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ARTICLE

NEW TRENDS IN PARTIES' OPTIONS TO SELECT THE APPLICABLE LAW? THE HAGUE PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL CONTRACTS IN A COMPARATIVE PERSPECTIVE

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INTRODUCTION

In a cross-border contract with connections to at least two legal orders, the parties are able to choose the law that courts or arbitrators have to apply to the contract—an option which is possible under nearly all conflict of law rules in the world.[1] Parallel to the freedom to determine the content of the contract[2]—and as a variation of the general idea of the freedom of individuals[3]—choice of law is a part of the principle of private autonomy, a principle that Christian Kirchner has emphasized as the instrument for any person

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1. *See, e.g.*, Symeon C, Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 875 (2013) (pointing only to Latin America as an exception).

2. In contrast to the freedom to conclude a contract, that is, if the contract exists at all and with whom. *See generally Principle 3: Freedom of contract the starting point*, *in* PRINCIPLES, DEFINITIONS, AND MODEL RULES OF EUROPEAN PRIVATE LAW: DRAFT COMMON FRAME OF REFERENCE, 62 (Christian von Bar et al. eds., 2009), http://ec.europa.eu/justice/policies/civil/docs/dcfr_outline_edition_en.pdf [hereinafter DCFR] (". . . should be free to decide whether or not to contract and with whom to contract") and Art. II.-1:102 DCFR, which is nearly identical to Art. 1.1 of the UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2010), http://www.unidroit.org/english/principles/contracts/principles2010/blackletter2010-english.pdf [hereinafter PICC].

3. JAN KROPHOLLER, INTERNATIONALES PRIVATECHT 296 (6th ed. 2006); Peter von Wilmowsky, *EG-Vertrag und kollisionsrechtliche Rechtswahlfreiheit*, 62 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATECHT 1, 3 (1998); *see generally* Jürgen Basedow, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, 75 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATECHT 32, 50, 54 (2011).

to organize his life in his own responsibility,[4] basing it not only on the methodological individualism of traditional Economic Analysis of Law but also on the normative individualism of New Institutional Economics.[5] From an economic perspective,[6] choice of law supports a contractual market solution aiming at the common benefit of both parties.[7]

But most private international law norms prescribe different ways to exercise choice of law and create various limits of the so-called "party autonomy."[8] Similar to substantive contract law,[9] this freedom of the parties is restricted. The restriction is justified mainly by national objectives,[10] in rare cases by the *public policy* exception,[11] a bit more often based on international mandatory rules,[12] and regularly concerning special areas of contract law to protect the weaker party.[13] But these restrictions are not tackled by the Hague Principles on Choice of Law. To invoke overriding mandatory

4. Christian Kirchner & Andreas Schwartze, *Recht*, *in* LEXIKON DER WIRTSCHAFTSETHIK 876, 878 (G. Enderle, et al. eds., 1993).

5. *See, e.g.*, Christian Kirchner, *Die ökonomische Theorie*, *in* EUROPÄISCHE METHODENLEHRE 132, 151 (Karl Riesenhuber ed., 2010).

6. For information concerning the highlighted normative individualism in this field, *see* Christian Kirchner, *An Economic Analysis of Choice-of-Law and Choice-of-Forum Clauses*, *in* AN ECONOMIC ANALYSIS OF PRIVATE INTERNATIONAL LAW 44 (Jürgen Basedow & Toshiyuki Kono eds., 2006).

7. GIESELA RÜHL, STATUT UND EFFIZIENZ ÖKONOMISCHE GRUNDLAGEN ZUM INTERNATIONALEN PRIVATRECHT 347, 351 (2011) (pointing out that the competition between different legal orders is being animated and discussing regulatory competition); *see also* Kirchner, *supra* note 6, at 47 .

8. On the history of this concept, *see* Peter Nygh, AUTONOMY IN INTERNATIONAL CONTRACTS 3 (1999).

9. *See* ANDREAS SCHWARTZE, EUROPÄISCHE SACHMÄNGELGEWÄHRLEISTUNG BEIM WARENKAUF 595 (2000); Symeon C. Symeonides, *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple*, 39 BROOK. J. INT'L L. 1123, 1128 (2014).

10. Symeonides, *supra* note 9, at 1136; Daniel Girsberger, *Die Haager Prinzipien über die Rechtswahl in internationalen kommerziellen Verträgen*, 24 SCHWEIZERISCHE ZEITSCHRIFT FÜR INTERNATIONALES UND EUROPAISCHES RECHT 545, 548 (2014).

11. *See* Regulation (EC) 593/2008, of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I), arts. 9, 21, 2008 O.J. L 177 (EU) [hereinafter Rome I]. From 1988 to 2010, only twenty-six decisions from four member states (Germany, Italy, United Kingdom, Greece) were justified by the public policy exception. *See* UNALEX DATABASE http://www.unalex.eu/Judgment/JudgmentSearch.aspx. *Compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 90, *with* Laws Applicable to Foreign-Related Civil Relations of the People's Republic of China (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2010, effective Apr. 1, 2011), art. 5 (China) [hereinafter Chinese PIL Statute], *and* Act on the General Rules of Application of Laws, Law No. 10 of 1898 (amended 2006), art. 42 (Japan) [hereinafter Japanese PIL Act].

12. *See* Rome I, Art. 9. For the Chinese private international law, *see* Gan Yong, *Mandatory Rules in Private International Law in the People's Republic of China*, 13 Y.B. OF PRIVATE INT'L L. 305 (2012/2013).

13. In some fields, choice of law is channelized to certain legal systems, e.g., carried persons, Rome I, *supra* note 11, at art. 5(2), or policyholders, *id.* at art. 7(3). For consumers, *compare* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2), *and* Rome I, *supra* note 11, at art. 6(2), *with* Chinese PIL Statute, *supra* note 11, at art. 42, *and* Japanese PIL Act, *supra* note 11, at art. 11. For employees, *compare* Rome I, *supra* note 11, at art. 8(1), *with* Chinese PIL Statute, *supra* note 11, at art. 43, *and* Japanese PIL Act, *supra* note 11, at art. 12.

rules or to refer to the *ordre public* is still possible under Article 11 of the Hague Principles on Choice of Law in International Contracts (PCLIC),[14] and the areas of consumer or employment contracts are completely exempted by Article 1(1) sentence 2 of the PCLIC. However, other restrictions from domestic law are result from differing acceptance of the ways to choose a legal order, and in this regard standardization via the Hague Principles could be helpful. It will be analyzed in this study if this is the case.

All these national restrictions affect legal certainty, a very relevant aim of choice of law,[15] because the parties cannot be sure that the law they have chosen is applied. The choice of law is up to the private international law of the state in which a court adjudicates their legal dispute, following the principle that the conflict of law rules are those of the *lex fori*.[16] Just to make international contract litigation more complicated, consider the following: because the contracting parties often also have the option to choose the forum of their legal dispute—and through this indirectly the applicable choice of law rules[17]—they may reduce the uncertainty about the effectiveness of their choice of law, at least if the actors are informed enough about the features of the private international law of the forum.

To largely remove the differences between conflict of laws regimes regarding choice of law and the connected legal uncertainties leading to high expenses for information and significant transaction costs,[18] an international unification of choice of law rules similar to the UN-Sales Law

14. *See* Thomas Pfeiffer, *Die Haager Prinzipien des Internationalen Vertragsrechts*, 501, 509, *in* FESTSCHRIFT FÜR ULRICH MAGNUS (Peter Mankowski. & Wolfgang Wurmnest eds., 2014).

15. von Wilmovsky, *supra* note 3, at 4; KROPHOLLER, *supra* note 3, at 297; Peter Mankowski, *Europäisches Internationales Privat- und Prozessrecht im Lichte der ökonomischen Analyse*, *in* VEREINHEITLICHUNG UND DIVERSITÄT DES ZIVILRECHTS IN TRANSNATIONALEN WIRTSCHAFTSRÄUMEN: BEITRÄGE ZUM VIII. TRAVEMÜNDER SYMPOSIUM ZUR ÖKONOMISCHEN ANALYSE DES RECHTS 118, 124 (Claus Ott & Hans-Bernd. Schäfer eds., 2002); Georg Kodek, *Praktische und theoretische Anforderungen an die Rechtswahl*, *in* RECHTSWAHL – GRENZEN UND CHANCEN 85, 89 (Bea Verschraegen ed., 2010); *see also* Dietmar Czernich, *Die Rechtswahl im österreichischen internationalen Vertragsrecht*, 23 ZEITSCHRIFT FÜR EUROPARECHT, INTERNATIONALES PRIVATRECHT UND RECHTSVERGLEICHUNG 157, 158 (2013); Symeon C. Symeonides, *Party Autonomy in Rome I and II From a Comparative Perspective*, *in* CONVERGENCE AND DIVERGENCE IN PRIVATE INTERNATIONAL LAW – LIBER AMICORUM KURT SIEHR 513, 536 (Katharina Boele-Woelki, Talia Einhorn, Daniel Girsberger & Symeon Symeonides eds., 2010); Chen Weizuo, *Chinese Private International Law Statute of 28 October 2010*, 12 Y.B. OF PRIVATE INT'L L. 27, 38 (2010) (". . . the Chinese legislator has paid great attention to legal certainty and predictability . . .").

16. *See* Girsberger, *supra* note 10, at 545; *see generally* BERND VON HOFFMANN & KARSTEN THORN, INTERNATIONALES PRIVATRECHT 10 (2007).

17. These could lead to substantive provisions that are favorable to a party even without a choice of law agreement. *See* Andreas Schwartze, *Internationales Forum Shopping mit Blick auf das günstigste Sachrecht*, *in* GRENZEN ÜBERWINDEN – PRINZIPIEN BEWAHREN, FESTSCHRIFT FÜR BERND VON HOFFMANN 415–23 (2011).

18. For discussion concerning similar findings with regard to the substantive law of contract, *see* ANDREAS SCHWARTZE, EUROPÄISCHE SACHMÄNGELGEWÄHRLEISTUNG BEIM WARENKAUF 5 (2000).

(CISG)[19] or to the UNIDROIT-Principles of International Commercial Contracts (PICC)[20] in the area of substantive law, would be suitable. Therefore, the Hague Conference on Private International Law[21], acting in favor of a worldwide standardization of conflict of laws, has—after an interrupted attempt to regulate all of the rules of Private International Law in the area of contract, including the objective connecting factors at the beginning of the 1980s[22]—taken up only the issue of choice of law related to contracts in 2006 and had submitted a proposal for "Hague Principles on Choice of Law in International Contracts"[23] (PCLIC) in 2012, which was slightly revised in July 2014[24] by the Council of General Affairs of the Hague Conference. On March 19, 2015, the final version of the Hague Principles[25] was approved.

Below, I will describe several differences between the rules governing choice of law in contracts contained in the Hague Principles and in some selected currently applicable conflict of law instruments, such as the Rome I Regulation of the European Union[26] or recent national codifications like the Chinese PIL statute[27] or the Japanese PIL Act.[28] On that basis I will examine whether the attempt to unify choice of law worldwide is improving legal certainty for the parties. This study concentrates on the content of the Hague Principles, leaving aside their basic form as non-binding recommendations mainly for national and international legislators.[29]

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19. United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1989 U.N.T.S. 3, http://www.uncitral.org/pdf/english/texts/sales/cisg/V1056997-CISG-e-book.pdf.

20. PICC, *supra* note 2.

21. For further details concerning this organization, *see, e.g.*, Rolf Wagner, *Die Bedeutung der Haager Konferenz für Internationales Privatrecht für die internationale Zusammenarbeit in Zivilsachen*, 12 JURA 891, 891–96 (2011).

22. Hans van Loon, *Feasibility Study on the Law Applicable to Contractual Obligations, Proceedings of the Fifteenth Session*, Prel. Doc. E, Tome I, 98–113 (1984). A future resumption of the work to unify the rules to determine the law governing the contract without a choice of law is announced, see Hague Conference on Private International Law, Council of General Affairs and Policy of the Conference, Conclusions and Recommendations, 2 (Apr. 2010), http://www.hcch.net/upload/wop/genaff2010concl_e.pdf, but is assessed with scepticism, Symeon Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 877 (2013).

23. Hague Conference on Private International Law, Draft Principles as Approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary (Nov. 2012), http://www.hcch.net/upload/wop/contracts 2012principles_e.pdf.

24. Hague Conference on Private International Law, Revised Prel. Doc. 6 (July 2014), http://www.hcch.net/upload/wop/gap2014pd06rev_en.pdf.

25. Hague Principles on Choice of Law in International Commercial Contracts (approved Mar. 19, 2015), https://www.hcch.net/de/instruments/conventions/full-text/?cid=135 [hereinafter PCLIC].

26. Rome I, *supra* note 11.

27. Chinese PIL Statute, *supra* note 11.

28. Japanese PIL Act, *supra* note 11.

29. PCLIC, *supra* note 25, at Preamble § 2. For an extensive analysis, *see* Andreas Schwartze, *Weltweit einheitliche Standards für die Wahl des Vertragsstatuts – Anwendung-*

I. Main features of the Hague Principles on Choice of Law

There are some aspects of choice of law regulated in the Hague Principles that are not fully in line with all or even most of the actual private international law norms. First, the freedom of choice should be as unlimited as possible, for example, concerning the time of the choice, the range of the selectable legal systems,[30] and even the type of legal rules by including non-state standards.[31] Second, the parties' agreement on the choice should be as predictable as possible, therefore requirements for implied or tacit choices are necessary[32] and choices via standard terms need special treatment.[33] The third aspect is that the choice the parties have agreed on should be respected as much as possible and therefore its replacement by overriding mandatory provisions or based on arguments of public policy, like in the United States under sections 90 and 187 of the Restatement Second,[34] should be marginal.[35] This last aspect will not be discussed in this article.

A. Aspects of a Less Limited Choice of Law

1. Timing of the Choice

The Hague Principles state that the choice of the applicable law "may be made or modified at any time."[36] A very similar phrase is used in Art. 3(2) sentence 1 of Rome I,[37] and like the EU rule, the Hague provision seems to open the possibility for the parties to agree on the application of a certain legal system even after the beginning of legal proceedings (as is currently possible in China[38] and in Japan[39]). Such a late choice of law is

schancen und Anwendungsbereich der Hague Principles on Choice of Law in International Contracts, *in* Festschrift zu Ehren von Christian Kirchner 315–32 (Wulf Kaal, Matthias Schmidt & Andreas Schwartze eds., 2014); *see* Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contracts*, 79 Rabels Zeitschrift für Auslandisches und Internationales Privatecht 624, 631 (2015); Benedicte Fauvarque-Cosson, *New Principles in the Legal World: The Hague Principles on the Choice of Law in International Commercial Contracts*, *in* English and European Perspectives on Contract and Commercial Law 455, 459 (Louise Gullifer & Stefan Vogenauer eds., 2014).

30. PCLIC, *supra* note 25, at art. 2 §§ (2), (3).

31. *Id.* at art. 3.

32. *Id.* at art. 4.

33. *Id.* at art. 6 § (1)(b).

34. If "contravening a fundamental policy of a state that has a greater interest in applying its law . . .".

35. PCLIC, *supra* note 25, at art. 11. *See generally supra* notes 9–13 and accompanying text.

36. PCLIC, *supra* note 25, at art. 2 § (3) sentence 1.

37. The language is that they "may at any time agree." Nearly the same expression exists in Switzerland's Federal Statute on Private International Law, art. 116(3) sentence 1 IPRG-CH: "Die Rechtswahl kann jederzeit getroffen oder geändert werden" [The choice of law may be made or changed at any time].

38. For the official interpretation of the Chinese PIL Statute by the Supreme Peoples Court, see Knut Benjamin Pissler, *Das neue Internationale Privatrecht der Volksrepublik China: Nach den Steinen tastend den Fluss überqueren*, 76 Rabels Zeitschrift für Auslandisches und Internationales Privatecht 3, 31 (2012).

often made either because the parties only then realize that there is the option for a choice of law or because the court is assuming an implied vote for a certain legal order.[40] To avoid the homeward trend of courts applying the legal norms with which they are familiar, some states prohibit a conclusive choice of law, like Austria.[41] The drafters of the Hague Principles omit that problem, but they generally do not want to extend the effects of the unification of conflicts of law to procedural issues (the same could be said of the U.S. Restatement[42]). Therefore, the rules of procedure of the forum may decide upon the question of whether the choice of law in front of a court or an arbitral tribunal is valid.[43] Under the Rome I Regulation, most authors argue that the private international law of the forum alone has to decide that question, leaving only problems of proof to the procedural provisions.[44] This solution is favorable because opening the door to decisions based on rules of procedure would endanger the predictability of which law will be applied on the parties' contract, since national court proceedings are not unified and therefore difficult to survey. Finally, the parties should be free to choose the law, even during litigation, if this will not burden the court with additional costs.

2. Available Legal Orders

The Hague Principles do not require any connection "between the law chosen and the parties or their transaction."[45] The same is true for the choice of law under the Rome I-Regulation,[46] although this is not explicitly clear in the wording of Article 3. In contrast to Rome III[47] or the EU Succession Regulation,[48] there is no limitation on choice of certain legal systems.[49] That "freedom of choice"[50] gives the parties the chance to opt for a

39. *See* Yoshiaki Sakurada & Eva Schwittek, *The Reform of Japanese Private International Law*, 76 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATECHT 89, 104 (2012).

40. Stefan Leible *in* NOMOS KOMMENTAR BGB, art. 3 Rom I-VO rec. 62 (Barbara Dauner-Lieb, Thomas Heidel & Gerhard Ring, eds, 2014).

41. Austrian Federal Statute on Private International Law, at § 11 (2) IPRG-AT.

42. Symeonides, *supra* note 15, at 513, 537.

43. See commentary on Art. 2(3) PCLIC, no. 2.13.

44. *See* Leible, *supra* note 40; for discussion in favor of a choice of law in the course of proceedings, see Francesca Ragno, *The Law Applicable to Consumer Contracts under the Rome I Regulation*, *in* ROME I REGULATION, art. 3 rec. 46 (Franco Ferrari ed., 2015); BEA VERSCHRAEGEN, RUMMEL ABGB, art. 3 EVÜ rec. 23 (2004).

45. PCLIC, *supra* note 25, at art. 2 § (4).

46. Ragno, *supra* note 44, at art. 3 rec. 26; Leible, *supra* note 40, at rec. 23; VERSCHRAEGEN, *supra* note 44, at art. 3 EVÜ rec. 16.

47. Regulation (EU) No 1259/2010, Implementing Enhanced Cooperation in the Area of the Law Applicable to Divorce and Legal Separation, 2010 O.J. L 343, p. 10 (hereinafter Rome III).

48. Regulation (EU) No 650/2012, On Jurisdiction, Applicable Law, Recognition and Enforcement of Decisions and Acceptance and Enforcement of Authentic Instruments in Matters of Succession and on the Creation of a European Certificate of Succession, 2010 O.J. L 201, p. 107.

49. The same is true for Article 41, sentence 1 of the Chinese PIL Act, *supra* note 11, *see* Pissler, *supra* note 38, at 32, and of the Swiss Federal Statute on Private International Law, *supra*

neutral law, e.g., if they cannot come to a consensus on a certain law or if they want to use a law that is more suitable for their type of transaction.[51] This "expansive concept of party autonomy"[52] is rejected by the U.S. conflict of law rules because they do not accept a chosen law that has "no substantial relationship to the parties or the transaction" if there is "no other reasonable basis for the parties' choice."[53] But this requirement is easily met[54] because it should only prevent a choice of law for fully domestic transactions.[55] Arguably, the parties usually know best what is the most adequate legal environment for their relationship. Therefore, they should be free to choose any law they like without being forced to show any special link to the agreed legal system. This is even more necessary to foster the competition of legal systems by increasing the number of potential competitors[56]

3. Choice of Non-State Law

The most controversial feature of the Hague Principles is the option for the parties to choose a regulation that is not produced by a sovereign state—called "rules of law" in the Principles (even in the title of Article 3 of the PCLIC).[57] This also seems to be possible in China for international agreements or international usages, even if this is not obvious from the words of section 3 of the PIL Statute of 2011.[58] Now, in the published version of the Hague Principles,[59] the use of non-state rules is limited to those rules that "are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules," and more than that, it is up to the law

note 37, at art. 116 IPRG-CH (only in employment contracts the choice is limited, art. 121(3) IPRG-CH).

50. *See* Rome I, *supra* note 1, heading before art. 3.

51. Commentary on Art. 2(4) PCLIC, no. 2.14; Leible, *supra* note 40, at art 3 rec. 23 (2014).

52. Commentary on Art. 2(4) PCLIC, no. 2.15.

53. Restatement (Second) of Conflict of Laws § 187 (2)(a) (1971). *See also* Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 880 (2013).

54. Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217 (2013), with one "rare" example in 2012 to the contrary.

55. Symeonides, *supra* note 15, at 513, 524. This is directly regulated by Rome I, *supra* note 11, at art. 3(3).

56. L.E. O'Hara & E. A. Ribstein, *From Politics to Efficiency in Choice of Law*, 67 U. CHI. L. REV. 1151, 1227 (2000); RÜHL, *supra* note 7, at 497; *see generally* Giesela Rühl, *Methods and Approaches in Choice of Law: An Economic Perspective*, 24 BERKELEY J. INT'L L. 801, 814 (2006).

57. On the drafting process of this article, see Genevieve Saumier, *The Hague Principles and the Choice of Non-State 'Rules of Law' to Govern an International Commercial Contract*, 40 BROOK. J. INT'L L. 1, 5–18 (2014).

58. Pissler, *supra* note 38, at 10.

59. The draft of October 2012 only stated that "a reference to law includes rules of law." PCLIC, *supra* note 25, at art. 2(1) § (2).

of the forum to "provide[s] otherwise."[60] The last clause especially is a concession to the large majority of states that do not allow their courts, as opposed to arbitration panels,[61] to base their decisions on non-state rules,[62] such as in Japan[63] or Switzerland.[64] The option for contract parties to agree on the basis of private international law on unwritten "general principles of law" (usually the *lex mercatori*a) or even on certain written and publicized sets of norms drafted by so-called "formulating agencies" (such as: the Principles of European Contract Law (PECL) developed by the Lando-Group,[65] the above-mentioned PICC of UNIDROIT,[66] the Draft Common Frame of Reference (DCFR) on European Private Law[67] with the narrower optional instrument based on it, the currently postponed Common European Sales Law (CESL),[68] and even the PCLIC itself), is for instance excluded under Rome I. This is because following recital 13 of the Preamble, parties are not precluded from incorporating "by reference into the[ir] contract a non-State body of law or an international convention." This means that the parties may only integrate such rules into the contract on the basis of substantive law. In other words, parties must use their freedom to design the content of the contract within a single legal order[69] (the same "incorporation by reference" of non-state norms is possible under the U.S. Restatement;[70] a choice by means of private international law is only allowed in Oregon and Louisiana[71]).

The two main arguments against choice of non-state rules are first, that they are by no means complete or comprehensive—on the contrary, they

60. PCLIC, *supra* note 25, at art. 3. *See* Martiny, *supra* note 29, at 637; Pfeiffer, *supra* note 17, at 501, 504.

61. *See* Saumier, *supra* note 57, at 19.

62. Commentary on Art. 3 PCLIC, no. 3.14; Fauvarque-Cosson, *supra* note 29, at 463; *see* Leible, *supra* note 40, at art. 3 Rome I-VO rec. 23.

63. *See* Yuko Nishitani, *Party Autonomy and Its Restrictions by Mandatory Rules in Japanese Private International Law: Contractual Conflicts Rules*, *in* JAPANESE AND EUROPEAN PRIVATE INTERNATIONAL LAW IN COMPARATIVE PERSPECTIVE 87 (Jürgen Basedow ed., 2008); Sakurada & Schwittek, *supra* note 39, at 93.

64. Marc Amstutz, Nedim Peter Vogt & Markus Wang, Art. 116 rec. 21 IPRG, *in* BASLER KOMMENTAR: INTERNATIONALES PRIVATRECHT (Heinrich Honsell et. al eds., 2007).

65. Principles of European Contract Law 2002, http://www.jus.uio.no/lm/eu.contract.principles.parts.1.to.3.2002/.

66. *Supra* note 2. Saumier, *supra* note 57, at 24, especially mentions the PICC together with the CISG.

67. DCFR, *supra* note 2.

68. European Commission, Proposal for a Regulation on a Common European Sales Law, COM/2011/0635 final, amended by the European Parliament in its legislative resolution P7_TA 0159 (Feb. 26, 2014), http://www.europarl.europa.eu/sides/getDoc.do;jsessionid=B387E40B215E3EE8C5A6BB621D73B3E5.node2?pubRef=-//EP//TEXT%20TA%20P7-TA-2014-0159%200%20DOC%20XML%20V0//en.

69. Ragno, *supra* note 44, at art. 3 rec. 21; Girsberger, *supra* note 10, at 550.

70. Symeonides, *supra* note 15, at 513, 539.

71. RÜHL, *supra* note 7, at 489.

are, almost necessarily, incomplete[72]—and second, that they are not legitimized by a (more or less democratic) legislation process. The first argument is not convincing at all, because even if the parties choose a state-made law to be applicable to their contract, this "set of rules" only governs the problems arising out of their contract itself, mostly regulated in the field of substantive contract law (see the examples in Article 9 of the PCLIC on interpretation, rights and obligation arising from the contract, performance and the consequences of non-performance and so on), but not other aspects of their contractual relationship, such as their capacity to conclude a contract or the effects their contract has on their property.[73] These parts of their legal relationship are governed by different conflict of law rules, and sometimes there is no choice of law possible. Parties, especially those acting commercially on an international basis, are normally aware that they have to choose a fallback legal regime, which is recommended even by the drafters of the Hague Principles.[74] The second argument points to the problem of rules introduced by one of the parties which are designed in the party's favor, like standard contract terms of business actors or contract forms developed by certain branches or industries. In contrast to such individual rules, state-made law is normally seen as "neutral and balanced," which is one criterion required by Article 3 of the PCLIC. This problem seems to be relevant, because if private rules can be chosen under private international law, they cannot be controlled like standard contract terms integrated into the contract by shaping the content of the agreement. It does not matter whether there is an instrument to control such clauses in the chosen set of rules, such as in Article II.-9:408 of the DCFR,[75] because it can only be applied to the conflict of law choice itself. From that it becomes clear that the basic paradigm in conflict of laws, which states that all national laws have to be generally seen as equal, irrelevant of their differences in content, is shattered. Why are parties allowed "to use the contract rules of Burma and not the rules of business organizations like the International Chamber of Commerce?"[76] Therefore some rule selection, like from those in Article 3 of the PCLIC, could be necessary. That may even be true for national legal systems. The real problem in applying non-state rules of law is the

72. Ralf Michaels, *Non-State Law in the Hague Principles on Choice of Law in International Contracts*, *in* VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION: LIBER AMICORUM MICKLITZ 43, 63 (Kai Purnhagen & Peter Rott eds., 2014).

73. See the exemptions in Article 1 § (3) of the PCLIC *supra* note 25.

74. Commentary on Art. 3 PCLIC, no. 3.15. *See also* Michaels, *supra* note 72, at 60.

75. Instruments to control private contract clauses are not included in the Unidroit Principles, except for the more general "gross disparity" in Art. 3.2.7 PICC, because there only the entry of standard terms into the contract is controlled, Art. 2.1.19 PICC, and the special interpretation *contra proferentem* in Art 4.6 PICC *supra* note 2.

76. Matthias Lehmann, *Liberating the Individual from Battles Between States: Justifying Party Autonomy in Conflict of Laws*, 41 VAND. J. TRANSNAT'L L. 381, 426 (2008).

lack of authoritative sources for interpretation,[77] which leads to uncertainty. But the more parties choose this soft law, the more court decisions become available, leading to more predictability. Even from this perspective, including non-state rules into the choice of law makes sense.[78]

In the end, the parties' choice to opt for a "generally accepted"[79] non-state set of rules should be respected to foster party autonomy, because such a choice may cause disadvantages only for the parties to bear, not for the society.[80] Additionally, the main difference as compared to incorporating non-state rules into the contract by means of using the freedom to change the default rules of the applied legislative model is rather small. A genuine choice of law under private international law rules may avoid mandatory provisions of any national legal order, but there are only very few of these in commercial contract law—in contrast, for instance, to consumer contracts or employment contracts, which are not within the scope of application of the Hague Principles.[81] The rare remaining principles are good faith (which normally is contained in elaborated private set of rules),[82] and the ban on illegal or immoral agreements (which could more or less be handled by using overriding mandatory principles and the public policy exception).[83] In any case, the compromise solution in Article 3 of the PCLIC (". . . unless the law of the forum provides otherwise") should be deleted because it hinders the main goal of the Hague Principles—to harmonize choice of law—and creates new uncertainty by enabling national legal orders to ban non-state law.

B. Aspects of Better Predictability of Choice of Law

Predictability is one main goal in the area of conflict of laws[84] because actors should know in advance what law will be applied to a certain legal relationship if it has to be judged by a court. From an economic point of view, an efficient planning of actions is only possible if the consequences of these actions, which are often determined by the law, are predictable. As

77. Saumier, *supra* note 57, at 26. On this problem in general, see Andreas Schwartze, *Europäisierung des Zivilrechts durch 'soft la*w,' *in* ÖKONOMISCHE ANALYSE DER EUROPÄISCHEN ZIVILRECHTSENTWICKLUNG 130, 153 (Thomas Eger & Hans B. Schäfer eds., 2007).

78. For a more critical discussion, see Michaels, *supra* note 72, at 65.

79. PCLIC, *supra* note 25, at art. 3. *Cf.* Max Planck Institute for Comparative and International Private Law, *Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, 71 RABELS ZEITSCHRIFT FÜR AUSLANDISCHES UND INTERNATIONALES PRIVATECHT 225, 241 (2007) ("The parties may also choose . . . the principles and body of rules . . . recognised internationally or in the Community.").

80. RÜHL, *supra* note 7, at 493.

81. *Supra* note 12 and accompanying text.

82. *See* U.N. Convention on Sales Contracts, *supra* note 19 at art. 7 § (1); PICC *supra* note 2 at art. 1.7.

83. PCLIC, *supra* note 25, at art. 11 §§ (1), (4). *Supra* notes 11, 12 and accompanying text.

84. *See, e.g.*, Rühl, *supra* note 56, at 807.

shown above, such legal certainty is rather difficult to achieve in the field of conflict of laws. However, especially regarding contracts, choice of law is seen as a way to have more reliability,[85] if parties can be sure that the court is applying the chosen law.

But the chosen law is only applied if the agreement about the choice of law is valid, which may be disputable in the case of an implied or tacit choice and where the choice is contained in standard contract terms.

1. Tacit Choice

To clarify under what circumstances an implied or tacit choice of law is valid is not an easy task. Maybe this is the reason why, as a rare example, in China, following section 3 of the PIL-Statute of 2011, only an express choice of law is valid and an implied choice is not accepted.[86] The Hague Principles try to set a rather strict condition by requiring that the choice of law has to "appear clearly from the provisions of the contract or the circumstances."[87] This is in contrast to Japan, where a tacit choice of law is accepted, but even in the new PIL-Act of 2007, no similar condition is laid down.[88] The wording of the PCLIC is mostly in line with the corresponding conflict of laws rule of the E.U.,[89] although Article 3(1) section 1 of Rome I-Reg has a more procedural connotation[90] because the choice has to be "clearly demonstrated." The inference drawn from the provisions of the contract must be strong, but there is no fixed list of criteria in the Hague Principles. The drafters give some examples for strong indications, such as a standard form that is generally used in the context of a particular legal system and terminology containing characteristics of a certain legal order or references to national provisions.[91] A choice of court clause is "not in itself equivalent to a choice of law."[92] Rather, it is seen only as a weaker argument in favor of a choice of law of the forum state[93] (following rec. 12 of Rome I it at least "should be one of the [relevant] factors to be taken into

85. Symeon C. Symeonides, *Choice of Law in the American Courts in 2012: Twenty-Sixth Annual Survey*, 61 AM. J. COMP. L. 217 (2013); Ragno, *supra* note 44, at art. 3 rec. 3.

86. *See* Pissler, *supra* note 38, at 10.

87. PCLIC, *supra* note 25, at art. 4 sentence 1, second alternative.

88. Sakurada & Schwittek, *supra* note 39, at 96.

89. See commentary on Art. 4 PCLIC no. 4.2.

90. Jan L. Neels & Eesa A. Fredericks, *Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts*, 44 DE JURE L. J. 101, 109 (2011) (referring to the discussion in the Working Group drafting the Hague Principle).

91. *See* commentary on Art. 4 PCLIC no. 4.9, 4.10. The last example is found in China, in the official interpretation laid down by the Supreme People's court, thereby accepting an implied choice of law. *See* Pissler, *supra* note 38, at 10. For other factors demonstrating an implied choice, see INGEBORG SCHWENZER, PASCAL HACHEM & CHRISTOPHER KEE, GLOBAL SALES LAW 4.18 (2012).

92. PCLIC, *supra* note 25, at art. 4 sentence 2.

93. *See* commentary on Art. 4 PCLIC no. 4.11. *See* Neels & Fredericks, *supra* note 90, at 107; Martiny, *supra* note 29, at 640. Favoring a substantial indication of a choice-of-forum clause in Germany, see Bundesgerichtshof [Federal Court of Justice] BGH from 13.06.1996 - IX ZR 172/

account"), although it is usually in the interest of the parties to let the judge apply a law with which he is familiar. Assuming a choice of law in such a case, as was proposed at the beginning for the Rome I-Regulation, would therefore be a better way to create predictability in this respect, stimulating the parties to make it clear if they want to separate forum and applicable law. Overall, the foreseeability of an implied choice of law following the Hague Principles could be enhanced.

2. *Choice via Standard Terms*

Special problems arise if both parties use standard terms for their choice of law and designate different laws but there are barely any relevant provisions in the actual conflict of laws regulations. However, if only one party uses standard contract terms with a choice of law clause or if both parties opt for the same law, this hypothetical legal order decides whether the choice of law is valid.[94] This is seen as the most (transaction-)cost-saving method, especially because the parties are able to concentrate on the agreed law.[95] In a battle of forms between the parties with contradictory choice of law clauses, it first has to be decided how to identify the prevailing contract term, because the national laws use at least four different methods for that ("first shot," "last shot," "knock out," and hybrid solutions[96]). If under both laws the same method is applied and therefore the same standard terms prevail, the law designated in the terms shall decide if the choice of law agreement is valid.[97] But if the parties' different preferred legal systems use different methods and therefore in one system party A's standard terms and in the other system party B's standard terms prevail (or if under one or both of these laws no standard terms prevail), there shall be no choice of law.[98] This seems to be a rather complicated solution,[99] but it is necessary. Generally applying the increasingly relevant "knock out" rule, articulated for instance in Article 2.1.22 of the PICC, would thwart even more choice of law attempts,[100] because under the knock out rule, there would be no agreement in any case with conflicting options for the governing law.

95, in 49 Neue Juristische Wochenschrift 2569 (1996); UNALEX DATABASE *supra* note 11 at DE 1881.

94. PCLIC, *supra* note 25, at art. 6; *see also similar* Rome I-Reg, *supra* note 11, at art. 3(5), art. 10(1), in contrast to Japan where usually the "lex fori" is applied; *see also* Sakurada & Schwittek, *supra* note 39, at 95; RÜHL, *supra* note 7, at 477.

95. RÜHL, *supra* note 7, at 480.

96. For more detail, see Thomas Kadner Graziano, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Form Situations: The Hague Solution*, 15 Y.B. OF PRIVATE INT'L L. 71, 74–80 (2102/2013).

97. PCLIC, *supra* note 25, at art. 6(b) first half.

98. PCLIC, *supra* note 25, at art. 6(b) second half.

99. See criticism in Martiny, *supra* note 29, at 643.

100. *See* Kadner Graziano, *supra* note 96, at 100.

Conclusion

If the main goals of the Hague Principles on Choice of Law in International Contracts are to improve the possibilities of choice of law in commercial contracts and at the same time to increase legal certainty, parties should be free to agree on a certain applicable law—even during a court procedure, if any additional costs for the court are bourne by the parties—and their choice should not be limited to certain sets of rules, no matter if they are state-made or private. To enhance the predictability of choice of law, a rebuttable presumption in favor of implied agreements should be introduced in certain situations, whereby the battle of contradicting choice of law clauses can best be pacified with the proposed rule of the Hague Principles.

Fostering such private autonomy by amending the Hague Principles on Choice of Law in International Contracts or guiding its interpretation is something Christian Kirchner would probably have strongly supported. We should follow his path and try to convince the relevant actors with our arguments. I think this presentation could be an example.