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THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS

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This article is dedicated to the one of the most important questions of the International Commercial Law. As a rule, it is widely accepted that the principle of party autonomy has been adopted, in respect of contractual obligations, by practically all national legislations in their provisions for private international law. At the same time, the Principles are silent regarding the option to choose trade usages as *lex causae* of the contract, and understandably so, since, from a systematic viewpoint, they cannot form a comprehensive set of rules capable of resolving basic issues of contractual obligations. Author believes that the Principles do not add any significant new features to the legal systems that have already developed and adopted the principle of party autonomy, with the exception of the possible application of non-national law before state courts. As a result, there have been formulated several useful conclusions which can be used in the science of the International Commercial Law.

Keywords: *international commercial contracts, the principal of party autonomy, contractual obligations, non-national law.*

PRINCIPIILE DE LA HAGA PRIVIND ALEGEREA LEGILOR ÎN CONTRACTELE COMERCIALE INTERNAŢIONALE

Acest articol este consacrat unor dintre cele mai importante probleme ce fac parte din dreptul internaţional comercial. De regulă, principiul autonomiei părţilor în contract este recunoscut ca unul fundamental în dreptul internaţional. Totodată, principiile păstrează tăcerea în ceea ce ţine de opţiunea de a alege uzanţele *lex causae* ale contractului; prin urmare, ele nu pot fi privite ca reguli comprehensive şi susceptibile de a soluţiona problemele principale ale obligaţiilor contractuale. Autorul este de părere că principiile nu conţin nimic nou pentru legislaţiile naţionale în vigoare, deoarece nu au dezvoltat şi nu au adoptat ceva necunoscut pentru principiul autonomiei care este prevăzut în toate legislaţiile, cu excepţia unei posibile aplicări a legii supra-naţionale în instanţele naţionale de judecată. Prin urmare, au fost formulate unele conclusii care pot fi privite ca utile în ştiinţa dreptului internaţional comercial.

Cuvinte-cheie: *contracte comerciale internaţionale, principiul autonomiei părţilor, obligaţii contractuale, legislaţie supra-naţională.*

Introduction

In March 2015 the Hague Conference on Private International Law published a set of nonbinding rules – "Principles on Choice of Law in International Commercial Contracts" (hereafter: "Principles") – whose sole regulatory object is the principle of lex voluntatis. This set of rules is the product of long and extensive comparative legal research, painstaking negotiations and numerous discussions and, due to the complex nature of its content, cuts through the dividing line between the legal spheres of common law and continental law.

Nevertheless, it is widely accepted that the principle of party autonomy has been adopted, in respect of contractual obligations, by practically all national legislations in their provisions for private international law [1], and at the same time it is the main connecting factor in statutes of a regional and international nature, whose role in harmonizing contract law at transnational level is considered to have been particularly successful [2]. Furthermore, given the functional importance of the said connecting factor in international transactions, many national codifications as well as regional and international legislative instruments have extended the regulatory sphere of party autonomy to other legal areas, including, for example, the field of non-contractual obligations, inheritance and family law [3].

In light of the above, the present paper attempts a general interpretative approach to the content of the Principles so as to offer a first estimation of the need (or lack of it) for establishing these Principles and to assess, albeit at this still early stage, the extent to which they contain features that can be deemed innovative and that can evolve dynamically as a set of rules capable of offering effective solutions in the field of international transactions; or if, on the other hand, they are just one more legal tool of non-national origin among the already existing tools, of only limited scope and likelihood of implementation.

I. Background

The starting point for the formulation of a set of rules was in 2006 when the Council of General Affairs and Policy (the Hague Conference's governing body) requested that the Permanent Bureau of the Hague Conference prepare a feasibility study on the development of an instrument – without specifying its precise form (e.g., international convention, model law, system of general principles of law, "Guide to Good Practice") – concerning choice of law in international contracts [4]. Furthermore, the Permanent Bureau of the Hague Conference distributed a questionnaire to its members, the ICC and a large number of international arbitral centers with a view to examining the use of choice of law agreements in current transaction practice and the degree to which such agreements are respected, and to appraise the adjustments that might be required for such a tool in the future.

In 2009, following preliminary work by the Permanent Bureau of the Hague Conference [5] and in line with the recommendations of the feasibility studies, a working group was set up under the chair of Professor D. Girsberger, in which experts in private international law, international commercial law, and international arbitration took part, who together represented in essence the sum of the existing legal systems [6]. In the years that followed the working group held various meetings until 2012 when the Special Commission unanimously approved a revised form of the Principles, while at the same time it made a number of recommendations with a view to filling out their content and their accompanying commentaries. In April 2014, the Council welcomed the wording of the Principles proposed by the working group and the draft of the accompanying commentaries, and invited the working group to set up an editorial committee to finalize the text of the Principles in both the official languages of the Hague Conference (i.e. English and French). Once this process was completed, in March 2015 the Council approved the final text of the Principles and the accompanying commentaries so that they might be submitted in their current form to the review of the legal world and of the key players in the sphere of international transactions.

II. Structure and legal character

As regards their technical structure, the Principles compose, in our view, a simple and uncluttered system of rules comprised of a Preamble and a total of twelve articles. A welcome innovation is the extensive and detailed commentary accompanying the various individual provisions, along the lines of the UNIDROIT *Principles of International Commercial Contracts* and the USA's Restatements of the Law; in addition, the examples cited in many cases make clearly intelligible the function of the provision in practice. This structure undoubtedly serves as an aid to interpretation and understanding of the Principles, thus assuring that users will be able to apply them correctly.

Besides the innovative technical structure of the particular system of rules, the Hague Conference broke new ground in yet another way by adopting a legal instrument of non-binding character ("soft-law") [7], in contrast with the usual and traditional practice of drafting international conventions, i.e. legal instruments of an heteronomous binding. The reason that led the Hague Conference to choose, for the first time in its history, a set of legal rules of non-binding character can be attributed mainly to the inevitable lack of agreement between States regarding the drafting of a binding international document owing to the existence, on the regional level, of certain statutes of a mandatory nature relevant to the field, such as, for instance, the Rome (I) Regulation and the Mexico Convention [8] (Inter-American convention on the law applicable to international contracts of 1974) as well as the desire to avoid likely conflicts regarding these instruments. On the other hand, the Hague Conference, from the earliest stages of the enterprise, perceived that the creation of a flexible legal instrument of a non-binding character would attract more easily the consensus required while, furthermore, it would serve more effectively the promotion of principle of party autonomy in the international arena and contribute to its subsequent refinement in the context of the legal systems that have already recognized it [9]. To the above can be added a number of advantages of a technical nature, such as the avoidance of the complex and time-consuming process – for those States involved – of ratification that accompanies any international convention, as well as the technically simpler (usually) future amendment of its content, as compared with a binding legal instrument [10].

III. Goal and scope of application

As set out in the Preamble, the specific set of rules was prepared with a view to affirming the key role of the principle of party autonomy and advancing its function further in the field of choice of law rules, while providing at the same time for some small-scale restrictions. It is possible to view it as a "code of current

best practices" in the field of choice of law in international commercial contracts [11]. According to the line of thinking of the drafters, the Principles should contribute in particular to the spread of lex voluntatis in countries which have either not as yet adopted the specific principle [12] or have recognized it, though in a considerably limited form, while it is also anticipated that the Principles will facilitate the further development and refinement of lex voluntatis.

It should be stressed, however, that the Principles' role and future prospects do not end here. More than that the set of rules in question is destined to be used as a standard for the drafting or revision of legal instruments of a national [13], regional, transnational or international nature, confirming yet again the longstanding contribution of the Hague Conference to the gradual unification and harmonization of choice of law rules. It is anticipated, however, that their contribution to the interpretation, supplementation and future development of rules of both national and international uniform private international law will be equally important. For this will lead to a common system of reference comprised of broadly accepted "General Principles" capable of forming an autonomous method – based on comparative research – for filling the gaps and shortcomings identified in conflict of law rules, whether in national or international legal instruments, thereby enhancing the effectiveness of the unification process.

The opening sentence of the Preamble, the content of which reappears in Art. 1, describes the scope of the Principles. It is clear that the latter concern choice of law in "international commercial" contracts. To implement them, two conditions need to apply: i) the internationality of the contract in question and ii) its commercial character. To a certain extent, the element of internationality is understood, since the choice of law rules concern exclusively cases that involve more than one legal order. Semantically, this element is defined in Art. 1(2) in a negative way, in that contracts of a national nature (i.e. contracts that are associated with the law of just one State) are excluded from the Principles' scope of application. As stipulated in the said Article, in order to best serve the goal of the Principles a contract is deemed to be international unless each party has its establishment in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State [14]. Accordingly, the international nature of the contract arises either from the professional establishment of the parties in different countries or from the elements which form the environment of the contract, such as, for instance, the place of conclusion of the contract, the place of performance, the parties' nationality, and so on. According to the drafters of the Principles, even if the parties are established in the same country the contract continues to be considered international unless the aforementioned factors are also located *in toto* within the same State. It is noted however that, although the said criteria lead, under a general approach, to ascertainment of the international nature of the contract, the establishment of internationality should be made each time on the basis of a careful *in concreto* review and assessment of all the factors of the case in question.

As explicitly stated in Art. 1(2), choice of law is excluded from the said internationalizing factors of the contract. This means that the parties are unable to internationalize a contract which, in all other respects, is strictly national by just choosing a foreign law, even when the choice in question is accompanied by a choice of forum or choice of arbitration agreement. The specific approach in respect of the internationality of the contract differs from the approach of the Rome (I) Regulation where, for lack of a respective criterion, only the choice of law or foreign forum is permissible and sufficient to make a national contract subject to the application of the said Regulation, though on the strict condition that the choice of the parties shall not prejudice the application of ius cogens provisions of the law of the State where all other elements of the contract are located (Art. 3(3) Rome I) [15].

As already noted, the second condition for the application of the Principles concerns the commercial character of the contract. The criterion is also found in other similar sets of rules, such as, for example, the UNIDROIT Principles. At this point we see that the term "commercial" contracts, although stated explicitly in the Preamble of the Principles (para. 1), is later omitted in Art. 1(1), where reference is made to their scope of application. The specific provision avoids clarifying the meaning of the said term, and limits itself to a general description of contracts that fall within the scope of application of the rules under consideration while defining those that are excluded from their regulatory scope.

Specifically, contracts that are considered commercial include those in which both parties are acting in the exercise of their trade or profession. In other words, they are B2B contracts. Under this formulation, the interpretative problems that would inevitably arise on account of the differences between national legal orders as regards the conceptual content of "commercial" contracts (as shown, for instance, by the prevailing view

in certain States that contracts should be viewed as commercial even when only one of the parties is acting in a professional capacity) are avoided. For the avoidance of any confusion regarding this matter, the Principles explicitly exempt from their scope of application consumer and labor contracts, which are considered non-commercial.

In other respects, this is a formula that is clearly influenced by the European model of the Rome Convention of 1980 and, thereafter, the current Rome (I) Regulation, in the framework of which a borderline is set between contracts that concern the protection of the weak party of the transaction and the rest, regarding which a rather liberal stance is adopted, with hardly any restrictions on freedom of choice [16]. By contrast, US private international law as formulated in the Restatement (Second) [17] does not provide special treatment for the protection of the weak party of the transaction, but just adopts the same restrictions on autonomy of choice for all contractual types, though the courts are assigned the different and case by case application of these restrictions, depending on the particular characteristics of the case in question.

It should be noted that the application of the Principles only to B2B contracts does not imply total rejection of the principle of lex voluntatis in the sphere of non-commercial contracts. The lack of a relevant reference is due more to the fact that the drafters of the Principles simply did not want to include in their text choice of law rules that would concern the contractual obligations in question, thereby expanding the application of the Principles beyond the bounds within which they wanted them to remain [18].

Again, along the lines of the Rome (I) Regulation (Art. 1(2)) and the Mexico Convention (Art. 5) the text of the rules in question included a list of topics that are expressly exempted from the scope of application of the rules (Art. 1(3)). These are matters such as the legal capacity of natural persons, arbitration clauses and choice of courts clauses, companies or other collective bodies and trusts, insolvency, and so on, regarding which there is no unanimity as to their contractual character or even the need for them to be subject to the principle of party autonomy. However, this exemption should not be construed as a negative stance on the part of the Principles vis-à-vis the application of lex voluntatis to certain issues. Rather, the drafters, as can be seen in the explanatory comments [19], deliberately avoided taking a clear-set position with regard to the said question, leaving it up to the discretion of the legislator (national or supranational) whether to extend the principle of party autonomy in some or even all the exempted questions.

IV. The principle of party autonomy

Article 2 provides for the principle of party autonomy in designating applicable law in the field of international commercial contracts. It is the central provision of this set of rules by means of which their primary goal is effected, i.e. the furtherance and, in essence, formation of the said principle. It is the connecting factor of private international law, with the longest historical course and almost universal acceptance in the sphere of modern-day international transactions, which has been at the center of academic discussion since the 19th century and has provoked, at times, intense controversy and debate as regards its doctrinal and legal foundation and the scope and limitations of its application [20]. Specifically, in the field of European private international law it has been described as "one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations" [21], while it met with similar recognition in the US through the Restatement (Second) of the Conflict of Laws (§ 187), which although a non-binding instrument was adopted by virtually all the federal states [22], and through § 1-105 of the Uniform Commercial Code (UCC).

This provision, in combination with Art. 3 with which it is intimately associated, refers more generally to the option for choice of law or rules of law by the parties without making a distinction between national jurisdiction and arbitral tribunals. Consequently, the application of lex voluntatis takes on a universal character irrespective of how the contractual dispute is resolved. In all other respects, the Principles – moving essentially along the lines of the Rome (I) Regulation – form a broad frame for the function of autonomy of choice while at the same time they introduce some minimum restrictions that concern in particular internationally mandatory rules and the reservation of public policy.

1. Contract splitting (Dépeçage)

Article 2(2)(a) provides for contract splitting [23]. This provision reflects the prevailing notion in both the Rome (I) Regulation (Art. 3(1)) and the (Second) Restatement of the Conflict of Laws (§187(2)) that the parties can choose the applicable law of their contract in whole or in part. The specific option is directly associated with the principle of freedom of choice in the sense that it constitutes the logical consequence of the latter and a particular form of its expression.

If the parties make a partial choice of law, the remainder of the contract is governed by the law otherwise applicable in the absence of choice. As can be seen, in contrast with the Rome (I) Regulation (Art. 4), the text of the Principles does not provide for an alternative mechanism for defining the lex causae of the contract on the basis of factual connecting factors, since the specific set of rules, as already noted, is restricted exclusively to the formulation of the principle of lex voluntatis without comprising more generally a comprehensive system for determining applicable law. Thus, according to Art. 2(2)(a), the law applicable to the remainder of the contract will be determined by the court or arbitral tribunal through objective connecting factors that are provided in the choice of law rules relevant to the case in question. The option, however, for contract splitting, as stated explicitly in Art. 2(2)(b), becomes even broader insofar as the parties can choose different laws for different parts of their contract. This provision could theoretically prove useful, particularly in cases of complex contracts of long duration, provided that the law regimes chosen are compatible with each other and do not influence negatively the homogeneity of the contractual relationship [24].

It should, however, be noted that the specific method for defining lex causae presents probably more of academic interest than helping to address the legal relationship effectively. International practice indicates that the parties rarely go ahead with contract splitting so as to avoid the risk of causing likely contradictory conditions, as a result of the parallel application of more than one law regime, and to strengthen the certainty of law [25].

2. Timing and modification of the choice of law

In the framework of absolute freedom of the parties, the Principles set very broad timing for both the initial choice and possible modification of the chosen law (Art. 2(3)). Specifically, the parties can agree at any time the submission of their contract to a specific law, or even to modify, after the conclusion of the contract, their initial choice determining a new lex contractus. In other words, choice – or change – of law subsequent to the conclusion of the contract is accepted, though the impact of the specific choice or change may be stipulated by the applicable lex fori or the rules governing the procedural framework of the arbitration, depending on their legal characterization as procedural or not issues.

Given that the law chosen by the parties governs, inter alia, the validity and the consequences of invalidity of the contract (Art. 9(1)(e)), there is the risk of retroactive invalidation being created by the subsequently designated law. To avoid the eventuality of such an adverse development, a limitation is placed on the modification of the lex contractus, with the same content as the corresponding provision of Art. 3(2) of the Rome (I) Regulation, by which every modification of applicable law made after the contract has been concluded shall not prejudice its formal validity (Art. 2(3)). Accordingly, even if it is assumed that the new law leads to invalidation of the contract concluded, the formal validity of the latter is not prejudiced since it was valid according to the initial chosen law.

In addition, following the general trend (Art. 3(2) of the Rome (I) Regulation), the Principles stipulate yet another limitation vis-à-vis the rights of third parties arising from the contract. Specifically, those rights that were established on the basis of the original lex contractus are not adversely affected by any substantial or formal invalidity of the contract. As a result, if the latter was valid under the initial law, the third parties would be able to pursue all the rights deriving from the said contract regardless of whether, subsequently, it was rendered invalid (substantially or formally) by the newly chosen lex contractus.

3. Unlimited freedom of choice

As regards the qualitative characteristics of the choice of law, Art. 2(4) establishes the absolute freedom of the parties in the sense that the chosen lex contractus is not required to have a geographical or other connection to the parties or the contract [26]. The provision in question follows the line of thinking of the European legislator in the frame of Art. 3(1) of the Rome (I) Regulation, where likewise provision is made for the option, without limitation, to agree the applicable law. This provision thus contrasts with § 187 (2a) of the US Restatement (Second), which, for issues that are beyond the regulatory competence of the parties, requires a "reasonable relation" between the State of the chosen law and the parties or the transaction, or, to put it another way, the existence of a "reasonable basis" capable of establishing the specific choice. In the same spirit, § 1-105 (1) of the US Uniform Commercial Code (UCC) provides that the law of the State chosen by the parties is applicable on condition that there exists a "reasonable relation" between the State in question and the parties or the transaction.

In the framework of the Rome (I) Regulation, the limitation of party autonomy through the element of geographical connection is found only in contracts for the carriage of passengers (Art. 5(2)) and certain insurance contracts (Art. 7(3)), while for all other types of contracts no provision is made for any kind of connection to the State of the chosen law. The Principles, as already noted, move in the same spirit, following the internationally prevailing trend, which is reflected in the majority of international contracts of related subject matter and exerts a strong influence on some federal laws of the US legal system.

4. Application of non-national rules

Besides the innovative element of the soft law nature of the rules under discussion, a yet more important innovation perhaps – related to their material content – is contained in the provision of Art. 3 [27], and concerns the significant broadening of the scope of application of the lex voluntatis by means of the option to choose the "rules of law" [28] instead of just a national law as the lex causae of the contract [29], and, what is more, independently of the sensed court or tribunal.

The application of non-State law before the national jurisdiction was the subject of heated academic debate within the Special Commission responsible for drafting the Principles. This particular issue has occupied the attention of the law community as well as the leading players in international transactions [30], whose interests exert pressure in the direction of greater liberalization in the sphere of cross-border contracts from the rules of heterogeneous origin (state or inter-state) and the predominance, respectively, of rules of non-binding character ("soft law") as a particular expression of maximization of the regulatory role of private will.

In the sphere of international arbitration, the choice of lex mercatoria or some other a-national set of rules has become accepted doctrine due to the special character of the arbitral phenomenon, although in practice there has emerged a sporadic and rather infrequent resort to a designation of this kind for lex contractus on account of the serious drawbacks that come with it [31]. A positive provision for this option is included in Art. 28 of the UNCITRAL Model Law, which provides explicitly for the choice of substantive law rules [32], while a rule of similar content is included also in national and non-national arbitration systems. Furthermore, the UNIDROIT Principles, which are considered an updated Restatement of lex mercatoria or of transnational commercial law [33], provide for their application only when the parties agree to submit their contract under the said rules [34]. In the same spirit, the Principles of European Contract Law (PECL) have included the choice of law rule, the content of which is similar to that of the Preamble of the UNIDROIT Principles [35]. These provisions constitute perhaps the first examples of rules that are included in instruments of a transnational character, and provide expressly the choice of a-national law without limiting it just to the sphere of arbitration.

On the level of international contracts, the proponents of the UNIDROIT Principles and PECL have asserted that the Inter-American Convention on the Law Applicable to International Contracts (the Mexico Convention 1994) opens the way for private international law reference for certain sets of rules. The idea of this kind of choice was in fact advanced to the level of negotiations, particularly by Fritz Juenger, with the result ultimately that the use of "rules of law" was included in the said Convention without, however, showing any direct connection with the principal of party autonomy. Specifically, the relevant line of argument was formulated with reference initially to Art. 9(2), according to which the national judge will have to take into consideration the general principles of international commercial law when the parties have failed to make a choice, and also to Art. 10, which includes an escape clause that applies both in the case of choice of law by the parties and in the designation of the lex contractus with objective elements. According to the specific provision, when considered necessary the national judge can take into consideration the practices and principles of international commercial law, i.e. the lex mercatoria, so as to satisfy the requirement for justice and equity. Accordingly, a supplementary rather than a central role is reserved for lex mercatoria as regards the definition of the lex causae effected by the Convention [36]. Special reference to the principle of party autonomy is made in Art. 7(1), which expressly provides for choice of law by the parties without, however, there being any indication on the part of the international legislator as to the permissibility of an agreement about the application of non-national law. Thus, it is not possible to support on reasonable grounds the parties' ability to designate the lex mercatoria or a set of rules as the lex causae of their contract, and views to the contrary tended rather to create confusion than contribute to the acceptance of such a choice in a substantial way [37].

More recently, the position regarding the application of non-national rules by state courts was reasserted more strongly in view of the publication of the Rome (I) Regulation. Specifically, the Green Paper submitted by the Commission contained the question whether the parties should have the option to make a direct choice

of international convention or even of general principles of law [38]. Reactions were mixed and reflected the positive stance of, primarily, the academic community and the somewhat negative reservations of various economic players, business organizations and consumer associations [39]. Regardless of this, however, the Commission – clearly with its eyes on the Principles of UNIDROIT and PECL, as well as the DCFR (Draft Common Frame of Reference) – provided in its opening proposition the option for the parties to choose as applicable law the general principles and rules of substantive law of contracts that are recognized internationally or within the EU (Art. 3(2)); in addition, it was expressly stated that the purpose of the provision was to further enhance party autonomy as a fundamental principle. The specific proposition was not adopted in the final text of the Regulation while on the initiative of the European Parliament certain points of the preamble were modified; though they did not add anything to what already applied, they could perhaps be considered as reflecting intentions to undertake initiatives in the future [40].

As appears in the preliminary work on Article 3 of the Principles, the initial proposal of the working group provided a simple formula so that the choice of law could have the widest possible content [41]. In addition, with a view to furthering lex voluntatis, the same working group proposed that the draft Principles not contain an explicit designation or formulation of limitations regarding "rules of law" while, in contrast to the draft Rome I Regulation, the group rejected the criterion of selectivity of rules on the basis of international or regional recognition. The only requirement that was adopted with regard to the chosen law was that the latter should make up a coherent body of provisions that preclude "pick and choose individual rules". Nonetheless, as the process continued, it was considered by the members of the Hague Conference that freedom of will, as proposed to function on the basis of the draft of the working group, went beyond the usual bounds of national legislations and, after a process of compromise, ended up as the provision of Art. 3 as it now stands, which, as can be seen, imposes a number of eligibility requirements for the applicable law [42].

To take a closer look: in contrast with the initial position of the working group, it provides that the parties can choose a set of rules that are generally accepted on an international, supranational or regional level. The accompanying comments on the said provision indicate that the particular criterion aims at designating a set of rules which, although they do not have to be comprehensive, should attain a minimum level of fullness of content so as to be in a position to provide solutions to the usual problems that arise in contractual relations in the sphere of international transactions [43]. Conversely, the sporadic choice of a small number of rules or, even more so, of individual rules is precluded.

At transnational level, international conventions could be considered as a generally accepted normative framework when executed as a result of an agreement between parties, such as the Vienna Convention for the International Sale of Goods (CISG), which can be designated by the parties as applicable law in the sense of "rules of law", in cases where otherwise the particular convention would not apply on the basis of its specific terms (Art. 1 CISG). Similarly, the UNIDROIT and PECL Principles, which as regards the integrity of their content are clearly closer to national legal systems than the systemically haphazard content of the lex mercatoria, would serve just as well the goal of designating the lex contractus by the parties in the context of the Principles in question.

However, the above supposition raises some questions. First, the requirement for "general acceptance" of the chosen set of rules contains a degree of vagueness without, moreover, specifying the group of persons or institutions whose acceptance is sought in order to fulfill this requirement. This criterion would apply more effectively in the case of binding instruments, such as the CISG, which is adopted by all contracting states and, by extension, is implemented by their national courts, although compliance with the "general acceptance" is still relative insofar as the member States may exclude the application of the Convention (Art. 6 CISG). As to the potentially eligible use of the UNIDROIT and PECL Principles, the proof of their general acceptance seems questionable, given the fact that they are not implemented by national courts and their role is restricted to nothing more than a simple reference point for certain issues of interpretation. Although they enjoy greater acceptance by arbitral tribunals, this does not mean that the criterion in question is in any way satisfied. On the other hand, the acceptance of the above mentioned specific instruments by the key players in the sphere of international transactions would again not lead to general acceptance because, since non-State law cannot be chosen as the lex causae of the contract, it is not generally accepted, and as long as it is not generally accepted, it may not be eligible for use according to the Principles, leading us thus in a vicious cycle. Furthermore, one may ask what further assurances, according to the drafters of the Principles, are added to the criterion in

question by, in particular, the acceptance of the chosen rules on the supranational or international and regional level, such as do not already comprise innate elements of the concept of "general acceptance".

According to the second restriction of Article 3, the chosen set of rules should be neutral and balanced. As indicated in the commentary [44], the neutrality of the rules is not related to their substance, but has a more formalistic character and concerns their source of origin. Hence, the non-State law may be eligible if it derives from an impartial body which is not linked to the contractual parties and if it represents diverse legal, economic and political perspectives, i.e. a neutral and independent set of rules [45].

The Principles are silent regarding the option to choose trade usages as lex causae of the contract, and understandably so, since, from a systematic viewpoint, they cannot form a comprehensive set of rules capable of resolving basic issues of contractual obligations. These Principles play an ancillary role in relation to the lex causae of the contract, and any impact they may have on the mutual rights and obligations of the parties is determined either by the chosen law or by other rules governing the dispute in question (see Art. 9 CISG, Art. 1.9 UNIDROIT Principles, Art. 28(4) UNCITRAL Model Law, and Art. 21(2) ICC Rules) [46].

Besides the restrictions outlined above, which concern specific attributes of the chosen a-national law, a more general supposition is also posed for its application, according to which the forum must recognize the ability of the parties to choose such law for disputes brought before national courts ("…unless the law of the forum provides otherwise"). This goes without saying, given that the Principles, as is generally the case with every set of rules identified as "soft law", apply to the extent and within the limits set by the current law of the forum. Yet, on the other hand, it should be noted that the reference to this restriction expressly confirms that the current regime in most national jurisdictions (including the US and the EU) is not affected, and, unlike arbitration, such a wide application of party autonomy cannot be allowed at the expense of national law. Thus, member states of the Hague Conference belonging in this category have yet another reason to reject a private international law equalization of "rules of law" with national law in cases brought before national courts, whereas, on the other hand, the status quo in arbitration proceedings is not changed in relation to that issue.

It should also be noted that a significant problem arises from the choice of a certain non-national set of rules, in particular with regard to filling gaps that are inevitably created when these rules of law do not cover the contract sufficiently or cover only certain aspects of contract law. For example, although the UNIDROIT Principles provide for the authorities of the agent (see Art. 2.2.1) they do not deal with the relationship between principal and agent. Similarly, the CISG refers exclusively to the sale of goods without adopting a general approach for contractual obligations. As a result, the agreement of the parties on the application of such rules leads without any doubt to the creation of regulatory gaps, which in the absence of special provisions in the Principles should be filled by designating additionally a national law, as noted in the commentary [47]. Although this option is provided to the contractual parties regardless of the special reference in the commentary of the Principles, it reduces substantially the value of the choice of non-national law.

5. Existence and validity of the agreement on choice of law

In legal theory and practice, the agreement on choice of law is treated as a reference contract of private international law (Verweisungsvertrag) which is independent and clearly distinct from the main contract in terms of methodology and function [48]. As a contract, it is necessary that certain conditions are in place for its conclusion and validity to create the corresponding legal effects. The question is, what law will provide the basis on which the existence and validity of this agreement will be decided? Various national codifications of private international law and existing international conventions indicate that there are two main trends, with the first leading to the application of the law indicated by the choice of law rules of the forum, without leaving any room for party autonomy, and the second favoring the said principle by submitting these issues to the applicable law as laid down in the clause of the main contract itself.

Specifically, the Principles – like in fact most international conventions [49] – exclude from their scope the capacity of natural persons (Art. 1(3)(a)), and consequently, such matters are to be resolved by the choice of law rules of the forum. Many national legal systems work along the same lines, excluding such matters from the regulatory scope of party autonomy and submitting them, accordingly, to choice of law rules that regulate the personal status of the individual. A similar provision is specified in Rome I Regulation (Art. 1.2a), in contrast with the Restatement (Second) of Contracts which applies the law chosen by the parties to the capacity of natural persons (§ 198 – capacity to contract).

With regard to the existence and material validity of the agreement designating the lex causae, the Principles provide for a combined application of two laws and, more specifically, the agreed lex causae and the law applicable in place of the parties' establishment (Art. 6(1) and (2)). In particular, the Principles stipulate that the law purportedly chosen by the parties determines in principle whether they have reached an agreement on the applicable law and if this agreement is materially valid. As a result, if the chosen lex causae confirms the existence of a valid agreement on choice of law, then that law applies accordingly to the main contract unless the contesting party can prove lack of the necessary consent by invoking the law of the state in which that party has its establishment (Art. 6(2)). An exception clause is thus introduced, which functions subject to two concurrent conditions, i.e.: (a) under the circumstances, it would not be reasonable to make a determination on whether there is consent or not under the lex causae of the contract, as specified in para. 1; and (b) the application of the law of the state in which the same party has its establishment leads to invalidity of the choice of law agreement, e.g. for reasons of duress or fraud or the consequences of silence in the process of contract formation. As we can see, this provision is in fact identical to Art. 10 of the Rome (I) Regulation and Art. 10(1)-(3) of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986).

The formal validity of the agreement on the choice of law is regulated in Art. 5 of the Principles by a substantive rule of private international law which establishes that such a choice of law is not subject to any requirement as to its form ("no form"), unless the parties have agreed otherwise. The introduction of this rule is justified, first, by the need to further facilitate international trade and, second, on the grounds that most legal systems do not prescribe any specific form for the majority of international commercial contracts, including choice of law clauses (see Art. 11 CISG; Art. 1(2) of the UNIDROIT Principles), as well as by the fact that many private international law codifications employ a set of alternative connecting factors which aim at the formal validity of the contract (favor negotii), such as, for example, Art. 11(1) of Rome (I) Regulation and Article 13 of the Mexico Convention [50]. This provision is fully consistent with Art. 7 of the Principles, which provides that a choice of law cannot be challenged solely on the ground of invalidity of the main contract. In other words, the agreement on choice of lex causae is to be kept separate from the main contract that contains the relevant clause, thereby allowing different treatment of the agreement and the contract in terms of both material and formal validity. Specifically, the formal validity of the main contract is governed by the law chosen by the parties or any other law designated on the basis of objective criteria, which sustain the validity of the contract (Art. 9(1) and (2)).

The absence of formal requirements for the choice of law agreement, as mentioned above, applies insofar as the parties have not agreed otherwise. This means that if the parties agree that certain formalities should be met in respect of the choice of law clause (for instance, a no-oral modification clause), these terms should apply, otherwise the choice of law will be deemed invalid.

6. Restrictions on lex voluntatis

As with all national laws that recognize party autonomy, so too the Principles allow party autonomy to operate within certain limits, though these limits are not set in a uniform way, but vary from country to country. This means that in order to set limits on the application of the law chosen, each national forum deciding on a cross-border contract should first identify the law of which state in particular – i.e. of those involved in the contract – will determine the respective restrictions, thus constituting the lex limitatis of the contract.

Comparative law research indicates in this case that the following trends have emerged on the international level [51]. According to the first trend, only the law of the forum is taken into consideration. In this context, the only restriction recognized by the majority of national laws and international conventions is the public policy (*ordre public*) of lex fori, while some normative systems provide for additional restrictions that derive from mandatory rules. Moreover, a relatively limited number of laws take into account the restrictions set by the applicable law in the absence of choice (lex causae) [52]; and last, a third category of normative systems follows a middle path, combining the relevant provisions of lex fori with the respective provisions of the state of the lex causae (of the law designated on the basis of objective connecting factors) or even the law of a third state. This is the model adopted in the Rome (I) Regulation, by which the law chosen must be within the limits set, without prejudice to the *ordre public* and the overriding mandatory rules of lex fori (Art. 21 and 9(2), respectively). In addition, restrictions are also placed by mandatory provisions (jus cogens) of the applicable law in the absence of choice in consumer contracts (Art. 6(2)) and individual employment contracts

(Art. 8(1)), as well as by the jus cogens provisions of the state (other than the state whose law has been chosen) where all other elements relevant to the situation are located (Art. 3(3) and (4)).

Specifically, Art. 11 of the Principles deals with the operation of overriding mandatory rules (*lois de police*) [53]. It lays great emphasis on the role and importance of these rules, as well as the reservation of public policy in private international law, describing them as a "safety valve" without which national lawmakers might be reluctant to allow the application of party autonomy or "the rules of law" (within the meaning of a-national law) [54]. In addition, they serve as a very important control mechanism, enhancing the confidence that a national lawmaker has in the parties to such an extent that they are allowed the freedom to determine the applicable law themselves. Without provisions of this kind, which protect, above all, the public interest and the special nature of each legal system, the principle of lex voluntatis would either have been rejected outright or, if accepted, would have been at risk of being undermined or even effectively abolished [55].

To denote the *lois de police*, the Principles use the term "overriding mandatory principles", which is consistent with the wording used in Art. 9 of the Rome (I) Regulation. This suggests that, at least in Europe, a uniformly cultivated understanding of their content has been ensured, though this is not the case in the rest of the legal world.

Unlike the Rome (I) Regulation, the Principles do not provide a definition of these provisions in Art. 11. According to the generally prevailing interpretation, they are jus cogens provisions, immediately applicable, in the sense that they apply irrespective of the determination method of the lex causae, that is, regardless of the choice of law other than the lex fori, while as to their content, they are provisions of the forum representing strong state intervention and implementing clear policies of the lawmaker safeguarding public interests.

Specifically, Art. 11(1) provides for the application of overriding mandatory provisions of the law of the forum (similar to Art. 9(2) of Rome (I) Regulation), while according to para. 2, the law of the forum determines when a court may or must apply or just take into account such overriding mandatory provisions of another legal system, i.e. other than that of the forum or of the law chosen by the parties, such as the legal system whose law would apply on the basis of objective connecting factors or a legal system of another state that is also associated with the contract by means of different criteria. Compared with the relevant provision of Art. 9(3) of the Rome (I) Regulation, it can be seen that the European provision is more narrowly defined, stating that the court may give effect exclusively to overriding mandatory provisions of the locus solutionis and on condition that these overriding mandatory provisions render the performance of the contract unlawful [56].

It should be noted, however, that the treatment of the *lois de police* and the answer to the general question of the utility of these provisions vary significantly among different non-European legal systems both in theory and in judicial practice. Recognizing the existing variations, the Principles delegate to the private international law of the forum the question of whether and under which circumstances overriding mandatory rules of another state, other than the forum, may or must be applied or taken into account by each court [57].

In addition to the overriding mandatory rules, the Principles provide in Art. 11(3) and (4) an exception based on public policy. Specifically, para. 3 refers to the public policy of the forum which may be invoked under three conditions, i.e.: (a) there must be a state policy of fundamental importance to justify its application to the case in question; (b) the chosen law must be manifestly inconsistent with that policy; and (c) the manifest incompatibility must arise in the application of the chosen law to a certain contractual dispute before the court.

It is observed that this wording refers to the relevant provisions of Art. 21 of the Rome (I) Regulation and Art. 17 of the Hague Convention on the Law Applicable to Agency (1978), where it is similarly required that the provision of a foreign law is manifestly incompatible with the fundamental notions of the forum. As a result, emphasis is put on the exceptional character of the public policy and any doubt as to whether the foreign law would be incompatible with the forum's fundamental policies must be resolved in favor of the application of the former. In addition, another element of the public policy is advanced with regard to the assessment of another state's law. This assessment is not carried out in the abstract but rather in a particular and individual way in light of each case under consideration. This means that a certain foreign law provision is assessed in the context of the dispute under consideration, along with the impact of its application on the fundamental principles of law or social values of the forum.

Art. 11(4) also recognizes the imposition of limitations by the *ordre public* of the lex causae chosen on the basis of objective connecting factors, i.e. the law that would apply in the absence of choice by the parties. Like para. 2 of the same article referring to the overriding mandatory provisions, the law of the forum,

including the choice of law rules, should determine the role of the public policy of a state other than the forum or the state whose law is chosen by the parties. This provision clearly takes into account, in particular, the fact that some legal systems, such as the US law, assign the role of lex limitatis to the *ordre public* of lex causae, i.e. to the *ordre public* of the state whose law applies in the absence of choice.

V. Scope of the chosen law

Art. 9 of the Principles describes the scope of the law chosen by the parties. First, it lays down the general rule that this law governs "all aspects of the contract", i.e. all issues relating to it, from its conclusion to its termination. This approach ensures certainty of law, as well as uniformity of outcomes while, at the same time, it reduces the risk of forum shopping, given that the law applicable to any aspect of the contract will be the law chosen by the parties, irrespective of the national court or arbitral tribunal that decides the dispute. However, it should be noted that the full submission of the contract to the principle of lex voluntatis does not affect the right of the parties to choose a different law for part of the contract (Art. 2(2)(b)), or even choose another law for one or more of the issues cited in this provision (dépeçage) [58]. Next, reference is made to a series of specific questions, while para. 2 of the same Article provides that any other governing law may be applied besides the law chosen, in order to ensure formal validity of the contract (favor negotii).

Paragraph 1 includes a non-exhaustive list of examples, introduced by the formula "…including but not limited to…", mentioning seven issues in total, which according to the drafters reflect the most important aspects of the contract, such as, for example, its interpretation (a) and the rights and obligations arising from the contract (b). The explicit reference to the said issues helps obviate problems associated with the legal characterization, since by listing them clearly their contractual nature is clarified in the framework of the application of the Principles, and, by extension, the law by which they are to be governed, which is none other than the law chosen by the parties rather than some other law, such as the lex fori or the lex loci damni that could also be applied because of the different characterization of the respective issues, such as, for instance, the various ways of extinguishing obligations, prescription and limitation periods, about which different legal systems adopt different approaches in respect of procedural or substantive character (d), the burden of proof (cf. Article 18(1) of Rome I Regulation and Article 12(g) of the Hague Sales Convention 1986) and legal presumptions (f) and, last, the question of pre-contractual liability (g). Consequently a single framework is developed for the legal characterization and, as a result, the prospect of achieving uniform solutions is further advanced.

As already mentioned, point (b) determines that the scope of the chosen law shall govern "rights and liabilities arising from the contract", and in combination with para. 1, which refers to "all aspects of the contract", we can conclude that the Principles limit party autonomy to contractual rights and obligations, leaving non-contractual obligations between the parties – such as obligations arising from tort – outside the scope of the chosen law. This limitation seems, at first sight, to be in harmony with the goal of the Principles in question, which is primarily to further simplify the terms under which international trade and international transactions in general operate, though it could be claimed that the intended simplification would be of even greater significance if the Principles included also the occurrence of tort between parties.

On the other hand, consideration needs to be given to the fact that the question of submission of a non-contractual obligation to the law chosen by the parties by virtue of an agreement concluded before the tort was occured is not addressed in the same way across all national legal systems. For instance, a uniform positive stance was developed in Europe by means of Article 14 of the Rome (I) Regulation, though under certain provisos. By contrast, in US law the situation remains confusing, with the Restatement (Second) being negative vis-à-vis pre-selection of the applicable law, while US case law includes some cases where choice of law clauses were taken into account, which explicitly included in their scope claims arising from non-contractual obligations. Given these disparities, and in view of the inevitable lack of general consensus regarding the matter, the drafters of the Principles decided to leave this kind of obligation out of the scope of these rules.

Choice-of-forum clauses also remain outside the scope of the Principles. This exclusion is directly related to the fact that choice-of-forum agreements are usually characterized as procedural contracts, since they are considered a fundamental element of international jurisdiction [59]. As a result, they are governed by the lex fori of the particular court before which the case is brought, by force of an unwritten customary rule of private international law by which procedural issues are subject to the law of the state of the forum [60].

As already noted, the second paragraph of Art. 9 deals with the question of formal validity of the contract and provides that the lex causae chosen by agreement may be ignored and, accordingly, any other governing law safeguarding its validity may be applied. The latter is determined by the choice of law rules of the state of the forum or the relevant rules applied by the arbitral tribunal. This provision, like in most national codifications of private international law, is governed by the principle of *favor validitatis*, i.e. the intention of the lawmaker to safeguard the validity of the legal act at all costs. In national laws, the observance of this principle is achieved by citing several alternative connecting factors, of which compliance with the law defined in the connecting factor that ensures formal validity of the legal act is sufficient. Normally, this is the law of the state where the contract is concluded (lex loci actus), the state of the parties' usual residence, or the state in which the respective representatives of the parties are present when the contract is signed. According to this provision therefore, national courts or arbitral tribunals are allowed to take advantage of one of the laws laid down in the relevant national choice of law rule, if this enables the court to safeguard the formal validity of the contract.

Final comments

With a view to further enhancing the functional role of party autonomy in the sphere of international trade, the Hague Conference took a groundbreaking step and published a set of non-binding rules which is expected to serve as a source of inspiration for every national and international lawmaker, as well as a reference point for state courts and arbitral tribunals. However, precisely because of this non-binding nature, the attainment of the goal of this set of rules depends entirely on the quality of their content and the effectiveness of the solutions they can offer. The authority of the institution that prepared the rules clearly plays a role in making this possible; however, beyond their theoretical value, such sets of rules need also to be assessed by the key practitioners in the legal and transactional realms.

After a first general assessment we believe that the Principles do not add any significant new features to the legal systems that have already developed and adopted the principle of party autonomy, with the exception of the possible application of non-national law before state courts. However, we remain doubtful as to whether this proposed regulation will be accepted in the near future, judging by the relatively recent negative stance of the EU in the context of the drafting of the Rome (I) Regulation. In addition, with regard to the rules currently in force in the sphere of arbitration, the restrictions set for the application of non-State law will probably raise more concerns than facilitate in an effective way the work of arbitral tribunals [61]. However, it is certainly the case that for Latin American countries a regulatory model has been created for the normative development of the principle of lex voluntatis, and the legal systems of the region now have the opportunity to evolve forthwith from a status of non-recognition of this principle to absolute expression of the principle by choosing rules of a-national origin.

In any case, and regardless of the level of acceptance of the Principles in future, the Hague Conference has produced a work which both furthered and enriched international academic discussion [62] in the search for uniform solutions to the application of party autonomy in cross-border contracts, leading ultimately to enhanced quality of the law-making process and the application of law on the national and transnational level.

References:

1. On this principle of private international law see Weintraub R., Functional Developments in Choice of Law for Contracts, *Collected courses of The Hague Academy of international law, (1984), vol. 187,* p. 239, 271, who considers the principle of party autonomy as "the most widely accepted private international rule of our time", while for Lorenz it is a "doctrine of convenience and business efficiency", Lorenz W., *Vertragsabscluß und Parteiwille im Obligationenrecht Englands* (1957), p.154; see also Nygh P., *Autonomy in international contracts,* Oxford (1999), Basedow J., Theorie der Rechtswahl oder Parteiautonomie als Grundlage des IPR, *RablesZ (2011)*, *vol.75,* p.75 *et seq.,* Stamatiadis D., *Party Autonomy in International Contract Law,* Nomiki Vivliothiki (2011), Rühl G., *Party Autonomy in the Private International Law of Contracts*, in: *Conflict of Laws in a Globalized World,* Cambridge University Press, 2007, p.153 *et seq*.
2. See Regulation (EC) No 593/2008 (Rome I), the Inter-American Convention on the Law Applicable to International Contracts (The Mexico Convention, 1994) as well as other international conventions of the Hague Conference relating to various individual types of contracts in international transactions such as, Convention of 30 June 2005 on Choice of Courts Agreements, Convention of 5 July 2006 on the Law Applicable to Certain Rights of Securities held with an Intermediary, Convention of 22 December 1986 on the Law Applicable to Contracts for the International Sale of

Goods, Convention of 14 March 1978 on the Law Applicable to Agency, Convention of 15 April 1958 on the Jurisdiction on the selected forum in the case of International sales of Goods, and Convention of 15 June 1955 on the law applicable to International sales of goods. Apart from these special types of contracts there has not been any statute regulating in general the contractual phenomenon in the field of private international law.

3. See Regulation (EC) No 864/2007 (Rome II), Regulation (EC) No 650/2012 and Regulation (EU) No 1259/2010 (Rome III) of the law applicable to divorce and legal separation.
4. Roughly three decades earlier a feasibility study was carried out on the development of an international convention for law applicable to contractual obligations, which indicated that there was probably only limited prospects of success for such a convention, with the result that the initiative was abandoned, see van Loon H., *Feasibility study on the law applicable to contractual obligations*, Prel. Doc. E of December 1983.
5. All the documents related to this legal undertaking can be found on the Hague Conference website at <www.hcch.net> under the link "Choice of Law in Contracts" and then "Preparatory Work", see also Marta Pertegás & Brooke Adele Marshall, Harmonization Through the Draft Hague Principles on Choice of Law in International Contracts, *Brook.J.Int'lL. 2014, vol.39,* p.975, 980, Martiny D., Die Haager Principles on Choice of Law in International Commercial Contracts – Eine weitere Verankerung der Parteiautonomie, *RabelsZ (2015), Vol.79,* p.625 et seq.
6. The working group was composed of N.B. Cohen (USA), C.Croft (Australia), S.E. Darankoum (Canada), A.Dickinson (UK), A.Sadek El Kosheri (Egypt), B.Fauvarque-Cosson (France), L.Gama, E.Souza (Brazil), F.J.Garcimartín Alférez (Spain), D.Girsberger (Switzerland), Y.Guo (China), M.E. Koppenol-Laforce (Netherlands), D.Martiny (Germany), C.McLachlan (New Zealand), J.A. Moreno Rodríguez (Paraguay), J.L. Neels (South Africa), Y.Nishitani (Germany), R.Oppong (UK), G.Saumier (Canada), and I.Zykin (Russia).
7. Soft-law documents are instruments that have received general acceptance and recognition, mainly because of the status and prestige of the commissions or international organizations that draft them; they are updated regularly to keep track of current developments. Furthermore, they are of a neutral nature because they do not constitute the expression of the views of a single national legal order, but rather a synthesis of existing trends across a variety of legal systems, and they are prepared on the basis of the comparative method, thus comprising a uniform regulatory framework with a coherent content that is directly accessible and intelligible to the parties of an international transaction, see note 1 hereinabove, Stamatiadis D., *op. cit*., p.247, 248. On the European level, instruments of this kind that led to the emergence of a uniform legal frame in the field of contracts are the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law, and the more recent "Common Frame of Reference", see Boele-Woelki K., *Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws,* Martinus Nijhoff, Leiden/Boston (2010), p.75 et seq., Bonell. M.J., *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts,* Brill/Nijhoff, 3rd edn., 2005, Voulgaris J., The Application of the UNIDROIT Principles of International Commercial Contracts in Private International Law, *Revue Hellénique de Droit Européen* (2001), p.113 et seq., Stamatiadis D., The Application of the UNIDROIT Principles of International Commercial Contracts and Principles of European Contract Law by the Courts and Arbitral Tribunals, *Revue Hellénique de Droit Européen (2007)*, v*ol. (27)*, p.1 et seq., see also Neels J.L., The nature, objective and purposes of the Hague Principles on Choice of Law in International Contracts, *Yearbook of PIL 2013/2014*, p.45 et seq.
8. See Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts (November 2013), p.4, 5, available on the official site of the Hague Conference, see above, note 5; Symeonides S.*,* The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments, available online at: *http://ssrn.com/abstract=2256661* [pdf], p.5, Martiny D., *op. cit.,* p.625.
9. See Introduction to the Hague Principles on Choice of Law in International Commercial Contracts, para. I9.
10. See Marta Pertegás & Brooke Adele Marshall, *op. cit*., p.983.
11. See Preamble para. 1, commentary no.2.
12. Especially the countries of Latin America, see Symeonides S.*, op. cit*., p.4, and references, Martiny D., *op. cit.,* p.629.
13. Such as, for example, the recent Law 5393/2015 of Paraguay regarding applicable law in international contracts, which was formulated on the basis of the system embodied in the Hague Principles.
14. Accordingly, this set of Principles differs from respective definitions that either are attributed in a positive way to other international instruments, such as the Hague Convention of 1986 on the Law Applicable to Contracts for the International Sale of Goods (Art. 1(a), (b)) or approximate to the meaning of internationality in a broader framework, defining as international those cases that involve "conflict of laws" or a "choice between laws of different states"; see also Art. 3, Hague Securities Convention of 2006.
15. The Hague Securities Convention (2006), which in Art. 3 states that "This Convention applies in all cases involving a choice between the laws of different States", moves in the same spirit as Art. 1(1) of the Rome I Regulation, which for the application of the specific legislative instrument requires the existence of "contractual obligations in civil and commercial matters … involving a conflict of laws".

16. Recital (23) of the Rome (I) Regulation provides that: "As regards contracts concluded with parties regarded as being weaker, those parties should be protected by conflict of law rules that are more favourable to their interests than the general rules". On the issue of the protection of the weaker party of the transaction in private international law, see the study by v. Hoffmann B., Über den Schutz des Schwächeren bei Internationalen Schuldverträgen, *RabelsZ (1974), vol.38*, p.396 et seq.; see also Lando O., The EC Draft Convention on the Law Applicable to Contractual and Non-Contractual Obligations, *RabelsZ (1974), vol.38*, p.6 et seq.
17. See Restatement (Second) of Conflicts of Laws, Section 187.
18. See Art. 1 (1), commentary No.1.11.
19. See Art. 1 (3), commentary No.1.24.
20. See in particular Nygh P., *op. cit*., p.3 et seq., Wicki A.A., *Zur Dogmengeschichte der Parteiautonomie im Internationalen Privatrecht,* Winterhur 1965, Schmeding J., Zur Bedeutung der Rechtswahl im Kollisionsrecht, *RabelsZ (1977), Vol.41,* p.299 et seq., Stamatiadis D., see note 1 hereinabove, p.29 et seq.
21. See Recital (11) of the Rome I Regulation.
22. As noted by Borchers: "courts of all conflicts stripes have flocked to the Second Restatement's broad endorsement of party autonomy in §187", Borchers Patrick J., 'Choice of Law in the American Courts in 1992: Observations and Reflections', *Am.J.Comp.L (1994)*, *Vol.42,* p.125, 135.
23. See Jayme E., Betrachtungen zur "dépeçage" im Internationalen Privatrecht, in: *FS G. Kegel, 1987,* p.253, Papasiopi-Pasia Z., 'Dépeçage: A new concept of European and Greek PIL, *Revue Hellénique de Droit Européen (1996)*, p.741 et seq., Emilianidis A., *The new European PIL of Contracts,* Sakkoulas SA, Athens-Thessaloniki (2009), p.114 et seq., Stamatiadis D., *op. cit*., p.257 et seq., Nygh P., *op. cit*., p.128 et seq.
24. *Nygh P., op. cit*., p.130-131, *Münch/Komm-Martiny,* Art. 27 EGBGB, Bd 10 (2006), p.1704.
25. G.P. Calliess, in Calliess (ed.), Rome Regulations, Wolters Kluwer (2011), Art. 3 Rome I mn 48.
26. See on this point Marta Pertegás & Brooke Adele Marshall, *op. cit*., p.988.
27. On the evolution of the particular provision, see *Michaels R.,* Non-State Law in the Hague Principles on Choice of Law in International Contracts, available via the following link: *http://ssrn.com/abstract=2386186*, [pdf], p.8 et seq., Marta Pertegás & Brooke Adele Marshall, *op. cit*., p.996 et seq, Saumier G., The Hague Principles and the choice of non-State "Rules of Law" to govern an international commercial contract, *Brook. J. Int'l L. (2014), vol.40,* p.5 et. seq.
28. The term is used as per the meaning in Art. 28(1) UNCITRAL Model Law and 21(1) ICC Rules to indicate a-national law, i.e. rules that do not derive from a state legislator but are rather a product of the initiative of intergovernmental organizations such as UNIDROIT (UNIDROIT PRINCIPLES OF INTERNATIONAL CONTRACTS 2010) and UNCITRAL, academic groups and teams of technocrats, such as, for example, the Lando Commission (Principles of European Contract Law 2003), the European Group on Tort Law (Principles of European Tort Law 2005), the Commission on European Contract Law and the Study Group on a European Civil Code (Draft Common Frame of Reference 2008), as well as various international professional associations that work in the framework of markets or industries, such as, e.g., the market for diamonds, cereals, coffee et al.: see Pamboukis Ch., *The lex mercatoria as applicable law in international obligations,* Ant. Sakkoulas, Athens-Komotini (1996), p.39 et seq., Symeonides S., 'Party Autonomy and Private Law-Making in Private International Law: The Lex Mercatoria that isn't', in: FS Kerameus K. (2009), p.1397.
29. In other words, this amounts to selection of a foreign law as governing law (kollisionsrechtliche Verweisung) and not as mere incorporation of the chosen rules as contractual terms (materiellrechtliche Verweisung), see Kropholler, J., *Internationales Privatrecht,* Mohr Siebeck, Tübingen 2006, p.293, Pamboukis Ch., *op. cit*., p.131, Stamatiadis D., *op. cit*., p.23.
30. Note that the examination in particular of the argumentation set forth in defense of the positions for accepting (or not) a-national rules by state courts would require much more space than allowed by the present study. On this subject, see Nygh P., *op. cit.,* p.60 et seq. and 185 et seq., and respective references, Stamatiadis D., *op. cit.,* p.194 et seq., and respective references.
31. See Martiny, in Reithmann/Martiny, *Intern. Vertragsrecht* (2004), No. 71 et seq., Pambouki Ch., *op. cit*., p.127 et seq.
32. See Calavros C., *Das UNCITRAL-Modellgesetz über die internationale Handelsschiedsgerichtsbarkeit,* Gieseking, Bielefeld (1988), p.122 et seq.
33. Bonell M. J., *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd ed. 2005), p.9 et seq.
34. Para. (2) of the Preamble of the UNIDROIT Principles states that: "They shall be applied when the parties have agreed that their contract be governed by them".
    a. Art. 1:101 – Application of the Principles [2] These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.
35. Art. 9(2): "The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations".

Art. 10: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case".

36. Regarding these views see Juenger F.K., "The Inter-American Convention on the Law Applicable to International Contracts; Some Highlights and Comparisons", *Am.J.Comp.L (1994), vol.42,* p.381, 392; idem, "Contract Choice of Law in the Americas", *Am.J.Comp.L (1997)*, *Vol.45,* p.195, 204; Schilf S., *Allgemeine Vertragsgrundregeln als Vertragsstatut,* Mohr Siebeck (2005), p.347-359.
37. COM (2002) 654 final, question 8.
38. All the views expressed on the issue can be found at the following online address: http://ec.europa.eu/justice/news/consulting_public/rome_i/news_summary_rome1_en.htm (date: 17.09.2016).
39. See Recitals (13) and (14) Rome I Regulation.
40. See Prel. Doc. No 1 of October 2012, p.13 et seq.
41. For a general evaluation of practical challenges of Art. 3 see Saumier G., *op. cit.,* p.22 et seq.
42. Art. 3, commentary No. 3.10.
43. Art. 3, commentary No. 3.11.
44. See Martiny D. *op. cit.,* p.638.
45. Art. 3, commentary No. 3.13.
46. Art. 3, commentary No. 3.15.
47. See v. Bar Chr., *IPR II,* C.H.Beck, München (1991), p.309, Stamatiadis D., *op. cit*., p.100 et seq.
48. See Hague Sales Convention of 1986 (Art. 5), Hague Sales Convention of 1955 (Art. 5), Hague Agency Convention (Art. 2) and Mexico Convention (Art. 5).
49. Art. 5, commentary No.5.3.
50. See Symeonides S., *op. cit*., p.11-13.
51. These include the Restatement (Second) of Conflict of Laws, § 187(2)(b).
52. For overriding mandatory rules see Bogdan M., *Private International Law as Component of the Law of the Forum* (General Course on PIL), Hague Academy of International Law (2012), p.239 et seq., Papassiopi-Passia Z., *Mandatory Rules and Substantive Choice of Law Rules*, Thessaloniki (1989), Hartley T.C., 'Mandatory Rules in International Contracts: The Common Law Approach', *Recueil des cours*, vol. 266 (1997), p.337 et seq., Stoll A., *Eingriffsnormen im Internationalen Privatrecht-Dargestellt am Beispiel des Arbeitsrechts,* Peter Lang, Frankfurt a.M. (2001).
53. Art. 11, commentary No.11.8.
54. Art. 11, commentary No.11.9.
55. See Stamatiadis D., *op. cit*., p.358 et seq.
56. Note that a similar solution is adopted in Art. 11(2) of the Mexico Convention (1994).
57. See Art. 9, commentary No. 9.3.
58. Regarding choice-of-forum clauses, see Briggs A., *Agreements on Jurisdiction and Choice of Law,* Oxford (2008), p.61 et seq.
59. It is argued as well that the Principles apply also to the question of the validity of choice-of-forum agreements. This argument reflects the spirit of the Hague Convention on Choice of Court Agreements (2005), which – although it does not deal separately with dual-choice contracts – provides that the validity of the choice-of-forum agreement shall be determined by the law (including private international law) of the state of the court chosen by the parties (Article 5(1) and Article 6(a)). As a result, if this state has adopted the Principles, the choice-of-forum agreement shall be governed by the law chosen by the parties in the main contract, Symeonides S., *op. cit*., p.28.
60. See also Saumier G., *op. cit*., p.23.
61. Such as the Brooklyn Law School Symposium, "What Law Governs International Commercial Contracts? Divergent Doctrines and the new Hague Principles", and more recently the Conference in Lucerne on the Hague Choice of Law Principles held on 8/9 September 2016.

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