,²⁸ provides that the Convention is applicable, where one or even both parties do not have their places of business in Contracting States, provided that the private international law of the forum²⁹ identifies the law of a Contracting State as the *governing law* (and provided that the parties did not opt out the CISG). Thus, if the private international law rules of the *lex fori* recognizes the principle of party autonomy, then the selection of the law of a contracting State,³⁰ such as “Italian” or “French” law, leads to the applicability of the CISG.³¹

A choice of law agreement, however, may also be a factor barring the applicability of the CISG in its entirety. Since Article 6 of the CISG is commonly understood as allowing parties to implicitly opt out of the Convention as a whole by way of the designation of the law of a non-

²⁸ Franco Ferrari, *What Sources of Law for Contracts for the International Sale of Goods? Why One Has to Look Beyond the CISG*, INT’L R. OF L. & ECON. 314, 320–21 (2005).

²⁹ For the purpose of this analysis, it is assumed that the competent forum sits in a Contracting State that has not declared an Article 95 declaration.

³⁰ A completely different question is whether the CISG is applicable when the parties choose the CISG as the law governing the contract and the CISG is not applicable on its own terms. For a discussion of the effects of such an opting-in see Michael Bridge, *Choice of Law and the CISG: Opting In and Opting Out*, in DRAFTING CONTRACTS UNDER THE CISG 65, 71 (Harry M. Flechtner & Ronald A. Brand eds., 2008); FRANCO FERRARI, CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS: APPLICABILITY AND APPLICATIONS OF THE 1980 UNITED NATIONS SALES CONVENTION 179 (2012); Harry. M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the Redline Products Problems*, in A TRIBUTE TO JOSEPH M. LOOKOFSKY 95, 112 (Mads Bryde Andersen & Rene Franz Henschel eds., 2015). See also Tribunale di Padova Sez. Este [Dist. Ct.], 11 Gennaio 2005 (It.), <https://cisgw3.law.pace.edu/cases/050111i3.html>.

³¹ Bridge, *supra* note 30, at 78 (“A reference to the law of a Contracting State might be seen as the most direct way of importing the CISG via Article 1(1)(b).”); see also JOSEPH LOOKOFSKY, UNDERSTANDING THE CISG, 27 (2017). See RB. Rotterdam, 25 November 2015, C/10/474075/ HA ZA 15-362, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RBROT:2015:8646> (Neth.); Hof Arnhem-Leeuwarden, 15 September 2015, ECLI:NL:GHAMS:2015:6816 (Neth.), <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHARL:2015:6816>; Tribunale Modena, [District Court] 19 Febbraio 2014, https://www.uncitral.org/docs/clout/ITA/ITA_190214_FT_clean.pdf (It.); IV CSK 187/13, of November 28, 2013, of the Supreme Court of Poland, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/61/PDF/V1604861.pdf?OpenElement>; Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Feb. 20, 2007, Bull. Ci. I No. 68 (Fr.), <https://cisgw3.law.pace.edu/cases/070220f1.html>; Cour de cassation [Cass.] [Supreme Court for Judicial Matters] 1e civ., Oct. 25, 2005, No.1388 (Fr.); Handelsgericht Zürich [HG] [Commercial Court], February 5, 1997, HG 95 0347 (Switz.), <https://cisgw3.law.pace.edu/cases/970205s1.html>.

contracting State (e.g., “English law”), such a choice of law usually³² prevents the forum from the possibility of applying the uniform regime.³³

It should be evident from the foregoing that the efficacy and the validity of the choice of law agreement might represent a gateway issue for the applicability of the CISG. If a scrutiny on the *pactum de lege utenda* needs to be performed by the competent court, then the question of which are the legal parameters to be used inevitably arises.

In order to produce effects, a choice of law agreement needs, in the first place, to have been *de facto* agreed upon. Only a choice of law agreement that has been mutually consented to by the parties involved in the dispute can be deemed “existent.”

Only once that “consent” as a threshold-requirement has been established,³⁴ it becomes possible to determine whether the agreement factually reached can be considered valid.³⁵ As is well known, this inquiry

³² For the remark that only in exceptional cases the designation of the law of a non-Contracting State pursues the goal of identifying the legal system to be relied upon to fill the gaps of the Convention see CHRISTOPH BENICKE, *Article 6 CISG*, in MUNCHENER KOMMENTAR ZUM HGB 788 (Karsten Schmidt ed., 3d ed. 2012); FRANCO FERRARI, *Article 6 CISG*, in KOMMENTAR ZUM EINHEITLICHEN UNKAUFRECHT 129 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004); ULRICH MAGNUS, *Article 6 CISG*, in WIENER UNKAUFRECHT (CISG) 171 (Ulrich Magnus & Dagmar Kaiser eds., 3d ed. 2012).

³³ See MICHAEL JOACHIM BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW 51, 56 (C. Massimo Bianca & Michael Joachim Bonell eds., 1987); SERGIO MARIA CARBONE & RICCARDO LUZZATTO, I CONTRATTI DEL COMMERCIO INTERNAZIONALE 132 (1984); FRANCO FERRARI, LA VENDITA INTERNAZIONALE: APPLICABILITÀ ED APPLICAZIONI DELLA CONVENZIONE DI VIENNA, at 166; Ole Lando, *The 1985 Hague Convention on the Law Applicable to Sales*, 72 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 84 (1987); MARTIN F. KÖHLER, DAS UNKAUFRECHT (CISG) UND SEIN ANWENDUNGS AUSSCHLUSS 204 (2008). In the case law see, e.g., V CSK 528/14, of June 25, 2015 of the Supreme Court of Poland, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/048/61/PDF/V1604861.pdf?OpenElement>; Oberlandesgericht [OLG] [Higher Regional Court for Appeals] Linz, Jan. 23 2006, 6 R 160/05z (Austria), <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunale [District Court] Padova, 11 Gennaio 2005 (It.), <http://cisgw3.law.pace.edu/cases/050111i3.html>; Tribunal Cantonal Jura [Appellate Court] Nov. 3, 2004, Ap 91/104 (Switz.), <http://cisgw3.law.pace.edu/cases/041103s1.html>; Oberlandesgericht [OLG] [Higher Regional Court] Düsseldorf, July 2, 1993 17 U 73/93 (Ger.), <https://cisgw3.law.pace.edu/cases/930702g1.html>.

³⁴ As has been said, “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.” Flechtner & Brand, *supra* note 30, at 122.

³⁵ Of course, the existence and the validity of choice of law agreements are only some of the *conditiones sine quibus non* of their effectiveness. Other questions that a court may be required to deal with refer to the scope or to the admissibility of a choice of law agreement. Whereas the former issue is

may involve two profiles. The first one relates to the compliance of the choice of law agreement with the formal requirements possibly applicable (formal validity). The second one involves the verification of the “genuineness” of consent, or lack thereof covering issues such as fraud, mistake, duress, misrepresentation, or questions of capacity (material validity).³⁶

Well, given that the questions related to the formation of consent and the questions related to the form are notoriously governed by the CISG,³⁷ it seems at first sight that two options are viable. The first one, based on the prevalence of uniform substantive law over private international law,³⁸ would allow national courts to rely on the CISG rules³⁹ on contract formation and on form as directly applicable to any contractual terms included in a sales contract. The second one, on the other hand, would require national courts to fall back to the private international law of the forum, as a necessary complementing tool to solve CISG-related transactions and problems.⁴⁰

The former approach would have the advantage of taking into consideration the parties’ bargain in its complexity,⁴¹ but—irrespective of the shortcomings that it reveals from a dogmatic point of view—is certainly to be held as inappropriate in the case in which the existence of a choice of law agreement constitutes “the factor” leading to the applicability of the CISG

left, as question of law and fact, to the wisdom of the national court involved, the latter needs to be addressed on the basis of the conflict of laws provisions of the *lex fori*.

³⁶ PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 72 (1999).

³⁷ On the contrary, since material validity issues fall outside the scope of application of the Convention pursuant to its Article 4(a), courts should resort to a choice of law process, see Henry Mather, *Choice of Law for International Sales Issues Not Resolved by the CISG*, 20 J.L. & COM. 155, 161 (2001).

³⁸ See Tribunale di Vigevano [District Court], 12 Luglio 2000 n.405, Giur. It. 2000, 280 (It.), <http://cisgw3.law.pace.edu/cases/000712i3.html>. See also Tribunale di Rimini [District Court], 26 Novembre 2002 (It.), <https://cisgw3.law.pace.edu/cases/021126i3.html>; Tribunale di Padova [District Court], 25 Febbraio 2004 (It.), <http://cisgw3.law.pace.edu/cases/040225i3.html>; Tribunale di Padova [District Court], 31 Marzo 2004 (It.), <http://cisgw3.law.pace.edu/cases/040331i3.html>; Tribunale di Padova Sez. Este [District Court], 11 Gennaio 2005 (It.), <http://cisgw3.law.pace.edu/cases/050111i3.html>; Tribunale di Forlì [District Court], 11 Dicembre 2008 (It.), <http://cisgw3.law.pace.edu/cases/081211i3.html>; Tribunale di Forlì [District Court], 16 Febbraio 2009 (It.), <http://cisgw3.law.pace.edu/cases/090216i3.html>.

³⁹ Martin Schmidt-Kessel, in *COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS* 176 (Ingeborg Schwenzer ed., 4th ed. 2016).

⁴⁰ On the supplementing role of private international law approach *vis-à-vis* the CISG, see generally, Franco Ferrari, *PIL and CISG: Friends of Foes?*, 31 J.L. & COM. 45 (2012–2013).

⁴¹ ICC Award No. 9651, ICC ICarb. Bull. Vol. 12/No. 2, 76 (2001), <http://www.unilex.info/case.cfm?id=692> (“Parties do not expect that on issues of formation and validity of the choice-of-law agreement, a law other than the chosen law could apply.”).

pursuant to Article 1(1)(b). Since what is at stake in the scenario considered is precisely the applicability of the CISG due to the choice of law agreement, it would be logically inconsistent to rely directly on provisions whose applicability is under dispute. Moreover, since it is precisely Article 1(1)(b) CISG that refers explicitly to the private international law of the forum, this clearly appears to be the source from which to derive the solution of the problem at stake. Consequently, the court seized, in a case as such the one considered, should apply its own private international law.

What is more debatable is whether the same skepticism, *vis-à-vis* what one can describe as a *voie directe* approach, applies also when a genuine choice-of-law⁴² amounts to an implicit⁴³ exclusion of the CISG pursuant to Article 6 CISG⁴⁴ (as is usually⁴⁵ the case when the parties have chosen the law of a non-Contracting State).

As a matter of fact, it has been suggested that—when disputed—the issue of the formation of a choice of law agreement implicitly excluding the

⁴² The choice of a law as governing law (“kollisionsrechtliche Verweisung”) has to be distinguished by the mere incorporation of legal provisions as contractual terms (“materiellrechtliche Verweisung”). While the former supersedes all the provisions of the law otherwise applicable including its mandatory rules, the latter implies that the law chosen is incorporated in the contract by reference as any other contractual term and, therefore, cannot affect the application of the mandatory rules of the law otherwise applicable. See generally Francesca Ragno, *Article 3: Freedom of Choice*, in *ROME I REGULATION POCKET COMMENTARY* 73 (Franco Ferrari ed., 2014).

⁴³ On the possibility of an implicit exclusion of the Convention see FRANCO FERRARI & M. TORSELLO, *INTERNATIONAL SALES LAW CISG*, 42 (2d ed. 2018). In the case law see TRIB. GENÈVE Mar. 30, 2015 (Switz.); Cour d’appel [CA] [regional court of appeal], Rouen Oct. 3, 2013, 12/02078 (Fr.), <https://cisgw3.law.pace.edu/cases/131003fl.html>; Corte Cubana de Arbitraje Comercial Internacional, *Arbitral Award* Sept. 2013, <http://www.globalsaleslaw.org/content/api/cisg/urteile/2579.pdf>; Oberlandesgericht [OLG] [Higher Regional Court of Cologne] Köln Apr. 24, 2013 (Ger.), <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=OLG%20K%F6ln&Datum=24.04.2013&Aktenzeichen=16%20U%20106/12>; Oberster Gerichtshof [OGH] [Supreme Court] Apr. 2, 2009, 8 Ob 125/08b (Austria), <http://cisgw3.law.pace.edu/cases/090402a3.html>; Tribunale Forlì [District Court], 16 February 2009 (It.), <http://cisgw3.law.pace.edu/cases/090216i3.html>; Foreign Trade Court of Arbitration attached to the Serbian Chamber of Commerce, *Arbitral Award* of 28 January 2009, <http://cisgw3.law.pace.edu/cases/090128sb.html>; Polimeles Protodikio Athinon [Multi-Member Court of First Instance of Athens] 4505/2009 (Greece), <http://cisgw3.law.pace.edu/cases/094505gr.html#ii2>.

⁴⁴ See JOHN HONNOLD, *UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION* 199 (4th ed. 2009).

⁴⁵ On the need to evaluate the exclusion of the CISG on a case by case analysis see Oberlandesgericht [OLG] [Appellate Court] Jan. 23, 2006, *OBERSTEN GERICHTSHOFES IN ZIVILSACHEN [SZ]* No. 6 R 160/05z (Austria), <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunal Cantonal du Jura [Appellate Court] Nov. 3, 2004, Ap 91/04 (Switzerland), <http://cisgw3.law.pace.edu/cases/041103s1.html>.

Convention (as the choice of law of a non-Contracting State) has to be governed by the CISG.⁴⁶ The argument usually advanced to support this view is that, “until it is shown that the parties agreed to exclude the CISG pursuant to Article 6 of the CISG, the Convention governs.”⁴⁷ It appears undeniable that, for the purpose of Article 6, the scrutiny on an agreement selecting the law of a non-Contracting State is simply aimed at verifying whether the parties had clearly⁴⁸ intended to exclude the CISG⁴⁹ in a scenario in which the CISG is *prima facie* applicable.⁵⁰ However, the opting-out of the CISG in the case considered, cannot be detached from the question of the existence

⁴⁶ See SCHMIDT-KESSEL, *supra* note 39, at 177; ULRICH SCHROETER, *in supra* note 39, at 14–24; INGBORG SCHWENZER & PETER HACHEM, *in supra* note 39, at 103–05. *Contra* COMMENTARY ON THE INTERNATIONAL SALE OF GOODS (CISG) 103 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005).

⁴⁷ Peter Winship, *The Hague Principles, the CISG, and the “Battle of the Forms,”* 4 PENN ST. J.L. & INTL. AFF. 151, 160 (2015–16). See also CISG-AC Opinion No. 16, Exclusion of the CISG under Article 6, Rapporteur: Doctor Lisa Spagnolo, Monash University, Australia. Adopted by the CISG Advisory Council following its 19th meeting, in Pretoria, South Africa on 30 May 2014, <http://www.cisg.law.pace.edu/cisg/CISG-AC-op16.html> [hereinafter CISG-AC Opinion No. 16] (“The better view is that once a contract is *prima facie* governed by the CISG by virtue of Article 1, the adjudicator must look to its provisions alone to decide if there has been an exclusion, since until such time as Article 6 is satisfied, the CISG remains the governing law of the contract. It is the CISG which controls the ‘choice of law rule’ when a contract to which the CISG is *prima facie* applicable exists.”).

⁴⁸ See FERRARI, *supra* note 30, at 162 (2012); PETAR ŠARČEVIČ, THE 1980 UNIFORM SALES LAW 3 (Franco Ferrari ed., 2003); JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 80–81 (3d ed. 1999) (In the sense that Article 6 CISG presupposes a clear indication of the parties’ intent to implicitly include the Convention.); In the case law see also Oberlandesgericht [OLG] [Higher Regional Court for Appeals] Linz, Jan. 23 2006, 6 R 160/05z (Austria), <http://cisgw3.law.pace.edu/cases/060123a3.html>; Tribunal Cantonal du Jura [Appellate Court] Nov. 3, 2004, Ap 91/04 (Switzerland), <http://cisgw3.law.pace.edu/cases/041103s1.html>; BP Oil Int’l v. Empresa Estatal Petrol (PetroEcuador), 332 F.3d 333 (5th Cir. 2003).

For the idea that an “*in dubio pro Conventione* approach” should prevail in case of doubts see CISG-AC Opinion No. 16, *supra* note 47, at para. 3.5.

⁴⁹ See CLAYTON P. GILLETTE, ADVANCED INTRODUCTION TO INTERNATIONAL SALES LAW 21 (2016); FRANCO FERRARI & MARCO TORSSELLO, INTERNATIONAL SALES LAW CISG 44 (2d ed. 2018); Schmidt-Kessel, *supra* note 39, at 104; PETER HUBER & ALLISTAR MULLIS, THE CISG—A NEW TEXTBOOK FOR STUDENTS AND PRACTITIONERS 63 (2007) (To determine whether the choice of a law agreement amounts to a purported exclusion of the CISG, resort has to be made to the rules of interpretation provided by Article 8 CISG.).

Contra COMMENTARY, *supra* note 46, at 85 (In general on the need to refer to Article 8 for the purpose of determining whether the parties have intended to implicitly exclude the CISG.); see also Trib. Genève (Switzerland), 30 March 2015; Turfworthy, LLC v. Dr. Karl Wetekam & Co. KG, 26 F. Supp. 3d 496 (M.D.N.C. 2014).

⁵⁰ See FERRARI, *supra* note 30, at 152 (For the remark that the lack of an exclusion represents a negative applicability requirement of the CISG.).

and of the validity of a genuine choice of law.⁵¹ Logically, this choice cannot perform any indicative role if it is not capable to produce effects⁵²: *ex nihilo nihil fit*.⁵³ Given that the choice of law agreement has a contractual nature⁵⁴ and is independent from the main contract to which refers (doctrine of severability),⁵⁵ an immediate reliance on the rules of the CISG is far from persuasive. Automatically subjecting the issue of the formal consent on the choice of law agreement (or its formal validity) to the CISG as the *law prima facie* governing the main contract would disregard the fact that the choice of law agreement has to be distinguished from the main contract because it

⁵¹ See FRANCO FERRARI, KOMMENTAR ZUM EMHEITLICHEN UN-KAUFRECHT 129 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004); see also Schmidt-Kessel, *supra* note 39, at 104 (A completely different situation arises when the court is faced with an exclusion of the CISG that does not operate at conflict of laws level, but only at substantive level (as is the case when the parties have excluded the CISG by referring to the purely domestic contract law of a Contracting State). In this case the CISG governs, because the opting-out agreement operates only as a contractual term.). *Contra* COMMENTARY, *supra* note 46, at 86. Similarly see FRANCO FERRARI, KOMMENTAR ZUM EMHEITLICHEN UN-KAUFRECHT 126 (Peter Schlechtriem & Ingeborg Schwenzer eds., 4th ed. 2004).

⁵² See BENICKE, *supra* note 32 (Clearly, no actual intention of these parties can be deduced from an agreement that is not existent, nor valid.).

⁵³ *But see* Winship, *supra* note 47, at 162–63 (2015–16) (“Sellers and buyers will rarely agree to exclude the CISG without designating the law applicable instead. Somewhat more likely is a transaction where Party A and Party B negotiate a term excluding the CISG and a separate term that designates the law of State Z, a non-CISG State, as the applicable law. The judge in this case must answer two questions: Did the parties agree to exclude the CISG? And, did the parties effectively choose the law of State Z? . . . The judge should analyze the first of these questions in light of the CISG’s general principles on the formation of an enforceable agreement. That the parties purport to choose the law of State Z as the applicable law is some evidence of their intent to exclude the CISG. Whether or not their choice of State Z’s law is valid is a separate question. If the judge concludes that the parties agreed to exclude the CISG, the judge must then determine whether rules of private international law would give effect to the parties’ choice of the law of State Z.”). See also Schmidt-Kessel, *supra* note 39, at 103 (“The formation and the interpretation of the exclusion of the CISG is subject to the rules of the Convention, as the CISG determines its sphere of application autonomously. This includes the situation in which the choice of law clause contained in standard terms is disputed between the parties. Whether the parties have also managed to enter the law of a certain State is to be decided by rules designated by the applicable conflict of laws rules of the forum or arbitration rules respectively” (emphasis added)).

⁵⁴ See FRANCO FERRARI, INTERNATIONALES VERTRAGSRECHT (Franco Ferrari et al. eds., 3d ed. 2018).

⁵⁵ Dietmar Czernich, *Die Rechtswahl im österreichischen internationalen Vertragsrecht*, *ZfRV—Zeitschrift für Europarecht*, INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG 157, 161 (2013); JAN VON HEIN, EUROPÄISCHES ZIVILPROZESS—UND KOLLISIONSRECHT (Thomas Rauscher ed., 4th ed. 2016); Daniel Girsberger & Neil B. Cohen, *Key Features of the Hague Principles on Choice of Law in International Commercial Contracts*, 22 UNIFORM L. REV. 316, 324 (2017); HHCH, *supra* note 22, at art. 7 (As a consequence, a genuine choice of law (“kollisionsrechtliche Verweisung”) can be effective even when the contract to which it applies is null and void or vitiated, for example, by fraud or misrepresentation.).

pursues an autonomous, typical and unequivocal goal;⁵⁶ the determination of the applicable law.⁵⁷ In the light of the deference that one has to pay to choice of law agreements as the epiphany of the triumph of party autonomy in international commerce,⁵⁸ for the purpose of Article 6 it is here suggested that, where disputed, the efficacy and validity of a choice of law agreement designating a non-Contracting State should be evaluated by referring to the private international law of the forum⁵⁹ and not—*tout court*—to the CISG as the substantive law governing the main contract.⁶⁰

⁵⁶ Andrew Dickinson, *A Note on the Autonomy of the Parties' Agreement on Choice of Law* (Sydney Law School Research Paper No. 12/83, 2011), <https://ssrn.com/abstract=2168058> (As has been said, separating “the process of determining the parties’ consent to the law chosen and the parties’ consent to the contract itself would appear to be theoretically, logically and practically desirable, and indeed necessary. It acknowledges the separate nature and function of rules of private international law and the need for a court or tribunal to identify as a preliminary question a system of law by reference to which the existence and validity of the parties contract must be tested.”).

⁵⁷ See MARIA HOOK, *THE CHOICE OF LAW CONTRACT* 13 (2016) (“[T]he choice of law contract is not only a connecting factor, because it designates the law applicable pursuant to the party autonomy rule, but also an object of connection, because it is itself an international contract whose existence and validity must be determined. . . . It is independent from any underlying relationship to which the chosen law is applied, because the sole function of the choice of law contract is to opt out of the applicable objective choice of law rule and select the law governing the underlying relationship. . . . As an independent contract, the choice of law contract must have its own applicable law . . . but in addition, it must be regulated by rules that are specific to the choice of law contract—by ‘modal choice of law rules’ . . .”).

⁵⁸ FERRARI & TORSELLO, *supra* note 49, at 41.

⁵⁹ FERRARI, *supra* note 32, at 129, para. 20; FERRARI, in *supra* note 51, at 85 para. 7 (“A derogation clause nominating the law of a non-contracting State is a choice of law clause governed by the rules of private international law (conflict of laws) of the forum. Even if the issue arises before a court of a Contracting State, the forum’s conflict of law rules govern this choice of law agreement (and determine the law applicable to its), its prerequisites and validity.”). In the same vein see also Peter Mankowski, in *COMMERCIAL LAW: ARTICLE-BY-ARTICLE COMMENTARY* 35, para. 6 (Peter Mankowski ed., 2019) (commenting on Article 6 CISG); KÖHLER, *supra* note 33, at 204–05; HUBER & MULLIS, *supra* note 49, at 61.

⁶⁰ Peter Mankowski, *Commentary: Rome I Regulations*, in *EUROPEAN COMMENTARIES ON PRIVATE INTERNATIONAL LAW*, para. 431, at 243 (Peter Mankowski & Ulrich Magnus eds. 2017) (commenting on art. 3 Rome I) (“Choice of law agreement and main contract are two different issues regardless whether formally the former appears as clause X in a uniform document and might convey the impression to be one of the consecutive issues of the main contract. There might not be a ‘make or fail’ approach if the choice of law agreement is added with the help of a Standard Term or that, conversely, the parties first negotiated which law shall be applicable and made this the integrative basis for their contract. Neither constellation makes the choice of law agreement and the main contract intertwine with each other to such an extent that they could not be extricated and separated from one another.”). For this approach, in relation to a question related to the existence and the validity of a choice of court agreement, see BGH, Mar. 25, 2015, VIII ZR 125/14, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&nr=71114&pos=0&anz=1>.

III. THE COMPLEMENTING ROLE OF THE PIL: THE SOLUTIONS PROVIDED BY THE ROME I REGULATION

1. The conclusions drawn above show that the private international law of the forum is the source to examine when scrutinizing a genuine choice of law agreement as a gateway issue for the applicability of the CISG. As is well known, this source is largely uniform in the EU and must be identified in the Rome I Regulation.⁶¹ This instrument offers modal choice of law rules⁶² precisely aimed at addressing the issues of the existence and validity of a choice of law agreement.

As can be inferred from Article 3(5), the Rome I Regulation clearly recognizes the severability of a choice of law agreement.⁶³ Despite that, however, the Regulation (like the Rome Convention) creates a vicious circle.⁶⁴ It provides that the existence and material validity of the consent of the parties, as to the choice, has to be ascertained on the basis of the same law which governs the consent and the material validity of the main

⁶¹ The Rome I Regulation replaced the 1980 Rome Convention and became applicable in all EU Member States (except Denmark) as the instrument dealing with the problem of the law applicable to contracts concluded after December 17, 2009. However, since Commission Regulation 593/2008 (Rome I), art. 25, 2008 J.O. (L 177) (EC) establishes the continuing validity of “international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations,” in some EU Member States (as Italy and France) the choice-of-laws rules to be applied to international sales contracts are to be found in the Hague Conference on Private International Law [HCCH], 1955 Hague Convention on the Law Applicable to International Sales of Goods (June 15, 1955).

⁶² For the concept of modal choice of law rules see Maria Hook, *The Concept of Modal Choice of Law Rules*, 11 J. PRIV. INT’L L. 185, 185 (2015) (“[M]odal choice of law rules are rules of choice of law that supplement the operation of choice of law rules. For example, a rule that requires a choice of law agreement to be in writing is a modal choice of law rule, because it supplements the choice of law rule that contracts be governed by the law the parties intended to apply.”).

⁶³ This principle is further acknowledged in the LDIP, *supra* note 18, at art. 116(2) and the HCCH, Principles on Choice of Law in International Contracts, *supra* note 22, at art. 7.

⁶⁴ For critical remarks see Harry M. Flechtner & Ronald A. Brand, *Opting In to the CISG: Avoiding the Redline Products Problems*, in A TRIBUTE TO JOSEPH M. LOOKOFKY 95, 123 (Mads Bryde Andersen & René Franz Henschel eds., 2015) (“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”).

contract,⁶⁵ namely, by the law that would apply if the choice of law were valid.⁶⁶ It follows that, if the law putatively chosen were the law of a CISG non-Contracting State, the existence of the choice of law agreement would need to be verified on the basis of the general contract law rules of the non-Contracting State.

On the other hand, if the law putatively chosen were the law of a CISG Contracting State (such as “Italian law”), the issue of the external consent of the parties on the governing law would be tested on the basis of the CISG rules on contract formation, as the CISG is part of the legal system chosen by the parties.⁶⁷ On the contrary, the issues related to the material validity of the agreement would be solved according to the domestic internal law of the Contracting State whose legal system has been chosen. As far as the relevance of the CISG, it is certainly true that the purpose of the uniform regime is not to set forth rules governing a choice of law agreement, but only to govern “the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract” (Article 4 CISG).⁶⁸

⁶⁵ See Rome I, *supra* note 19, at art. 3(5); see also Rome I, *supra* note 19, at art. 8. The same solution is also provided in HCCH, 1955 Convention on the Law Applicable to Contracts for the International Sale of Goods, art. 2 (June 15, 1955). The same solution is embraced in HCCH, Principles on Choice of Law in International Commercial Contracts, *supra* note 22, at art. 6, and in HCCH, 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 15, at art. 10(1). In the case law on the Rome Convention see Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 2, 1994, VII ZR 262/92 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 24, 1988, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1431, 1432 1989 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 15, 1986, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1145, 1987 (Ger.).

⁶⁶ The same solution is embraced in HCCH, Principles on Choice of Law in International Law, *supra* note 22, at art. 6 and in the HCCH, 1986 Hague Convention on the Law in Applicable to Contracts for the International Sale of Goods, *supra* note 15, at art. 10(1). In the case law on the Rome Convention see Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 2, 1994, VIII ZR 262/92 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 24, 1988, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1431, 1432, 1989 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 15, 1986, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1145, 1987 (Ger.).

⁶⁷ In the case law see, *inter alia* Bundesgerichtshof [BGH] [Federal Court of Justice] July 23, 1997, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 3309, 1997 (Ger). Of course, this situation does not occur when the law chosen is the law of a CISG Contracting State that has made a reservation under Article 92.

⁶⁸ Thomas Kadner Graziano, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution*, 14 Y.B PRIV. INT'L L. 71, 96 (2013). For similar remarks see Mankowski, *supra* note 59, at 61 (2007) (“it is submitted that there are good grounds to assume that the formation provisions of the CISG (Article 14 *et seq.* CISG) are only aimed at the formation of sales contract, and do not extend to other agreements that may be concluded on the occasion of a sales contract (such a choice of law or a forum selection). In fact, the requirements set up in Article 14(1) CISG (. . .) clearly refer to a classic sales contract. It is true that Article 19(3) CISG mentions clauses concerning

This truism, however, does not preclude that the substantive rules of Part II of the CISG might, *cum grano salis*, be extended also to address a separate agreement—the *pactum de lege utenda*. Not only does Part II of the CISG address matters of general contract formation that are not specific to international sales contracts,⁶⁹ but also addresses a unitary approach *vis-à-vis* the choice of law agreement. The main contract is precisely what is prescribed for by a specific modal choice of rule of the law of the forum.⁷⁰ It is the Rome I Regulation that promotes the so called “bootstrap principle” and this represents the acknowledgment rather than the dilution of the aforementioned principle of severability.⁷¹

The circular approach provided by Article 3(5) Rome I Regulation applies also when the choice of law agreement is contained in the standard terms of one of the parties.⁷² Since the CISG governs the question of whether standard contract terms are incorporated into an international sales contract,⁷³ the question is to be solved according to Article 14 read in conjunction with Article 8.

Difficult problems, however, arise when the parties’ standard terms contain conflicting choice of law clauses (the “battle of the forms”). In this author’s opinion, Article 3(5) of the Rome I Regulation does not address this scenario;⁷⁴ in this respect, the Rome I Regulation seems to present a gap that, arguably, could be filled by relying on the Hague Principles, which devotes a specific rule on the matter. As the Hague Principles are intended to provide

dispute resolution mechanism, but this reference does not necessarily presuppose that the formation of such clauses—which are generally regarded to be separate contracts from the contract of sale—is governed by Article 14 *et seq.* CISG; it simply says that they are so important that the insertion or modification of such a (separate) clause or contract during the negotiation process may also affect the conclusion of the sales contract. As a result, the formation rules of the CISG should be regarded as not covering the formation of choice of law clauses (or forum selection clauses).”).

⁶⁹ FRANCO FERRARI & MARCUS TORSSELLO, *INTERNATIONAL SALES LAW CISG* 173 (2d ed. 2018) (As it has been noted, moreover, “the CISG does not only address issues specific to the type of contract it governs, namely that for the international sale of goods, but it also addresses matters of a more general nature.”).

⁷⁰ Mankowski, *supra* note 60, at para. 431, at 243 (commenting on art. 3 Rome I).

⁷¹ *Id.*

⁷² CALLIESS, *supra* note 19, at para. 28 (commenting on art. 3 Rome I); ULRICH MAGNUS, in J. VON STAUDINGERS KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: STAUDINGER BGB—EGBGB/IPR EINFÜHRUNGSGESETZ ZUM BÜRGERLICHEN GESETZBUCH/PR, para. 167 (Ulrich Magnus ed., 2016) (commenting on art. 3 Rome I).

⁷³ See Mankowski, *supra* note 59, at 35, para. 6 (commenting on art. 14 CISG).

⁷⁴ For a similar conclusion see Graziano, *supra* note 68, at 80.

a type of codification of “best practices with respect to choice of law in international commercial contracts, as recognized [sic] at an international level,”⁷⁵ it is here submitted that they might be relied upon by a court sitting in a EU Member State as a supplementing tool to be used in the presence of ambiguities or gaps of the Rome I Regulation regime.⁷⁶

The vexed problem of the battle of the forms is expressly dealt with by Article 6(1)(b) Hague Principles. According to this provision:

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 prevailing 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.⁷⁷

Although the proposed solution may appear simple, its application in practice may prove much more complex. In the event that the issue of conflicting terms was raised before a national court, the identification of the solution provided by the chosen law with regard to the “battle of the forms” could be troublesome. Legal systems do not always provide for a clear and univocal solution to the battle of form issue, thus making it complicated to identify the “prevailing” law according to the system considered.⁷⁸

Notwithstanding the aforementioned difficulties that the application of the rule under examination may trigger,⁷⁹ the solution endorsed by the Hague Principles is to be welcomed.⁸⁰ The novel approach puts an end to the

⁷⁵ HCCH, Principles on Choice of Law in International Commercial Contracts, *supra* note 22, at pmb. at ¶ 2.

⁷⁶ As it emerges from the Preamble, the Hague Principles have a multi-faceted functionality of the Principles. They aim not only at being a “model for national, regional, supranational or international instruments,” but also a means “to interpret, supplement and develop rules of private international law.” On the possible gap-filling role to be performed by the Hague Principles see Basedow, *supra* note 22, at 308–11.

⁷⁷ HCCH, Principles on Choice of Law in International Commercial Contracts, *supra* note 22, at art. 6(1)(b).

⁷⁸ Ole Lando, *The Draft Hague Principles on the choice of law in international contracts and Rome I*, in A COMMITMENT TO PRIVATE INTERNATIONAL LAW: ESSAYS IN HONOUR OF HANS VAN LOON 299, 309 (Permanent Bureau of the Hague Conference On Private Int’l Law ed. 2013); Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contract—Eine weitere Verankerung der Parteiautonomie*, 79 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 624, 643 (2015).

⁷⁹ Schwartze, *supra* note 22, at 98.

⁸⁰ Thomas Kadner Graziano, *The Hague Solution on Choice-of Law Clauses in Conflicting Standard Terms*, 22 UNIF. L. REV. 351, 355 (2017); Thomas Pfeiffer, *Die Haager Prinzipien des*

uncertainty regarding the approaches to be employed in battle of form scenarios.⁸¹ Moreover, the alternative solution, consisting in denying *tout court* any effect to divergent choice of law clauses inserted in standard terms (by promoting a knock-out rule at the conflict of laws level⁸²), seems too radical and hard to reconcile with the need to take into consideration the expectations of the parties.⁸³

Having introduced the mechanism provided by the Hague Principles, it is now the time to test it in relation to a hypothetical situation in which colliding choice of law agreements have been exchanged in the context of the negotiation of an international sales contract. Let us suppose that, due to an exclusive choice of court agreement selecting the Spanish courts, the court of Madrid is chosen in relation to an international sale dispute between a company seated in Germany and a company seated in England. Since the CISG is not directly applicable pursuant to Article 1(1)(a), the court is required to verify whether the law applicable to the contract under the Rome I Regulation is the law of a CISG Contracting State. Let us further assume that, in the case at stake, the English Offeror/Seller issued a quotation (to be classified as an offer pursuant to Article 14 CISG), with attached standard terms, including a clause designating English law as the law governing the contract. German Offeree/Buyer, on its part, issued a purchase order which incorporated her standard terms, including a choice of German law as the law applicable to the contract. Offeror performed her contractual obligations. If the Spanish court were to apply the Hague Principles, the analysis would require a comparison of the approach taken by the German law *vis-à-vis* the problem of the “battle of the forms” and the solution provided by English law. In this respect, a preliminary question would need to be addressed: is

internationalen Vertragsrechts—Ausgewählte Aspekte aus der Sicht der Rom I-VO, in Parteiautonomie im IPR—Allgemeines Anknüpfungsprinzip oder Verlegenheitslösung, in Festschrift für Ulrich Magnus 501, 507 (Peter Mankowski & Wolfgang Wurmnest eds., 2014); Francesca Ragno, *I Principi dell’Aja sulla scelta della legge applicabile ai contratti commerciali internazionali: mero esercizio di stile o strumento utile in ambito europeo?*, 22 *CONTRATTO E IMPRESA/EUROPA* 320, 352 (2017).

⁸¹ For the different approaches that have been endorsed see Graziano, *supra* note 68. On the problem see also Anatol Dutta, *Kollidierende Rechtswahlklauseln in allgemeinen Geschäftsbedingungen: ein Beitrag zur Bestimmung des Rechtswahlstatuts*, 104 *ZEITSCHRIFT FÜR VERGLEICHENDE RECHTSWISSENSCHAFT* 461 (2005); Lisa Möll, *Kollidierende Rechtswahlklauseln in Allgemeinen Geschäftsbedingungen im Internationalen Vertragsrecht* (Peter Lang ed., 2012).

⁸² Lando, *supra* note 78; MAGNUS, *supra* note 72, at para. 174.

⁸³ Graziano, *supra* note 80, at 360.

the reference to German law to be intended as German law comprising the CISG or as referring just to the purely domestic German contract law? In order to understand the significance of this preliminary issue, let us consider the latter possibility first. As a result of the fact that (the purely domestic) German law provides for a knock-out rule, whereas English law provides for the last-shot rule, the case under consideration would present a true conflict situation under Article 6(1)(b) of the Hague Principles. Since one of the designated laws (German law) applies a knock-out rule, “no standard terms would prevail,”⁸⁴ and no choice of law would be deemed to exist. It follows that the court would be required to identify the applicable law for the purpose of Article 1(1)(b) pursuant to the objectively connecting factor provided by Article 4 Rome I Regulation. This would likely lead to the designation of English law, as it is the law of the habitual residence of the seller. As a consequence, the CISG would not be applicable.

A (possibly) different conclusion would be drawn if the court were to apply the CISG. Given the absence of a black letter rule in the CISG devoted to solving the issue of the battle of the forms, a plethora of different theories have been proposed in the legal literature and in the case law.⁸⁵ In this author’s view, the preferable opinion is that the issue of the “battle of forms” needs to be solved on the basis of the mirror-image rule provided in Article 19 CISG.⁸⁶ If the offeree replies to an offer containing standard contract terms that form part of the offer by sending an acceptance that also contains standard contract terms, one must ascertain whether the reply contains additional or different terms that materially alter the offer (Article 19(2)).⁸⁷ Since there is no doubt that a choice of law agreement is to be considered as a material alteration of the offer,⁸⁸ the reply of the offeree represents a new

⁸⁴ HCCH, Principles on Choice of Law in International Commercial Contracts, *supra* note 22, at art. 6(1)(b).

⁸⁵ On the issue see Bruno Zeller, *The CISG and the Battle of the Forms*, in INTERNATIONAL SALES LAW—A GLOBAL CHALLENGE 203 (Larry A. Di Matteo ed., 2014).

⁸⁶ FERRARI & TORSSELLO, *supra* note 69, at 201.

⁸⁷ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, art. 19(2), S. Treaty Doc. 98-9, 1489 U.N.T.S. 3.

⁸⁸ In the legal doctrine see Franco Ferrari, in UN-CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG): A COMMENTARY, para. 11, at 272 (Stefan Kröll et al. eds., 2d ed. 2018) (commenting on art. 19 CISG); MAGNUS, *supra* note 72 (commenting on art. 9 CISG). In the case law see Oberlandesgericht [OLG] [Appellate Court] 6 R 200/04f (Austria), <http://cisgw3.law.pace.edu/cases/050323a3.html>; Rechtbank van Koophandel te Hasselt [Kh.] [commerce tribunal], May 2, 1995, AR 1849/94.

offer which is deemed to be accepted if the contract is performed by the offeror (the last-shot rule). If one accepts this conceptualization, it follows that in the aforementioned case the law winning the battle would be German law. As both the CISG and English law enforce the last shot rule in battle of forms cases, under Article 6(1) b), the choice of law clause agreed upon would be deemed the choice of German law. As a consequence, the Spanish court would apply the CISG pursuant to Article 1(1)(b).

Despite the controversy surrounding the issue, in this author's opinion, the preliminary question concerning the possibility of referring to the CISG to address the "battle of forms" dilemma in a private international law context should be answered in the affirmative. As elaborated above, the Convention not only forms part of the legal system of the Contracting State chosen, but also provides also a contractual regime that can be relied upon vis-à-vis choice of law agreements.

With that said, it should be noted that, under the Rome I Regulation, the existence (but not the validity)⁸⁹ of the choice of law agreement may be determined by the law of the country of habitual residence of the party denying such a choice. This can be done 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 Article 10(1),⁹⁰ which possibly could be the CISG. It appears thus possible that a choice of law agreement deemed to be existent under the CISG could be considered non-existent according to the law of the non-Contracting State where the opposing party resides.

As for the formal validity of a choice of law agreement, the Rome I Regulation provides a regulatory framework which acknowledges that, in light of the above mentioned principle of severability, the formal validity of a choice of law agreement does not depend on the formal validity of the main

⁸⁹ FERRARI, *supra* note 54, at para. 9 (commenting on art. 3 Rome I); Lawrence Collins, DICEY, MORRIS, COLLINS ON THE CONFLICTS OF LAWS, para. 32, at 114 (C.G.J. Morse et al. eds., 15th ed. 2012).

⁹⁰ On the relevance of this provision in relation to the so called "Schweigen auf ein kaufmännisches Bestätigungsschreiben" see VON HEIN, *supra* note 55, at para. 41 (commenting on art. 3 Rome I). For a similar provision see the HCCH, 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 15, at art. 10(3).

contract⁹¹ and needs to be addressed separately from the main contract.⁹² Article 3(5) Rome I Regulation refers to Article 11 Rome Regulation, which provides for the alternative application of the *lex causae* (and thus the chosen law)⁹³ or the *lex loci actus*. If the choice of law agreement complies with the formal requirements that one of these two laws establish, possible defects of form according to the other of the aforementioned laws are irrelevant.⁹⁴ It follows that, if the *lex causae* or the *lex loci actus* is the law of a EU Member State bound by the Rome I Regulation, no form requirement has to be met for a choice of law agreement to be valid. Article 3(1), indeed, does not require the choice of law to be expressed in writing. Due to the primacy of EU law,⁹⁵ this principle prevails over any conflicting approach possibly embraced in the residual domestic legislation.⁹⁶

IV. TACIT CHOICE OF LAW

Having underlined the role to be recognized to the private international law of the forum in respect to a possible scrutiny on a choice of law agreement as a factor leading to the applicability or exclusion of the CISG, it should be borne in mind that pursuant to the Rome I Regulation, choice of law agreements do not need to be expressed. This implies that, for the purpose of Article 1(1)(b) and Article 6 CISG, a choice of law (selecting the law of a Contract State or the law of a non-Contracting State) might be inferred by a national court seated in a EU Member State bound by the Rome

⁹¹ Ferrari, *supra* note 88, at para. 11. In the case law on the Rome Convention see BGH, BGHZ 78, 391, 394 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Nov. 6, 1980, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 391, 394, 1981 (Ger.), <https://dejure.org/dienste/vernetzung/rechtsprechung?Gericht=BGH&Datum=06.11.1980&Aktenzeichen=VII%20ZR%2047/80>; Oberlandesgericht (OLG) Nürnberg Feb. 22, 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR], 1484, 1484–85, 1997 (Ger.); OLG Celle, EWIR 2001, 1051 (Ger.).

⁹² MAGNUS, *supra* note 72, at para. 179.

⁹³ *Id.*

⁹⁴ When, however, the choice of law agreement concerns a consumer contract covered by Commission Regulation 593/2008 (Rome I), art. 6, 2008 J.O. (L 177) (EC), the questions related to the form of the choice have to be solved according to the law of the consumer's habitual residence.

⁹⁵ CALLIESS, *supra* note 19, at para. 30.

⁹⁶ See Michael Bogdan, *The Rome I Regulation on the Law Applicable to Contractual Obligations and the Choice of Law by the Parties*, NEDERLANDS INTERNATIONAAL PRIVAATRECHT 407, 410 (2009); Anna Gardella, *Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali (Roma I)*, 32 NUOVE LEGGI CIVILI COMMENTATE 612, 629 (Francesca Salerno & Pietro Franzina eds., 2009).

I Regulation.⁹⁷ According to the EU regime, as a matter of fact, parties are permitted to choose the applicable law implicitly, without expressly indicating the law chosen, as long as the tacit choice constitutes a real, rather than a hypothetical, choice.⁹⁸ The party asserting that there has been a choice of law has the burden of proof.⁹⁹ However, while the Rome Convention required an implied choice of law to be demonstrated “with a reasonable degree of certainty” from the terms of the contract and the surrounding circumstances, the Rome I Regulation demands the court to infer an implied choice when “clearly demonstrated”¹⁰⁰ by the terms of the contract or¹⁰¹ the circumstances of the case¹⁰² (including, of course, the conduct of the parties¹⁰³ and the *pre-contractual*¹⁰⁴ negotiations). The substitution of the words “*reasonable certainty*” by the words “*clearly demonstrated*” introduced a stricter test that seems to aim, on one hand, to eliminate the

⁹⁷ On the relevance of a tacit choice of law for the purpose of Article 1(1)(b) and Article 6 CISG, see MAGNUS, *supra* note 32, at art. 1, 92, para. 104; PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG), art. 1, para. 38 (Peter Schlechtriem & Ingeborg Schwenzer eds., 2d ed. 2005); HONNOLD, *supra* note 48, at 80–81 (3d ed. 1999); LOUKIS A. MISTELIS, UN-CONVENTION ON THE INTERNATIONAL SALES OF GOODS (CISG), art. 6, 85, para. 12 (Stefan M. Kröll, Loukis A. Mistelis & Pilar Perales Viscasillas eds., 2d ed. 2019).

⁹⁸ Thus, the theory of the hypothetical choice of law, under which a judge can ascertain which law the parties would have chosen if they had considered the issue, is not admissible. *See generally* Giuditta Cordero Moss, *Tacit Choice of Law, Partial Choice and Closest Connection: The Case of Common Law Contract Models Governed by a Civilian Law*, in RELT OG TOLERANSE FESTSKRIFT TIL HELGE JOHAN THUE 367, 374 (Johan Giertsen, Torstein Frantzen & Giuditta Cordero Moss eds., Festschrift Thue 2007).

⁹⁹ ALEX MILLS, PARTY AUTONOMY IN PRIVATE INTERNATIONAL LAW 327 (2018). For case law, see *Lawlor v. Sandvik Mining and Construction Mobile Crushers and Screens Ltd.* [2012] EWHC (Civ) 1188 (QB).

¹⁰⁰ *See also* HCCH, 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods, *supra* note 15, at art. 7(1).

¹⁰¹ *See on the Rome Convention, Marubeni Hong Kong and South China Ltd. v. Mongolian Government* [2002] EWHC (Comm) 873 (Despite the use of the word “or”, it is submitted that, in ascertaining the will of the parties, regard has been made both to the terms of the contract and to the circumstances of the case.).

¹⁰² *Aeolian Shipping SA v. ISS Machinery Services Limited* [2001] EWCA (Civ) 1162 (As stated in the case law referring to the Rome Convention “the circumstances which may be taken into account when deciding whether or not the parties have made an implied choice of law under Article 3 of the Rome Convention (whether by initial choice or subsequent change) range more widely in certain respects than the considerations ordinarily applicable to the implication of a term into a written agreement, in particular by reason of the reference in Art 3(1) to ‘the circumstances of the case.’”).

¹⁰³ VON HEIN, *supra* note 55, at 126, art. 3, para. 36; MAGNUS, *supra* note 72, art. 3, para. 82.

¹⁰⁴ *See Aeolian Shipping SA v. ISS Machinery Services Limited* [2001] EWCA (Civ) 1162.

ambiguity linked to the expression “reasonable”¹⁰⁵ and, on the other hand, to discourage courts from too easily avoiding the application of a foreign law on the basis of an “assumed” designation of the law of the forum.¹⁰⁶ This trend of “*favor legis fori*,” which amounts basically to a variation of the homeward trend,¹⁰⁷ is particularly evident in some jurisdictions, where national courts have sometimes inferred *tout court* a choice of *lex fori* from the fact that the parties have argued their case entirely on the basis of this law (even though they had not expressly agreed on its applicability).¹⁰⁸ Since Article 3(1) does not authorize the court seized with the matter “to infer a choice of law that the parties might have made where they had no clear intention of making a choice,”¹⁰⁹ the afore-described approach seems highly questionable, as it legitimizes purported choices that do not reflect the true will of the parties.¹¹⁰ Moreover, it runs counter the *effet utile* of the default rules laid down in Rome I Regulation. When the party asserting a tacit choice cannot satisfy the court, then resort has to be made to the objective test under Article 4.

As affirmed in the case law,¹¹¹

in view of the potential difficulty in drawing a line between inferring an unexpressed intention and imputing an intention, the test whether an implied choice of law has been established is objective (. . .) The objective nature of the

¹⁰⁵ Ole Lando & Peter A. Nielsen, *The Rome I Regulation*, 45 COMMON MKT. L. REV. 1687, 1698 (2008).

¹⁰⁶ Bogdan, *supra* note 96, at 408; DIETER MARTINY, NEUANFANG IM EUROPÄISCHEN INTERNATIONALEN VERTRAGSRECHT MIT DER ROM-I-VERORDNUNG, 747, 756 (Zeitschrift für Europäisches Privatrecht 2010); Thomas Pfeiffer, *Neues Internationales Vertragsrecht*, 19 EUROPÄISCHE ZEITSCHRIFT FÜR WIRTSCHAFTSRECHT 622, 624 (2008).

¹⁰⁷ See FRANCO FERRARI, HOMEWARD TREND: WHAT, WHY AND WHY NOT 171, 184 (Andre Janssen & Olaf Meyer eds., 2009).

¹⁰⁸ For Germany, see OLG München, IMRRS 2017, 0137; BGH, BKR 2003, 593, 596; Bundesgerichtshof [BGH] [Federal Court of Justice] April 23, 2002, NEU JURISTISCHE WOCHENSCHRIFT [NJW-RR], 1359, 1361, 2002 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 12, 1990, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1292, 1293 1991 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 15, 1986, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR] 456, 457, 1986 (Ger.); BGH, NJW-RR 1988, 159 160. For the Netherlands, see R.B. Rotterdam, 08.02.2012, <Rechtspraak.nl>; Hof s-Hertogenbosch, NIPR 2001, 446 *et seq.*; Hof Amsterdam, NIPR 2001, 328 *et seq.*; R.B. Rotterdam NIPR 2001, 243 *et seq.*; RB Utrecht, NIPR 2000, 237 *et seq.*

¹⁰⁹ See Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 282 OFFICIAL J. EUR. CMTYS. 1, 17 (1980).

¹¹⁰ See generally VILLANI, *supra* note 9, at 69.

¹¹¹ Lawlor v. Sandvik Mining and Construction Mobile Crushers and Screens Ltd. [2013] EWCA (Civ) 365.

test means that the party asserting an implied choice of law has to satisfy the court to the required standard that, on an objective view, the parties must have taken it without saying that their contract should be governed by that law (. . .). He does not have to prove that there was in fact a subjective conscious choice (. . .), but he does have to satisfy the court that the only reasonable conclusion to be drawn from the circumstances is that the parties should be taken to have intended the putative law to apply.¹¹²

Provided that a court must in any case ascertain a real rather than an imputed intention and every element needs to be carefully considered in the light of the whole contractual terms and of the circumstances of the case, there are factors which are normally held as indicating a tacit choice of law. Some of these indicators, which are not to be perceived as conclusive or as giving rise to presumptions,¹¹³ have been mentioned in the Report on the Rome Convention.¹¹⁴ One of the strongest indications of a tacit choice of law is a jurisdiction agreement,¹¹⁵ at least when the parties have agreed on the exclusive jurisdiction of the *forum prorogatum*.¹¹⁶ Before the entry in force of the Rome Convention, courts quite often have assumed that the choice of forum suggests the choice of the substantive law of the forum.¹¹⁷ At first, the maxim *qui eligit iudicem, eligit ius* has even been incorporated into the Commission's Proposal in the form of a presumption, according to which "the parties have agreed to confer jurisdiction on one or more courts or

¹¹² For the idea that the existence of a tacit choice of law should be established on the basis of the law putatively chosen, see Oberster Gerichtshof [OGH] [Supreme Court] May 1, 2015, 8 Ob. 98/14s, <https://rdb.manz.at/document/rdb.tso.ENzfrvls2015030704?execution=e1s3&highlight=+ZfRV%E2%80%99ILS+2015%2F39>.

¹¹³ C.M.V. CLARKSON & JONATHAN HILL, *THE CONFLICT OF LAWS* 217 (4th ed. 2011); NYGH, *supra* note 36, at 114–15.

¹¹⁴ See Giuliano & Lagarde, *supra* note 109, at 28.

¹¹⁵ See *id.* at 17 ("in some cases the choice of a particular forum may show in no uncertain manner that the parties intend the contract to be governed by the law of that forum, but this must always be subject to the other terms of the contract and all the circumstances of the case"). For the remark that a jurisdiction agreement can be considered indicative even when it is not concretely effective, see Hoge Raad der Nederlanden (HR) Aug. 10, 2010, NIPR 310, ECLI:NL:PHR:2010:BN1405, <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:PHR:2010:BN1405> (Ger.).

¹¹⁶ DIETER MARTINY, *MÜNCHENER KOMMENTAR ZUM BÜRGERLICHEN GESETZBUCH: BGB BAND 10: IPR, ROM I-VO, ROM II-VO, ROM III-VO, EUUNTHVO, EUERBVO*, art. 1-24 EGBGB, art. 3, para. 50 (Jan von Hein et al. eds., 7th ed. 2018).

¹¹⁷ See generally Marubeni Hong Kong and South China Ltd. v. Mongolian Government [2002] EWHC (Comm) (Comm) 873; Bundesgerichtshof [BGH] [Federal Court of Justice] May 5, 1993, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 1445, 1446 1993 (Ger.); BGH (Germany), NJW 1991, 1420, 1420; Hellenic Steel Co. and Others v. Svolar Shipping Co. Ltd. and Others, 1 Lloyd's Rep. 370 (1991).

tribunals of a Member State to hear and determine disputes that have arisen or may arise out of the contract, they shall also be presumed to have chosen the law of that Member State.”¹¹⁸ However, the approach taken by the Commission drew widespread criticism¹¹⁹ and was rejected during the negotiations.¹²⁰

As a result, for the purpose of the Rome I Regulation only,¹²¹ an exclusive (Member State) forum selection clause appears to be just one of the factors that a judge may take into account in determining whether a choice of law is clearly demonstrated (Recital no. 12 Rome I). It follows that an *electio fori* is a strong indicator of a tacit choice but may be overridden by others.¹²²

The rejection of the idea that the choice of a given jurisdiction automatically embodies the choice of the law of the forum prorogated can be shared. While that assumption bears some practical advantages, as it promotes the application by the court seized of the domestic law instead of a foreign law, it should not be underestimated that an *electio fori* usually depends on procedural factors—ranging from the rules of evidence to the varying conditions of efficiency and rapidity of the judicial process, the language of the proceedings, the reputation for impartiality of the Court and the enforceability of the judgment—which are entirely unconnected with the question of the applicable law.¹²³ Moreover, had the parties wanted to

¹¹⁸ See *Proposal for a Regulation of the European Parliament and the Council on the Applicable to Contractual Obligations (Rome I)*, at 14, COM (2005) 650 Final (Dec. 15, 2005). See also Paul Lagarde, *Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980*, 95 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 331, 335 (2006).

¹¹⁹ See Francisco J. Garcimartin Alferz, *The Rome I Regulation: Much Ado about Nothing?*, 2008 EUR. LEGAL. F. 1–61, 1–67; STEFAN LEIBLE, EIN NEUES INTERNATIONALES VERTRAGS—RECHT FÜR EUROPA 41, 44 (Franco Ferrari & Stefan Leible eds., 2007); BENEDETTA UBERTAZZI, IL REGOLAMENTO ROMA I SULLA LEGGE APPLICABILE ALLE OBBLIGAZIONI CONTRATTUALI 64–65 (2008); but see Ole Lando & Nielsen, *The Rome I Proposal*, 2007 J. PRIV. INT'L L. 29, 35.

¹²⁰ See *Proposal for a Regulation of the European Parliament and of the Council on the law applicable to contractual obligations (Rome I)—Compromise package by the Presidency*, art. 3(1), 0261 COD rev. 1 (Apr. 13, 2007), <https://register.consilium.europa.eu/doc/srv?l=EN&f=ST%208022%202007%20ADD%201%20REV%201>.

¹²¹ See Stefan Leible & Matthias Lehmann, *Die Verordnung über das auf vertragliche Schuldverhältnisse anzuwendende Recht*, 2008 RECHT DER INTERNATIONALEN WIRTSCHAFT [RIW] 528, 532; see also *King v. Brandywine Reinsurance Co.* [2005] EWCA (Civ) 235 (Eng.).

¹²² See NYGH, *supra* note 36, at 117; VON HEIN, *supra* note 55, at para. 24; MAGNUS, *supra* note 72, at para. 74.

¹²³ See Czernich, *supra* note 55, at 157; FERRARI, *supra* note 54, at para. 29.

designate the *lex fori* as the their *lex contractus*, they would have likely expressed their will in a specific clause.¹²⁴ That said, it remains somehow arbitrary that Recital no. 12 of the Rome I Regulation attaches an indicative value only to the agreements conferring exclusive jurisdiction on one or more courts or tribunals of a Member State. The rationale of what seems to be a deliberate¹²⁵ choice is highly dubious given the universal character of the Rome I Regulation.¹²⁶

The cautious approach eventually embraced in the Rome I Regulation in relation to (exclusive) choice of court agreements should apply also when national courts are faced with clauses submitting arbitration in a particular country.¹²⁷ As a matter of fact, national courts (as arbitral tribunals),¹²⁸ have sometimes assumed that the parties, in agreeing to arbitrate the dispute in a particular country, have intended the law of that country to apply to the substance of the dispute.¹²⁹ However, in the light of the aforementioned considerations, and of the wording of Recital no. 12, the specification of the place of arbitration should not be treated as giving rise to conclusive or irresistible inference that the parties have further agreed that the law governing the contract is to be the law of that country,¹³⁰ but should be considered just one of the relevant factors in inferring a tacit choice.¹³¹

¹²⁴ See Alferz, *supra* note 119.

¹²⁵ See, e.g., Max Planck Institute for Foreign Private and Private International Law, 71 RABELS ZEITSCHRIFT FÜR AUSLÄNDISCHES UND INTERNATIONALES PRIVATRECHT 225, 243 (2008) (discussing the inconsistency of a distinction between member states and non-member states that was promptly underlined in the debate that arose on the Commission's proposal).

¹²⁶ See also Jan L. Neels & Eesea Fredericks, *Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts*, 44 DE JURE 101, 107 (2011).

¹²⁷ See FERRARI, *supra* note 54, at para. 30.

¹²⁸ See Schiedsgericht Hamburger Freundschaftliche Arbitrage [HFA] [Hamburg Friendly Arbitrage] 1999, NEUE JURISTISCHE WOCHENSCHRIFT—RECHTSPRECHUNGS—REPORT ZILRECHT [NJW] 780, 781, 1999 (Ger.); Case No. 2391 of 1977, Journal du droit International 949 (1977).

¹²⁹ See Oldendorff v. Liberia Corp. [1996] C.L.C. 482; Hellenic Steel Co. v. Svolamar Shipping Co. [1991] 1 Lloyd's Rep 370; BGH, 1967, 156.

¹³⁰ See Compagnie d'Armement Maritime S.A. v. Compagnie Tunisienne de Navigation S.A. [1971] AC 572; see also Jean-Louis Delvolve, FRENCH ARBITRATION LAW AND PRACTICE 138 (Jean Rouche & Gerald Pointon eds., 2003); COMPARATIVE INTERNATIONAL COMMERCIAL ARBITRATION, para. 17–15 (Julian David Matthew Lew et al. eds., 2003); AXEL STEINER, DIE STILLSCHWEIGENDE RECHTSWAHL IM PROZESS IM SYSTEM DER SUBJEKTIVEN ANKNÜPFUNGEN IM DEUTSCHEN IPR 87 (1998).

¹³¹ See Giuliano & Lagarde, *supra* note 109 (according to which “other matters that may impel the court to the conclusion that a real choice of law has been made might include (. . .) the choice of a place where disputes are to be settled by arbitration in circumstances indicating that the arbitrator should apply the law of that place” (emphasis added)).

A tacit choice may also be inferred by the reference in the contract to a statute or specific provisions of a certain legal system.¹³² This factor needs to be carefully evaluated since such a reference sometimes aims just to incorporate the relevant provision(s) into the terms of the contract (*materiellrechtliche Verweisung*)¹³³ or to provide a paradigm for interpretative purposes.

Since Article 3(1) expressly admits a partial choice of law, the reference to a legal rule of a specific country to govern only part of the contract or to construe the contract should not amount *ipso iure* to a tacit designation of the law applicable to the contract in its entirety.¹³⁴

Another indicating factor could be considered the course of dealing developed by the parties. When the parties have subjected their previous contractual agreements to a particular law, it can be expected that, in the absence of a contrary agreement, the contract to be governed by the law previously chosen where the choice of law clause has been omitted in circumstances which do not indicate a deliberate change of policy by the parties¹³⁵. The same rationale may apply when an express choice of law can be found in related transactions between the same parties.¹³⁶

¹³² See Giuliano & Lagarde, *supra* note 109; see also Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 19, 2000, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR] 1002, 2000 (Ger.); Pret., 6 aprile 1998, Foro it. 1999, I 53, 54 (It.); Bundesgerichtshof [BGH] [Federal Court of Justice] May 10 1996, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR] 1034, 1996 (Ger.); Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 14, 1999, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR] 813, 1999 (Ger).

¹³³ See CHRISTOPHER CLARKSON & JONATHAN HILL, THE CONFLICT OF LAWS 215 (4th ed. 2011); Collins, *supra* note 89, at para. 32–56; RICHARD PLENDER & MICHAEL WILDERSPIN, THE EUROPEAN INTERNATIONAL LAW OF OBLIGATIONS, para. 6-010 (3d ed. 2009).

¹³⁴ See FERRARI, *supra* note 54, at para. 33; MAGNUS, *supra* note 72, at para. 89; MARTINY, *supra* note 116, at para. 57; see also *Oberlandesgericht Munchen* [OLG] [Munich Higher Regional Court] Oct. 3, 24 U 474/87 (referencing case law where a foreign law for interpretative purposes has been considered as an explicit choice of the law applicable to the contract).

¹³⁵ See Giuliano & Lagarde, *supra* note 109, at 17 (1980); FERRARI, *supra* note 54, at para. 32; MAGNUS, *supra* note 72, at para. 89; MARTINY, *supra* note 116, at para. 66; see also VILLANI, *supra* note 9, at 69.

¹³⁶ See Giuliano & Lagarde, *supra* note 109; *Blue Sky One Ltd. v. Mahan Air* [2009] EWHC (Comm) 3314.

Factors like the place of the conclusion of the contract,¹³⁷ the use of a certain language for the contract or for the negotiations,¹³⁸ the recourse to a certain currency of payment,¹³⁹ and an agreement on the place of performance¹⁴⁰ are, at best, not sufficient indicators of the parties' tacit choice of law.¹⁴¹ Moreover, the reference to circumstances which are significant for the closest connection test under Article 4 Rome I Regulation reveals an approach which is not in line with the research of a real, rather than a hypothetical, choice of law by the parties.¹⁴²

V. CONCLUDING REMARKS

The analysis undertaken started from the premise that party autonomy is nowadays the ruling principle in contract conflicts. In the context of international sales contracts, choice of law agreements are often employed as a transaction-planning tool and in some instances represent a gateway issue to the CISG [Articles 1(1)(b) and 6].

In light of the particular nature of the *pacta de lege utenda* and their autonomous standing *vis-à-vis* the international sales contracts in which they might be incorporated, it is suggested that choice of law agreements should be treated as separate contracts. As a consequence, for the purpose of the CISG, disputes on the existence or the (formal) validity of choice of law agreements should not be solved *tout court* on the basis of the CISG, as the

¹³⁷ See FERRARI, *supra* note 54, at paras. 35, 45; MAGNUS, *supra* note 72, at para. 95; MARTINY, *supra* note 116, at paras. 98–99.

¹³⁸ See FERRARI, *supra* note 54, at para. 35; MAGNUS, *supra* note 72, at para. 95; MARTINY, *supra* note 116, at paras. 98–99; Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 2, 1991, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR] 423, 1992 (Ger.).

¹³⁹ See FERRARI, *supra* note 54, at paras. 35, 45; MAGNUS, *supra* note 72, at para. 95; MARTINY, *supra* note 116, at paras. 98–99; Bundesgerichtshof [BGH] [Federal Court of Justice] Dec. 7, 2000, NEUE JURISTISCHE WOCHENSCHRIFT [NJW-RR] 1936, 2001 (Ger.).

¹⁴⁰ See FERRARI, *supra* note 54, at para. 35; MAGNUS, *supra* note 72, at para. 95; MARTINY, *supra* note 116, at para. 96.

¹⁴¹ See FERRARI, *supra* note 54, at para. 35; Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 27, 2005, VII ZR 206/04 (Ger.); see also Oberlandesgericht Köln [OLG] [Cologne Higher Regional Court] 1995, NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 245, 1995 (Ger.); Oberlandesgericht Frankfurt [OLG] [Frankfurt Higher Regional Court] May 23, 1995, 5 U 209/94 182, 1995, <https://cisgw3.law.pace.edu/cases/950523g1.html>. (I am not sure if this is the right case but based on the context from the text/argument of the case and the author's argument it seems like it is the right case, I just cannot figure out what the "182" refers to in her original citation.)

¹⁴² See CALLIESS, *supra* note 19, at para. 37.

law *prima facie* governing the main contract, but should be dealt with by referring to the conflict of laws of the forum.

This carries two (possibly complex) implications. On the one hand, national courts should identify the modal choice of law rules to be concretely applied. On the other hand, given the bootstrap principle employed in some private international law regimes, it would still be possible to sing with Professor Flechtner—to whom this short contribution is dedicated—that “we have the C-I-S-G.”