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THE POWER OF WILL AND CHOICE OF LAW IN INTERNATIONAL CONTRACTS

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Introduction

This thesis provides an analysis of contractual choices of law in private international law in different legal orders. Specifically, there will be analysed the European and the American system in combination with the new Hague Principles on Choice of Law in International Commercial Contracts. These sources of law find their basis in two principles which can be considered as one opposed to the other, they are the principle of party autonomy and sovereignty of the States. It is generally recognized that the first tends to promote the contractual freedom, whereas the second tends to set limits to the first through several mechanisms and provisions that States are used to dispose in the exercise of their sovereign powers. For the aim of this thesis, it is necessary to premise that what is relevant is not the examination of these abstract principles, but rather the impact that they have on contractual choice of law in international private law. In fact, the principle of party autonomy leads to the freedom of contract in choice of law and it will be examined how this opportunity to choose the law applicable to the contract may variate in these national contexts depending on the legislator. On the other hand, the principle of sovereignty represents the basis in order to impose limits to choice of law which States adopt towards parties in international contracts.

In the first Chapter it will be provided a brief general explanation of these principles. On one hand will be examined the principle of sovereignty both from its external and internal perspective. On the other hand, will be crossed the evolution of party autonomy in the highlighted legal systems in order to see how this principle has developed in time. Furthermore, it will be provided an analysis of various doctrinal opinions that have conflicted and still conflict on the nature of party autonomy in private international law, starting from the distinction between autonomist and anti-autonomists, until the most recent theories on the scope and the nature of choice of law in international contracts.

The second and the third chapter will provide an examination of positive existing law in application of, respectively, the freedom of contract and the limits established to the latter. I opted for a comparative threefold analysis based on topics because I believe that it could better highlight the approaches adopted by the European, American and International systems in order to identify the advantages and disadvantages that these legal orders adopt on the issue of choice of law.

Thus, the second chapter is dedicated to the ways in which freedom of contract is exercised in the systems under examination. Specifically, relevance will be attributed to provisions recognizing the freedom of contract and all the ways in which the latter can be expressed into international agreements. The connection with the chosen State, the express and tacit choice; the *depeçage*; the battle of forms and the choice of non- State laws are the themes examined in this chapter in accordance to a threefold comparison among the European Regulation 593/2008, the American approaches especially Restatement Second and the Hague Principles. By the way it will be noted that not every system dedicates an expressed analysis to these issues, some of them are simply implied whereas others are not foreseen in the legal orders. It will be also observed how the examined legal systems adopt different approaches toward the freedom of contract, specifically the European and the International context are more in line with a party autonomy approach, whereas the American system reflects the sovereignty principle.

In the third chapter it will be analysed the other side of the principle of freedom of contract in choice of law, thus the sphere of the limitations expressive of the principle of sovereignty. In fact, nonetheless the importance attributed to party autonomy, it is generally recognized that there must be imposed limits to the freedom to choose the applicable law to the contract. The main limitations are caused by the mandatory rules and the protection of public order which States provide and that can not be derogated by parties in the exercise of their power of freedom of contract in international agreements. However, through a triple

comparison it will be examined how the specific sources of law assume different concepts of limitations and it will be analysed how the operation of these divergent limits can be framed in different levels of thresholds concerning mandatory rules and public order respectively in the U.S., the European and the International context.

In the last chapter, there will be provided conclusions on the principles of party autonomy and sovereignty and it will be observed how, following to an examination of positive law carried out in the previous chapters, these principles are nestled respectively in Regulation 593/2008 and the American approaches on choice of law in the contractual matter, even if they have a different level of convergence. Finally, it will be taken into consideration the importance and the resonance that the Hague Principles would effect in the examined legal orders if were implemented in the latter, enhancing the effects of the power of will and choice of law in international contracts and promoting the harmonization of Private International Law at global level.

Chapter I, Party autonomy and Sovereignty

1. The cornerstone principles, sovereignty and party autonomy

The principles of party autonomy and sovereignty have always been considered as two opposite pillars. Whereas the first tends to promote the interest of the specific parties in the transaction, the second tends to protect the general interest of the States towards the parties in order to set limits to the freedom of contract warranted by party autonomy. In the contractual matter it is necessary to premise that these principles are relevant both at substantive and at private international law level because they play an important role in both fields. However, for the aims of this thesis will be analyzed the relevance of these principles in choice of law in international contracts and therefore main attention will be given on the effects that the application of these principles cause on international agreements in p.i.l. making a comparison between the European, American and International system.

Starting from the abstract, sovereignty will be first analyzed because it is recognized as the principle which refers to the general interests of the States towards private parties and imposes limitations on the freedom of contract. Second, further and deeper attention will be provided for party autonomy , as it represents the grounds for freedom of contract and it deals with the specific concrete interests that parties want to reach when creating obligations between them, from the perspective of private international law.

2. The principle of Sovereignty, the external view

Opposed to party autonomy there is a principle that can be considered as the ground of the limits to freedom of choice, that is the principle of the State's sovereignty. States are the main subjects of national and international law and are generally considered as sovereign, implying that "they need not accept any authority from above or from anyone else unless they choose to do so".[1] At this point the exercise of the sovereignty can be considered from two outlooks, thus from the internal or from the external perspective.

Starting from the latter, the external perspective considers the relationship between the national States and other foreign subjects of international law, that is to say other States or entities. Some States have imposed in their fundamental acts that they are bound by supranational sources of law, such as art. 11 or art. 117(1) of the Italian Constitution in order to establish the primacy of supranational law over national law, e.g. European law. However, not every supranational legal order is above the national one. It is necessary to recall as an example the relationship between the European Convention of Human Rights (ECHR) and Italy. The Constitutional jurisprudence[2] identified in article 117(1) of the Italian Constitution the norm which contains provisions ruling on the relationship between the internal legal order and the ECHR. Art. 117 is integrated with the ECHR rules, which are called "interposed rules" and from the perspective of the hierarchy of sources of law they are in between internal rules and constitutional rules. Thus, in case of

[1] J. KLABBERS, *International law*, *Cambridge University Press second edition*, page 74; *The Reception of International Law in the EU Legal Order 2018, Oxford Principles of European Union Law: Volume I: The European Union Legal Order. Oxford University Press,* page 1208-1233; *Autonomy, Constitutionalism and Virtue in International Institutional Law, in International Organisations and the Idea of Autonomy: institutional indepence in the international legal order. New York: Routledge,* page 120-140; *International Law and World Order: A Critique of Contemporary Approaches July 2018, In : Netherlands International Law Review,* 2018*,* page 253-258.

[2] Judgement 348/349 2007.

conflict between internal law and ECHR, the latter prevails. On the other hand, in case of conflict between ECHR and constitutional rules, the latter prevail.

ECHR rules are important because they have two functions: the first shows how these provisions become an interposed parameter in order to examine the constitutional legitimacy of internal rules. In fact, internal rules are considered as hierarchically subordinated because they are supposed to pursue interests which are less important compared to a supranational interest, which has been agreed by the State. On the other side, the other function of ECHR rules is that they are considered as a criterion in order to follow a constitutionally oriented interpretation of the internal provisions.[3] Thus, the Italian judge when deciding a specific case, is obliged to look for an interpretation of rules which is in compliance with rules established by ECHR and therefore compatible at the same time with art. 117(1). If the judge is not able to find a specific constitutionally oriented interpretation, he will propose an issue of constitutionality due to incompatibility between internal rules and ECHR rules.

On the other hand, the rules of ECHR are different from the European Union laws. Both are supranational law, but they find their constitutional grounds in two different articles, respectively art. 117(1) and art. 11. The consequences are different because art. 11 assumes that "States can recognize and accept limitations of their sovereignty, through the adhesion of supranational organizations" and therefore the primacy of E.U. law foresees that in case of incompatibility between the first and internal rules, the latter shall be disapplied. [4]

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[3] A.RUGGERI, *Corte Costituzionale, rapporti fra ordinamento interno e Cedu; Gerarchia, competenza e qualità nel sistema costituzionale delle fonti normative, Giuffrè, Milano* 1977; *Lineamenti di giustizia costituzionale,, Giappichelli, Torino, I ed*., 1998; *"Itinerari" di una ricerca sul sistema delle fonti, XII, Studi dell'anno 2008, Giappichelli, Torino* 2009.

[4] D. BUTTURINI, *La tutela dei diritti fondamentali nell'ordinamento costituzionale italiano ed europeo, Edizioni scientifiche italiane Napoli*, 2009. ; *La partecipazione paritaria della Costituzione e della norma sovranazionale all'elaborazione del contenuto indefettibile del diritto fondamentale. Osservazioni a margine di Corte cost. n. 317 del 2009, in Giurisprudenza costituzionale,* 2010, page 1816-1826, *La Carta dei diritti fondamentali tra costituzionalismo multilivello e ordine formale delle fonti nella sentenza VFGH del 14 marzo 2012, in Diritto*

However, not every State complies with this constitutional scheme concerning the exercise of sovereignty from the external approach and that is the case of the United States. The reason is that the U.S. is a federal State and the Constitution rules on the division of powers between the State at a federal level and the inner States, in order to exercise sovereignty over people. Thus, to the Federal Government are attributed specified powers[5], such as broad financial matters in tax law, or the power to rule on commerce and deal with commercial interests[6], on the other hand the territorial States may generally legislate in all the matters within their jurisdiction when it is not specified otherwise by the U.S. Constitution. From an inner perspective, this structure can be considered as similar to the one established by 117 of the Italian Constitution, in fact, it is provided by the latter that the State has exclusive legislative powers over specified matters established by the same article, whereas the Regions have legislative powers "over every matter not expressly reserved to the State's legislation."

However, concerning the exercise of sovereignty, there is a big difference from our system compared to the U.S., that is the legislative powers of the inner States are not mentioned in the U.S. Constitution, whereas they are mentioned in ours. Notwithstanding the lack of this provision, it is in compliance with the intrinsic nature of federalism that inner States are given a lot of autonomy. In fact, this general independence provided in favor of the States is considered as an "inherent attribute of the States' sovereignty"[7], therefore there is no need to specify it in the Constitution in order to recognize them a high degree of authority. The Constitution, however, establishes limits to this regulation in order to prevent

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Pubblico Comparato ed Europeo, 2013, page 372-380; NOVELLI, *Fonti nel diritto nazionale ed europeo a confronto nel dialogo tra le corti supreme*, *in Diritto e giurisprudenza*, 2012, page 100;

[5] Art.1, section 1 of the U.S. Constitution " All legislative powers herein granted shall be veseted in the Congress of the United States."

[6] U.S. Const.,Article I, §8, cl. 3. "To regulate commerce with foreign Nations, and among the several States, and with the Indian Tribes."

[7] K.R.THOMAS "*Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, *Congressional research service, 2013*; *The Constitution of the United States of America: Analysis and Interpretation : 2014 Supplement : Analysis of Cases Decided by the Supreme Court of the United States to July 1, 2014.*

conflicts which may affect the national economy such as U.S. Const. Art. I, §10, cl. 2[8].

2.1. The principle of Sovereignty, the internal view

The principle of sovereignty of the States can be examined from another perspective. In fact, the exercise of sovereignty by the State is shown in the relationship between the State and the private subjects, especially in the contractual relationship. In this field the State can be examined from a dual profile. From one point of view, the State can be a part of the contract in the exercise of private autonomy. On the other hand, the State is the supervisor of the powers which are granted to the parties when exercising the freedom of contract, therefore the first must be necessarily over the latter because of the need to protect the general interests of the community.

Concerning the first aspect, it is generally accepted that also a State can be part of the contract. Problems may arise because it is usually recognized that States are stronger than privates, in fact, if a State decides to be part of a contract it is presumed that the latter is always in a better situation than the private counterpart. The reasons why the State is advantaged vary from the economical, legal and financial perspective and the issues which may arise deal with the misuse of contractual powers in order to discriminate the weak parties.

In fact, the State owns the particular features of sovereignty and independence, which affects the established contractual relationship. Moreover, the State has the power to modify the law of contracts and, in general, all the provisions dealing with legal positions. Concerning this power, it is true that the States can't be forced

[8] U.S. Const. Art. I, §10, cl. 2: "No State shall, without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports, except what may be absolutely necessary for executing it's inspection Laws: and the net Produce of all Duties and Imposts, laid by any State on Imports or Exports, shall be for the Use of the Treasury of the United States; and all such Laws shall be subject to the Revision and Control of the Congress."

not to legislate because they have contracted certain clauses and they have to respect the law under which those clauses can be enforced, but it is also true that national States could get profit of their notorious supremacy and could issue laws that overbalance legal positions in which the State is part, in favor of the latter. Therefore, the State can't be subject to subscribe "standstill clauses"[9] which forbid that Country to issue legislation in that specific matter, however there is still a way to fight and solve this hypothetical conflict, thus to put in place an "establishment clause". [10] That is a clause provided in the contract, through which the parties decide to establish and to crystallize a determinate legal position and determinate clauses, nonetheless the hypothetical law changes that would render that clause invalid or unenforceable. This clause is considered as an exception to the general principle which provides that the parties of a contract must be subject to the effects established by law and must be bound by all its modification.[11]

Furthermore, States could conclude contracts with foreign subjects and in this event, an important issue which intertwines with the principle of sovereignty is choice of law because the States could have an interest to impose to the contractual part its own will, breaching the contractual equality.

According to Professor Currie[12], national States have an interest in applying its national law as explained in his theory called "The concept of governmental

[9] S. ASANTE, *Stability of Contractual Relations in the Transnational Investment Process, in Int. Comp. L. Quart.1979,* page 401 ss; *Transnational Investment Law and National Development, Lagos University Press*, 1982.
[10] S. CARBONE, *Il contratto internazionale*, *UTET Università*, Torino, 1994, page 124 ss; *Il diritto non scritto nel diritto internazionale. Due modelli di codificazione, Editoriale scientifica, 2012 ; Lezioni di diritto internazionale privato,* Padova*, Cedam,* 2000.; *Autonomia privata e commercio internazionale. Principi e casistica, in Istituti di diritto civile,* Milano, Giuffré, 2014.
[11] *Id*. page 120 ss.; *Contratti internazionali, autonomia privata e diritto materiale uniforme, in Dir. comm. int.,* 1993, page 755-789.
[12] B.CURRIE, *Selected Essays on the Conflict of Laws*, Durham, NC, 1963, page 189: " The court should… inquire whether the relationship of the forum state to the case at bar… is such as to bring the case within the scope of the State's governmental concern, and to provide a legitimate basis for the assertion that the state has an interest in the application of its policy in this instance"; *Change of venue and the conflict of laws, U Chicago Law Review*, 1956; *Unconstitutional discrimination in the conflicts of laws, Privileges and Immunities, Jale Law Journal*, 1960; *The Verdict of Quiescent years, Mr. Hill and the Conflict of Laws, Chicago Law Review,* 1962.

interests". He maintained that if a case falls within a law's spatial reach, after the examination of an interpretative process, that State from which the law emanates has a governmental interest in applying it. He further maintained that "an interest is the product of two elements:

1) Governmental policy
2) The concurrent existence of an appropriate relationship between the State having the policy in the transaction, the parties, or the litigation."

His perspective of "law as an instrument of social control" [13] explicitly refers to the situation in which the State plays the role as a neutral part and the contract is put in place by both parties. Because this approach leaded to favor only determinate subjects, his theory was considered as extreme and by someone, also constitutionally infirm.[14]

In fact, from a practical point of view this theory was a pro-plaintiff and a pro-defendant approach only when those subjects were local domiciliary, not in case they were situated out-of-staters. It is true that Currie's theory expressly refers to the situation in which the State is neutral, however I believe that Currie's analysis on the interests of the State in applying its own law can be adopted in the case in which the contract foresees the State as counterpart as well. The reason why I assume this, is that in both cases (State as neutral part and State as counterpart) the interests involved intertwine with the principle of sovereignty and the State wants to exercise its own jurisdiction, nonetheless the latter it is or not part of the contract.

[13] B. CURRIE, *Selected Essays* page 64.
[14] J.ELY,*Choice of Law and the State's interest in protecting its Own*", *William and Mary Law Review*, 1981, page 23; *On constitutional ground*, 16th edition, 2002; *Democracy and Distrust: A Theory of Judicial Review*, *Valparaiso University Law Review,* 1981.

3. Historical developments on party autonomy, the evolution of choice of law

Party autonomy is one of the most ancient principles in the history of law and it has been defined as "one of the most widely accepted paradigms of contemporary private international law"[15]. It may have several definitions, depending on the matter to which this principle refers to.

Concerning private international law, Professor Symeonides assumes that "Party autonomy is a shorthand expression for the principle that parties to a multistate contract should be allowed, within certain parameters and limitations, to agree in advance on which State's law will govern the contract." In fact, through this expression it can be deducted that subjects who want to create obligations in a multistate contract are free to do that, however they are bound by several limits.

It is important to say that the opportunity to choose the applicable law is a conquest that has been reached in time. Historically, party autonomy has been sanctioned at multistate level by Egyptians between 120-118 B.C.[16] At that time, it was issued a decree which provided that contracts written in Egyptian language where subject to the jurisdiction of the Egyptian courts, which applied Egyptian law, whereas contracts in Greek were subjects to the jurisdiction of the Greek courts, which applied Greek law. By this ancient decree, it is deductible that choice of law is an extremely ancient issue and, at the time, parties where able to choose the applicable law exclusively by choosing the contract's language.

In the Middle ages, the development of *ius mercatorum* transformed the economy. From an economy based on the social status which foresaw a close mechanism of

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[15] R.J. WEINTRAUB, *Functional Developments In Choice of Law of Contracts*, M. Nijhoff, 1985 ,page 187; *Comparative Conflict of Laws: Conventions, Regulations and Codes, Foundation Press*, 2009; *Choice of Law in Contract, Iowa Law Review,* 1968, page 399 ; *Commentary on the Conflict of Laws, Thomson/West, 2006* ; S.C. SYMEONIDES, *The Hague Principles on Choice of Law for International; Contracts: some Preliminary Comments, The American Journal of Comparative Law*, 2013 page 875; *Private International Law: Idealism, Pragmatism, Eclecticism, The Hague Academy of International Law, Brill-Nijhoff,* 2017; *Oxford Commentaries on American Law: Choice of Law,Oxford University Press*, 2016.

[16] S.C. SYMEONIDES, *Codyfing Choice of Law Around the World,* 2014 page 112

trade, the society has moved to a dynamic system completely neutral to political subjective perspectives.

In time, the economy has been nationalized and States acquired the monopoly of it. Here party autonomy plays an important role in order to react to the State's will to impose a closed economy.[17] However, party autonomy concerning international choice of law was controversial until the end of the second world war, where the division between anti-autonomists and the autonomists got deeper.[18]

3.1. Anti-autonomists and the U.S. choice of law revolution

A significant example of the dispute between autonomists and anti-autonomists in private international law emerges from the American choice of law system regarding conflicts of law. However, before providing the doctrinal distinctions and related diverse considerations in the U.S. context, it is necessary to give a broad explanation of the U.S. system conflicts of law as it is completely different from our National system because of its federalism. The U.S. Constitution disposes law-making powers at both federal and national level. It works as a delocalized system which has a broad control at federal level. In fact, some specific matters of national concern are attributed to the federal government, whereas all the other matters are attributed to the national States, included most of the private law norms[19]. Therefore, is the Constitution itself that implicitly introduces conflicts of law, which can be vertical or horizontal. Vertical conflicts are only those that occur between federal and state law and these are solved through the Constitution's

[17] S.M. CARBONE, *Il contratto internazionale*, page 8.
[18] F. DE LY, *Choice of non-State law and international contracts, In Verbindend Recht, Liber amicorum Krijn Haak,* 2012*, page 827; Lex Mercatoria (New Law Merchant): Globalization and international self-regulation. Diritto del Commercio Internazionale,* page 555-590*; (1998). Lex Mercatoria and Unification of Law in the European Union. In Hartkamp Hesselink Hondius et al, Towards a European Civil Code, 3rd ed,* 2004.
[19] U.S. Constitution Amendment X: "The powers not delegated to the United Statates by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

supremacy clause, which provides that federal principles rule on the conflicts between federal and state law[20] . The latter are disputes which may arise between or among:

1) The laws of the State of the United States (interstate conflicts) ;
2) The laws of the States of the U.S. and the laws of foreign countries (international state conflicts) ;
3) The laws of the U.S. and foreign countries (international federal conflicts)[21].

Anti-autonomists believe that the opportunity for parties to choose the applicable law relies on the base of a territorial approach. In the U.S. context at the beginning prevailed the theory proposed by Joseph Beale (in 1934 he was the drafter of the first Conflict's on Law Restatement), according to which "empower the parties to choose the applicable law would be tantamount to give them the power to legislate", therefore he proposed in the U.S. context an absolute *lex loci contractus* rule for the Restatement, which was supposed to limit enormously the will of parties because it mandated the application of the law of the State in which the contract was made to all the aspects of the contract.[22] Specifically, when an event occurred in a foreign territory, the only law which could operate was that foreign law,[23] and his theory was called the "*Vested right theory*". This theory foresees the opportunity to apply the forum law only to enforce a determined right, whereas the substantive laws applicable to that right must be necessarily those of the foreign territory.

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[20] U.S.Constitution Amendment VI: "This Constitution, and the laws of the United States whichshall be made in pursuance thereof; and all the treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding".

[21] S.C. SYMEONIDES, *The American Choice of Law Revolution: Past, present, Future*, 2006, page 3 ss.

[22] S.C. SYMEONIDES, *Codyfing Choice of Law Around the World* page 113 ss.

[23] W.M. RICHMAN, D. RILEY, *The First Restatement of Conflict of Laws on the Twenty-Fifth Anniversary of Its Successor: Contemporary Practice in Traditional Courts, Maryland Law Review,* 1997.

From this point of view, Beale's approach represents the primacy of the principle of sovereignty of the State over the party autonomy's principle, in fact, he thought that the State must control in a rigid way the will of the parties because the possibility to opt out a specific law may rely on the will to evade fundamental policies, in fact, under his theory, the contract was subjected from the substantial point of view only to the rules established by the specific foreign country without taking into consideration any possible manifested will of party. The advantage of the First Restatement was that the provision proposed a national law system which allowed to reach a solution in all the possible cases of conflicts. Therefore, Beale's First Restatement on Contract's conflicts of Law was based on a rigid system intended to provide the legal certainty in conflicts of justices. Its aim was to promote interstate uniformity through a complete and universal application of choice of law.

However, because of its excessive strictness, Baele's approach has been opposed by those who favored autonomy in choice of law that were fostered by the dawn of the American choice of law revolution. Thus, slowly the vast majority of the American States started to abandon Baele's approach. Notorious is the debate between Judge Edward R. Finch and Beale in 1928 at the American Law Institute which shows the weaknesses of Beale's approach and the primacy of the autonomist's approach.[24] Famous is Professor Walter W.Cook statement, who proposed a change from the traditional system to a "set of guiding principles, which make provisions for as much certainty as may reasonably be hoped for in a changing world, and at the same time provide for not only needed flexibility but also continuity of growth".[25]

The true revolution has exploded in 1960s, where many courts began abandoning *the lex loci contractus* rules in favor to other disparate conflicting approaches and in 1971 was issued the Second contracts' Conflict Law Restatement, section § 187

[24] *Id* note 22.
[25] W.COOK *An Unpublished Chapter of the Logical and Legal basis of the Conflict of Laws, Illinois Law Review,* 1943, page 422.

which substituted the old one at least in the vast majority of the American States. In the end, in 1990s the traditional contract's law conflict's system was completely reformed. Finally, a research promoted in in 2009 shows that forty one of the U.S. jurisdictions abandoned the traditional territorial Baele's approach.[26] There are several aspects on which the Revolution intervened. One of them is the change of perception of rules of private international law on party autonomy in order to better protect the parties' interests. Conflicts of law are now considered in the U.S. as a set of rules which finds its legal grounds on extraterritoriality, rather than territoriality. Another aspect is that the law selection is not bound to a specific jurisdiction anymore, but rather to the content of the contract and how the parties expressed their will, at least in the vast majority of the cases in which there is not a mandatory rule which forbids the law selection or another limit. Furthermore, there have been changes from the rigidity imposed by the First Restatement on Conflicts of Laws, compared to the new rules which promote flexibility in the specific case[27] and this approach is in compliance with the common law U.S. system.

However, the main principle on which the Revolution inspires is the freedom of contract. In fact, it is necessary to say that this Revolution does not establish itself new contract rules on conflict's law,[28] but rather it limits to reject the First Restatements on Conflicts of Laws. In this context, it is important to recall an expression of an important figure of that age, Brainerd Currie "We are better off without choice of law rules"[29]. He maintained that choice of law rules were considered as obstacles to a complete exercise of party autonomy, because these

[26] *Id* note 22.
[27] S.C. SYMEONIDES, *American Federalism and Private international Law, Hellenic Journal of International Law,* 2010 page 14.
[28] At least before 1971, date in which the Restatement Second on Conflicts of Law was issued
[29] See B. CURRIE, *Selected Essays on the Conflict of Laws* , page 180 : "The traditional rules…have not worked and cannot be made to work ... But the root of the trouble goes deeper. In attempting to use rules we encounter difficulties that stem not from the fact that the particular rules are bad,…but rather from the fact that we have such rules at all.". See also *ibid*. at 183 : "We would be better off without choice-of-law rules."

laws hinder the will of parties in choosing the applicable law, therefore his conception was called the "Antirulism".[30]

However, in order to counteract Beale's approach, he proposed a "domestic method" based on the opportunity to choose the applicable law not on a Federal level but rather on a State level. He thought that a statutory construction and interpretation could be considered as more in line with a party autonomy approach. In fact, the general rule established by the First conflicts disposed a preselection of the applicable law, whereas Currie opted for a case by case analysis taking into consideration the interests of the single States in applying a specific substantive law. Whereas Beale's approach is the perfect expression of the State's sovereignty, Currie's theory has a limited view of the sovereignty of the States and I believe that it is an important step because is the first theory in this field which takes into consideration more interests instead of the only Federal level. Thus, there was a responsible feeling to counterbalance the old interests with the new ones, in order to better respond to trade's evolution. However, this revolution could not last for ever because there were too many conflicting theories on choice of law which were merged by court's interpretation. Furthermore, the U.S. common law system considers jurisprudence as a binding source of law, therefore every court at State level had its own interpretation of the specific case of choice of law.

The result was that, in relatively short time, American conflicts law began looking like "a tale of a thousand-and-one-cases in which each case decided as if it were unique and of first impression,"[31] therefore there was a need to individuate a clear, transparent and objective way to solve conflicts of law. The excessive judicial subjectivism has come to an end in the second half of the 1960s, doctrine and

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[30] S.C. SYMEONIDES, *The American choice of law revolution: Past, Present and Future,* page 14 ss.

[31] S.C. SYMEONIDES, *American Federalism and Private international Law* page 15;
M. ROSENBERG, *Comments on Reich v. Purcell*, *15 UCLA Law Rev*iew, 1968, page 641- 644 "The idea that judges can be turned loose in the three-dimensional chess games we have made of conflicts cases, and can be told to do hand-tailored justice, case by case, free from the constraints or guidelines of rules, is a vain and dangerous illusion."

Judges realized the true need for a specific set of rules in order to look for a balance between the flexibility and certainty needs.[32] Finally, in 1971 was approved the final version of the Restatement Second which represents a compromise between all the most important theories that have been exposed during the Revolution.[33]

3.2. Autonomists in the national context, Mancini's theory

Dealing with the national context, at the beginning there was only an applicable law: that was the *lex loci contractus*, by which it was provided that the applicable law was the one in which the contract had been concluded. However, that criterion could be considered as appropriate in the past because commercial trades used to be *inter praesentes* and the contract used to be performed in the same place in which it was concluded. Nowadays times are changed, international trades are increased and there are many forms of performances which may require the intervention of third parties who are involved in different countries. E.g. banks providing new forms of credit assignment which have the registered office in a State different from the one of the parties.[34]

One of the forerunner of the modern approach in private international law is Pasquale Stanislao Mancini. His theories represent nowadays the grounds of the actual Italian law 218/95 but unfortunately at the time he had no success. He

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[32]S.C. SYMEONIDES, *American Federalism and Private international Law* page 16
"the traditional system had gone too far toward certainty to the exclusion of flexibility, the revolution went too far in embracing flexibility to the exclusion of certainty."

[33] Restatement Second on Conflicts of Law, Section 187 It will be analized in Chapter II

[34] G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato, Edizioni Cacucci, Bari,* 1999, page 20 ; *Norme di conflitto a carattere materiale e scelta di legge, in Studi in onore di F. Capotorti,* Milano 1999 ; *Specificità del metodo conflittuale e materializzazione del diritto internazionale privato, in Il diritto civile oggi. Compiti scientifici e didattici del civilista. Atti della Società Italiana degli Studiosi del Diritto Civile,* Napoli, 2006 ; *La scelta della legge applicabile da parte dei contraenti*, *in Il nuovo diritto europeo dei contratti: dalla Convenzione di Roma al Regolamento Roma I,*, Milano, 2007; *Il diritto applicabile ai contratti: norme di conflitto e norme materiali*, *in : N.Boschiero, R. Luzzatto (a cura di), I rapporti economici internazionali e l'evoluzione del loro regime giuridico,* Napoli, 2008.

concentrated on the importance of the principle of nationality and equality. The first principle is extremely important from the Italian perspective, especially at the time where he exposed his theories because people could not yet realize the importance of a uniform nationality. In fact, unification of the Italian territory occurred in 1848, whereas Mancini's theories are dated to 1851. Furthermore, his theories were well received in the civil code of 1865[35] . Mancini's considerations are very important in this period because they contributed to develop an "Italian awareness" to be part of a nation, in order to acquire a uniform identity.

According to Mancini, the principle of nationality is closely linked to another general principle of the legal system and the private international law system: the principle of equality, or universality, as expressed in art. 3 of the Italian Civil Code of 1865, according to which the foreigner is admitted enjoying the civil rights attributed to the citizens. This rule is extremely important, because it establishes the abolition of all the inferiorities with foreigners and foreign law, It is in fact from the recognition of perfect equality between States in their mutual relations that the need to recognize the same rights for individuals belonging to the different nations derives, applying similar rules of private international law. The principle of equality and the principle of nationality are therefore intertwined in private international law, and the Unity of Italy is the historical moment in which this weaving can be appreciated.[36]

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[35] Art. 9 Civil Code 1865: "The extrinsic forms of the acts between the living and the last will are determined by the law of the place in which they are made. However, it is within the faculty of the disposers or contracting parties to follow the forms of their national law, as long as this is common to all parties.
The substance and effects of donations and dispositions of last will are deemed to be governed by the national law of the settlers. The substance and the effects of the obligations are deemed governed by the law of the place where the acts were made, and, if the foreign contractors belong to the same nation, by their national law. In any case, the demonstration of a different will is saved."

[36] S.TONOLO, *L'Italia e il resto del mondo nel pensiero di Pasquale Stanislao Mancini, Cuadernos de Investigación Historica,* 2011 ; F. TREGGIARI*., Diritto nazionale e diritto della nazionalità: Pasquale Stanislao Mancini, in AA.VV., Raccolta di scritti in memoria di Agostino Curti Gialdino, vol. I, Edizioni Scientifiche Italiane,* Napoli 1990*.;* A. DROETTO, *Pasquale Stanislao Mancini e la scuola italiana di diritto internazionale del secolo 19, Giuffrè,* Milano 1954.

Whereas in the U.S. rules of private international law at the beginning were considered as territorial laws, in most of the European countries there has always been an immediate recognition "extraterritoriality". The main reason may rely on cultural and social traditions, which assume the United States as a unique country with many inner States that enjoy a high degree of discretion in the specific matters such as a large independence concerning rules of private law.

Thanks to Mancini's contribution, rules of private international law were recognized as extraterritorial in Italy. He divided these rules into two categories:

1) The mandatory rules: laws which can't be derogated by the exercise of the will of parties. These Mandatory provisions deal with the status and capacity of the people; family's relationships and hereditary succession ;
2) The voluntary rules: laws which can be derogated by the exercise of the will of the parties, among which contract law. In this matter, the law intervenes only to integrate the contract where the will of parties is not clear or is absent.

Basically, the main concepts of these categories are still existing today, even if they have been modified and renewed by law 218/95 and in the matter of contractual obligations, by the regulation 593/2008. [37]

4. Party autonomy, normative grounds

As it has been broadly noticed, party autonomy is a concept that, in time, has been exposed in time to several changes. Starting from the Italian perspective, it is necessary to recall article 1322(1) of the Italian civil code, which states "The parties are free to determine the content of the contract, within the limits imposed by law"[38]. Apparently, subjects who want to put in being a determinate contract

[37] *Id.*
[38] Even if there are different doctrines which assume a discrepancy between the content of the conctract and the opportunity to choose the applicable law.

are obliged to respect only the limits imposed by law. However, party autonomy shall not be subject only to those limits. In fact, it is necessary to report the disposal established by art. 41 of the Italian Constitution, which assumes that "Private economic initiative is free. It can not be carried out in contrast with social utility in such a way to damage safety, freedom and human dignity. The law determines the appropriate programs and controls for public and private economic activity to be directed and coordinated for social purposes.

According to this double disposal, it can be deducted that there is a double limit that should be considered. The first is the "law limit", the second is the " social utility limit" that consists in a constitutional bound and these two limits can be considered as two representations of State sovereignty, which one of its goals is to control public and private autonomy. The State has an interest to check that the will of the parties, thus the contract, is concretized in a proper way without infringing their freedom to contract.

However, party autonomy is a particular principle that can be manifested in the contract in a plurality of ways and the national States react on different level concerning their exercise of the power of sovereignty. In fact, as will be examined, every State has its own means to exercise the powers over its own territory and therefore there can be imposed different limits to party autonomy depending on the specific law.

Thus, one of the expression of party autonomy is the freedom to choose the applicable law to the contract. [39] It is true that nowadays is generally accepted that subjects are able to choose the applicable law to their contract, but it is also true that the National States put in place provisions that set limits to this power. The main reason is that, even if from a formal point of view all the people must be

[39] G. ALPA, *Party Autonomy and Choice of Law Applicable to Domestic Contracts, European Business Law Review,* 2014*,* page 1 ss. "Until some years ago the principle of sovereignty prevailed over the principle of freedom of contract and the parties, wheter they had the same citizenship, could not choose a foreign law applicable to their transaction*"; European private Law: Results, Projects and Hopes, in EBLR*, 2003; *Il diritto privato nel prisma della comparazione, Giappichelli*, 2004.

treated equally, there may be some discrepancies from the substantial point of view. The States are aware of the fact that there are factual divergences between people and these differences may reflect into a contract as well. E.g. in a domestic Italian franchising contract, from a formal point of view both the franchisor and the franchisee are treated as equal, because they are both entrepreneurs. However, from a substantial perspective, usually the franchisor is the strongest party in the specific contract. That is because he is the one that provides his goods, services and brands to the franchisee in change of a sum of money paid from the franchisee (royalty). Usually the franchisor owns a capital very much higher than that of the franchisee, and more than usually the latter is subject to terms and conditions that he would not have accepted, if he had been in a better economic situation. In order to regulate the specific contract, the State has enacted law 129/2004 which must be interpreted, in case of doubts, in favor of the franchisee through the particular mean of the interpretation by analogy of law 192/98.[40]

The example provided shows that the State's sovereignty is exercised because of the need to protect subjects who are economically and socially presumed to be weak and therefore imposing limits to the party autonomy. The difference between formal and substantial equality is implicitly recognized by article 3 of the Italian Constitution, which regulate the difference between formal and substantial equality.[41] From a comparative perspective, the United States Constitution as well contains a provision which deals with formal and substantial equality[42]. These

[40] Will be discussed in chapter 3 comparing the choice of law interests on weak parties in the U.S and Europe.

[41] Art. 3(1) of the Italian Constitution "All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions."
Art.3,(2): "It is the task of the Republic to remove the economic and social obstacles which, by limiting the freedom and equality of citizens, prevent the full development of the human person and the effective participation of all workers in political, economic organization. and social life of the country."

[42] Section 1 Fourteenth Amendment of the U.S. Constitution:" No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

comparisons are important premises because they show that the aim of the States, at both national and international level are the same: ensure the substantial equality. However, in order to reach this aim, the National States put in place different forms of provisions that are the expression of the State's sovereignty.

In any case, dealing with the contractual matter, problems arise concerning the balance between party autonomy and sovereignty when the contract is considered as "International". I believe that in this field party autonomy and sovereignty are the pillars and, respectively, freedom of choice represents one of the expression of the first concept whereas the limits to freedom of choice are represented by the second. Before analyzing in the specific these two concepts, it is necessary to provide a broad definition of the "International contract".

5. The concept of "Internationality" of the contract

The internationalization of economy grows as well as the internationalization of the contracts which rule on this economy. At the same time, it is not sufficient anymore to deal only with one State, as internationality itself requires more states involved.[43]

However, economy is not the only factor that promotes the development of international contracts, in fact it shall be considered the "legal concept" itself as another development factor.

At this point, it is necessary to recall Pugliatti's doctrine, he maintained that the legal concepts have no fixed structure and are not rigid, but rather they shall adapt to the legal and historical reality. Moreover, he supported that the relationship between legal concepts and reality is an ongoing process because the historical flow is strictly connected to the legal system[44] and the evolution of society reflects

[43] S.M. CARBONE, *Il contratto Internazionale* page 2.
[44] S. PUGLIATTI, *Fiducia e rappresentanza indiretta, Diritto Civile, Saggi,* 1951 page 218-219*; Nuovi aspetti del problema della causa nei negozi giuridici,* Messina, *Tip. La Sicilia*, 1934;

on legal orders. Therefore, the social and economic evolution have made automatically risen the need to create regulations for international contracts. According to Professor Vitta, internationality of the contract could be intended in two ways depending on the specific case. The first interpretation is the concept of internationality *erga omnes*, it means that the contract is international if it has alternatively objective or subjective elements of internationality, regardless the fact that a State is part or not to a Convention. On the other side, the interpretation *inter partes* assumes that the element of internationality requires links with member States of a determinate Convention.[45]

5.1. International uniform law

When dealing with party autonomy in international contracts there are two different profiles that can be considered: the first aspect is the material contract's autonomy, whereas the second is choice of law in conflicts of law[46].

Dealing with the first aspect and concerning the exercise of party autonomy in International law, it is necessary to recall the national law adopted in compliance with International Conventions and adopted in the national State following to an act of adhesion by the latter. This procedure is in compliance with the function of internationality of the contractual relationship because the aim that the international community in this field wants to reach is the uniformity of acts in order to level connections between States.

Therefore, usually the regime established indirectly by international law derogates the domestic one because it has a different application's criteria due to the

Istituzioni di diritto civile: introduzione, diritto delle persone, teoria dei fatti giuridici,*Giuffrè,* Milano 1933.

[45] E. VITTA, *International Conventions and National Conflict System, Recueil des Cours*, I, page 172 ss; *Corso di diritto internazionale privato e processuale; Diritto internazionale privato,* 1972

[46] Even if there are several doctrines that will be analized later that maintain that choice of law can be considered as substantial material law.

harmonization's need,[47] thus international material law as implemented in the national legal order is considered as a *lex specialis*, which necessarily derogates the *lex generalis* and the first substitutes the latter where required in the specific case. In fact, if national law does not conflict with the material international provision there can be a mutual application of those regimes, whereas in case of conflicts the *lex specialis* applies. [48] In this field It is useful to recall the judgement of the Court of Cassation[49] in which the Supreme Court stated that " in our legal order r.d.l 1958/1928 as converted into law in 1929 in execution of the 1924 Bruxelles Convention dealing with bill of loading concerning International maritime transport is *lex specialis* compared to the current law."

There are two kinds of material uniform international laws: the first set of rules concerns the matters that can be derogated and is applied in compliance with several requirements.

The first of these requirements is the party cooperation. In fact, whether this requirement should miss, the optional law couldn't be applied. The second requirement is that the contractual relationship must be balanced from a subjective point of view, meaning that both parties should not be in such a situation to accept contractual obligations that they wouldn't have accepted if they had been in a different and better economical position. The rationale behind this provision is dual, the first reason is imposed to protect weak parties that are not able to contract because they are in hardship, in fact in this case the applicable material law will be the imperative provisions that can't be derogated. On the other side, there is a constant feeling to warrant the freedom to determinate contractual obligations, in

[47] S.M. CARBONE, *Il contratto internazionale*, page 28 ss.
[48] *Lex specialis* and prevalence of the uniform law have a common rationale, not because of their intrinsic content, the reason of this procedure lies behind choice of law opportunity. In fact, the division between lex specialis and *lex generalis* is more appropriate to allow a uniform application. Also A. MALINTOPPI , *Diritto uniforme e diritto internazionale privato in tema di trasporto, Giuffrè, 1955* page 64 ss. ; *Id* note 47*,* pag. 30 "Specialità e prevalenza diritto uniforme hanno una ratio comune e un ambito di applicazione derogabile, non a ragione del suo contenuto intrinseco. Ma proprio a causa di quei determinati rapporti è la scelta più appropriata per consentire una uniforme applicazione."
[49] Judgement 2164/1960.

order not to limit the "different normative results of the private party autonomy".[50] An example of this provision may be exposed in the sales of movable goods. In fact, according to art. 6 of the Vienna Convention on International sale of goods parties are able to adopt partially or fully the provisions established by this Convention.[51]

The second kind of international uniform law foresees imperative contractual relationship, intended to be those relationships in which parties can't derogate through their will from what is established by law. Again, the reason is to protect contractual disparity and to avoid and eventually solve contrasts or conflicts of undue competitions. An example of international uniform law can be found into International Maritime Law, as the regime has been adopted in Italy with law 243/198, which is covered by several doctrinal opinions as well[52]. These doctrinal opinions have debated especially on the nature of the contract's internationality, in this field the debate was between those who maintained as sufficient requirement the international objectivity, versus those who supported international subjectivity as well.[53] However, the first thesis has prevailed because of the adoption of the Protocol of Grisby in 1968. In fact, it has expressly been excluded from the qualification of the internationality of the contract all the subjective elements, including the nationality of the ship. The same interpretation is recalled in the article 1 of the 1956 Geneva Convention on the Contracts for the International Carriage of goods by road (CMR)[54],which has been executed in Italy with law 1621/1960 and later with l. 241/1982, in the part where it is stated "as specified

[50] S.M. CARBONE, *Il contratto internazionale*, page 31 ss.
[51] Article 6 CISG: The parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions.
[52] *Id* note 31.
[53] The main exponent of the second theory was Professor Antonio Scialoja.
[54] Article 1: "This Convention shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties."

in the contract", meaning that there must be an objective criterion in order to evaluate the case.

The rationale behind this choice lies on the need of certainty of law and foreseeability which is foreseen by our national legal order and by current doctrinal and jurisprudential interpretation, thus the international objectivity requirement obliges the interpreters to individuate the location of the execution of the contract that is presumed by the will of party or from the itinerary of the trip. From this point of view, there are no limits or preclusions for the interpreters in order to reconstruct the specific situation. In the end, what is relevant is a "subjective perspective of objective internationality" of the contractual relationship.[55] However, it is necessary to consider international material law as applied to the specific contract. In fact, there are more and different contracts regimes in which international material law has intervened and the consequence is that, depending on the specific case, the parties may have more or less freedom to determine their content.

5.2. International choice of law

From the point of view of the choice of law, contracts can be divided into two branches: domestic contracts and international contracts. The first are those who are entirely related to a specific applicable law in a determined national State. On the other hand, international contracts are all those contracts which contain one or more "element of foreignness with the national State". That is considered as any element of the specific situation, from which can be deducted that the law applicable may not be the one of the national State.[56] These elements could be subjective or objective. The firsts deal with personal information of the parties

[55] S.M.CARBONE, *Il contratto internazionale*, page 38.
[56] E.g. a contract concluded by a citizen of a determined State with a foreigner, or a contract which must be performed into another State, different from the one in which that has been concluded.

such as citizenship; residency; domicile, whereas the seconds deal with a specific aspect of the contract such as the location where the contract has been concluded or the location of performance thereof. [57]

Every time in which there is a situation where there may be more applicable laws, it is said that there is a "conflict of law". Conflicts of laws are ruled by a plurality of sources of laws and the specific case is solved in a different way depending on the law applicable. The most relevant sources concerning the party autonomy, having considered the will to compare rules of law from a comparative perspective, are:

1) Starting from the Italian system, Law 218/95, which examines the national context concerning general rules of private international law ;
2) The European Regulation 593/2008, which examines the contractual choice of law in civil and commercial contracts and establishes specific rules for specific subjects, such as consumers; labour contracts; and contracts of carriage ;
3) Section § 187(2) of the Restatement in the U.S. system and the Uniform Commercial Code (U.C.C.) revised section 1-305, which provide rulings on choice of law in the United States, adopting a different method compared to the European model ;
4) The Hague Conference on principles of Choice of law in commercial contracts, which is a soft law instrument which is aimed to create a uniform application, at an international level, concerning choice of law.

Concerning the application of these sources of law, it must be pointed out the relationship between Law 218/95 and Regulation 593/2008. The first is a national rule of private international law, which has general features compared to the nature of *lex specialis* of the Regulation 593/2008. In fact, the latter contains a specific

[57] R.DE NOVA, *Quando un contratto è internazionale? Rivista di Diritto Internazionale Privato Processuale,* 1978, page 665 ss.*; Obbligazioni e contratti*, *Utet Giuridica*, 2013.

material scope which applies only to "contractual obligations in civil and commercial matters"[58], therefore recalling the direct applicability of the European regulations[59] and the fundamental relevancy of article 11(2) and 117(1)[60] of the Italian Constitution, the national legal order must comply with E.U. law. The reception of E.U. law is therefore established by article 57 of law 218/95, according to which "The contractual obligations are in any case regulated by the Convention of Rome of June 19th of 1980 on the law applicable to contractual obligations, rendered enforceable with Law of the 18th December 975/1984 without prejudice to other international conventions, as applicable." This shows the incorporation, put in place by our national law[61]. However, a few considerations shall be pointed out in relation to the first part of the disposal, where it is stated "In any case". There are two consequences, the first positive refers to the fact that recalling an international Convention favors the application of a uniform international law. On the other hand, there may be the risk that a subject could be crystalized to the recalled norms, regardless the new Convention on that specific matter. However, current doctrinal and jurisprudential interpretations agree on an extensive interpretation of this norm. It must be interpreted considering

[58] Art. 1 Reg. 593/2008: "This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters. It shall not apply, in particular, to revenue, customs or administrative matters".
[59] Art. 288(2) TFUE: "The regulation has general scope. It is binding in its entirety and directly applicable in all member States."
[60] Art. 11, comma 2: Italy agrees, on conditions of equality with other States, to the limitations of sovereignty that may be necessary to a world order ensuring peace and justice among the Nations Art. 117, comma 1: Legislative powers shall be vested in the State and the Regions in compliance with the Constitution and with the constraints deriving from EU legislation and international obligations.
[61] U. VILLANI, *Nozioni di diritto internazionale privato, Edizioni scientifiche italiane, 2014* page 21; *Sulla scelta della legge applicabile ai contratti nel regolamento comunitario Roma I*, *in Scritti in onore di Francesco Capriglione, Cedam,* Padova, 2010, page 731 ss.; *La legge applicabile alla sostanza dei contratti nel regolamento del 17 giugno 2008 (Roma I), in L'internazionalizzazione delle piccole e medie imprese. Aspetti economici e giuridici*, a cura di A. Nifo*, Edizioni Scientifiche Italiane*, Napoli, 2010, page 193 ss.

all the substitutive norms issued in time[62], that is to say that art. 57 l. 218/95 currently refers to reg. 593/2008.

However, the concept of internationality of the contract is explicated in different ways depending on the source of law.

In fact, according to article 1 of the 1986 Hague Sales Convention, it is provided a positive definition of "internationality". This provision determines the law applicable to "contracts of sale of goods":

a) between parties having their places of business in different States;

b) in all other cases involving a choice between the laws of different States, unless such a choice arises solely from a stipulation by the parties as to the applicable law, even if accompanied by a choice of court or arbitration."

On the other hand, art. 1(2) of the Principles of choice of law in International commercial contracts provides a negative definition of internationality by stating that: "For the purposes of these Principles, a contract is 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". The second definition is preferred by large part of the doctrine, because it requires a case-by-case analysis, therefore it warranties a concrete verification of the internationality of the contract. Moreover, the official comment of art. 1(2) of the referred principles individuates an internationality test[63].

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[62] F. MARONGIU BONAIUTI, *Conseguenze della trasformazione della Convenzione Roma in regolamento comunitario per il sistema di diritto internazionale privato,* in *Studi sull'integrazione europea,* 2006 page 309 ss.; *Note introduttive, II, in Regolamento CE n. 593/2008 del Parlamento europeo e del Consiglio del 17 giugno 2008 sulla legge applicabile alle obbligazioni contrattuali ("Roma I"), Commentario dir. da F. Salerno e P. Franzina, in Le nuove leggi civili commentate*, 2009, page 534-547.

[63] *Official commentary of the Principles on Choice of Law in International Contracts,* 1.17: "First, Article 1(2) refers to the establishments of the parties as a relevant element. When the parties' establishments are located in different States, the contract is international and the Principles apply. This is a simple test that facilitates the ascertainment of internationality without having to refer to other relevant factors. If a party has more than one establishment, the relevant establishment is the one that has the closest relationship to the contract at the time of its conclusion (see Art. 12). Second, even if the first test does not apply, a contract still qualifies as international unless "all

6. Choice of law as a material norm, theories

After asserting that choice of law is an expression of party autonomy, there are two main Italian doctrines which consider a different nature of choice of law. The first doctrine maintains that the law which rules on choice of law (l. 218/95) is a material norm. Before examining this doctrine, there are two extreme theories that deserve to be explained. According to the first approach, the norm attributes directly to the parties the power to rule on their interests and to choose the applicable law through the meeting of their will. In this way, l. 218/95 looses its own effects, because the choice made by the parties finds its grounds exclusively on the contract, better to say on the "will of the parties to be bound". This theory is also known as theory of the incorporation.[64]

However, the consequence of this approach is that law 218/95 looses its authority and his proper effects. Therefore, all the limits to which the parties should be subjected, such as the mandatory norms, do not exist anymore. The clause established allows an extension of the will of parties beyond the national limits and parties are not subjects to the distinction between voluntary rules and mandatory norms proposed by Mancini and reassessed in most actual sources of law[65].

Following this line, the second theory which has been criticized by the vast majority of the doctrine is called the "Contract without law"[66] and it can be considered as an extremism of the "Incorporation doctrine". The main feature of this approach is that it reverses the relationship between law and parties. In fact,

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other relevant elements" are located in the same State. These relevant elements may be, for example, the place of conclusion of the contract, the place of performance, a party's nationality, and a party's place of incorporation or establishment. If a party has more than one establishment involved in the transaction, subordinate establishments that have been disregarded in the first step pursuant to Article 12 (see para. 1.17) may still be taken into consideration."

[64] G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, page 21 ss.

[65] The Hague Principles, art. 11 ; Regulation 593/2008, art. 21; Restatement 187(2).

[66] *Id.* note 63.

usually parties can express their will in compliance with limits established by law, whereas according to the authors of this theory, the will of parties is over the law and they are able to determine the content of the contract in an absolute way, thus choosing the applicable law without any other bound.

Now, the theories briefly recalled assume at first the primacy of party autonomy over all, at second that the rules of private international law are considered as "material" thus they are part of the set rules of private law extended to the international context. However, it is important to recall the social function of law and the relevance of this function on the contract[67]. The agreement has not only effects on the parties, but also on the social context.[68] This happens usually in contracts in which both parties are entrepreneur and one of them is economically stronger than the other one, or when a contract which provides a high cost for one of the parties and has effects on the surrounding space E.g. a procurement contract between two private enterprises in order to build a chain of supermarkets has an impact on the social reality of the private subjects that live in the nearby. For this reason, it is necessary to consider that there are interests other than those directly involved in the contract and there may be the need to protect these as well and the only way to safeguard them is to impose limits to party autonomy.

The aim is to avoid the "social disorder" which is created when parties get profit of the other one's situation and this may happen both at national and supranational level. However, it is useful to consider the reverse situation as well, thus a national interest that is protected by a national law may not be protected as well in an international contract[69] but rather it can be a limit that hinders the freedom to contract. In the end, this theory promotes the internationalization of party

[67] *Id.* note 63.
[68] M.L.NIBOYET, *La thèorie de l'autonomie de la volontè; Droit international privé, 5th edition*, *Issy Moulineaux,* 2014
[69] G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, page 31 ss.

autonomy by attributing to it the same relevance at the internal level, reasserting the substantive character of the rule of private international law.

6.1. Choice of law as a conflict law, theories

Another interpretation of the norms on choice of law considers a different nature from the material norm. Whereas the latter assumes that choice of law deals with substantial internal law, thus represents an expression of the national system of private law, the theory examined right now supports the idea that there is a dissociation between rules on private law and on private international law. According to the authors[70] of this theory, the aim of the rules is exclusively to locate the contract in a determinate legal order, therefore rules of private international law acquire a "neutrality feature". Whereas the supporters of the first theory maintain that the choice of law in the contract allows a direct application of the material norms of the State recalled, the supporters of this theory assume that the choice of law exposed in the contract leads to an indirect application of the norms of the recalled State.[71] In this way, the parties' choice of law becomes a connecting criterion that allows only to individuate the law governing the contract and it acts like a neutral filter without referring directly to the specific foreign law. However, nonetheless the conflictual nature of choice of law private international law, nowadays the concept of neutrality has been eroded and there are many authors who maintain that the existence of a substantial relationship between the choice of the applicable law and private contractual autonomy.

Among these authors, there are some who believe that the choice of law itself represents an expression of a particular branch of party autonomy, that is the

[70] G. KEGEL, *Internationales Privatrecht*, 1995, page 26 ss. ; *Gutachten zum internationalen und ausländischen Privatrecht,* Baden-Baden 1999 ; G. VAN HECKE, *Principes et mèthodes de solution des conflicts de lois*, Nijhoff, Leiden, 1969 page 445 ss.
[71] G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, page 36 ss.

international party autonomy. This part of the doctrine assumes that there is a difference between the traditional and the international party autonomy. Through the first, subjects are able to determine the content of the contract and the applicable clauses and it relies on the freedom of contract. Whereas the second applies when the contract is international. Thus, part of the doctrine distinguishes between the power to choose the applicable law (*kollisionsrechtliche Verweisung*) and the power to dispose the content of the contract through a clause which contains the regime established by the foreign law (*materiellrechtiliche Verweisung*)[72]. Whereas the first refers to the opportunity attributed to parties to subject the whole contract to the chosen law, the second refers to the act through which the parties regulate their interests thus in the contract is not explicitly recalled the foreign law, but the content of the contract has the same "literal tenor"[73] of the foreign law recalled.

However, others have considered that is the internationality itself that would allow parties to choose the applicable law and by this opportunity, the parties put in place a contract inside the contract. Because of the fact that there are two choices that subjects put in being, thus the creation of a binding agreement with a determinate set of rules and the application of a specific law, it can't be really said that the power of parties concerning the ruling on the content of the contract is completely different in nature from the international autonomy[74]. Both of them shall be considered as a concretization of legal transactions, (in the abstract sense as "*negozio giuridico*") because in both cases the legislator connects the expression of the will of parties with determinate effects, and these effects are respectively

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[72] F. SBORDONE, *Le Obbligazioni contrattuali, in : Nozioni di Diritto Internazionale Privato*, page 86-87; *La «scelta» della legge applicabile al contratto*, *Edizioni scientifiche italiane,* 2003; *Contratti internazionali e lex mercatoria, , Edizioni scientifiche italiane*, Napoli, 2008 ; *Potere di scelta della legge applicabile e funzione delle norme di diritto internazionale privato, in AA.VV., Il diritto civile oggi. Compiti scientifici e didattici del civilista, Atti del I Convegno S.I.S.Di.C,* Napoli, 2006. *;* E. ZITELMANN, *Internationals Privachtrecht I*, *Ducker & Humblot* , Leipzig, 1897, page 270 ss.; *Die Juristische Willenserklärung*, *in Jhering's Janrbücher f. die Dogm*, 1878.

[73] *Id.*

[74] *G.* CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, page 36 ss.

the determination of the content and the law applicable. The only difference between these two concepts, according to this doctrine, deals with the function of both of them. [75]

Thus, the function of the power to determinate the content of the contract is to rule directly on the specific interests that parties want to reach, and this is in line with the technique of dissociation between material law and private international law because this power refers exclusively to private substantial law, that is the determination of the content. On the other hand, when parties choose to apply a specific law, they put in place a clause in which they recall the applicable set of rules, by this way the subjects do not express directly their will of power but rather they simply defer to the applicable foreign law therefore the application is indirect and the will of parties act as a subjective link between the contract and the need to place it in a national context.

Finally, there are two more theories that deserve to be mentioned, because they go further in explaining the relationship between freedom of choice and choice of law under the conflict of law theory. Specifically, it has been maintained that choice of law in the contractual matter is a rule of international private law that provides the opportunity, given to the parties in an international contract, to choose the applicable law in their agreement.[76] Whereas most authors who follow the "conflictual approach" maintain that the function of the choice of law is to localize the contract and to promote an application of a specific set of rules, the doctrine examined in this paragraph leaded by Deby Gerard assumes that there is an incompatibility between the concept of freedom of choice and its localizing function. The main reason is that the choice of law expressed by the parties is a representation of their freedom and therefore is the intrinsic concept of freedom

[75] B. PALLIERI, *Diritto internazionale privato italiano*, *Giuffrè*, Milano 1974, page 305 ss.
[76] D. GERARD, *Le rôle de la règle de conflit dans le règlement des rapports internationaux*, *Revue internationale de droit comparé,*,1973, page 268-272.

that contrasts with the mandatory element of the connecting criterion.[77] In fact, there may be the case in which parties do not put in place an express choice of law and following this theory there would be no connecting criterion that can be applied and the inacceptable consequence would be that the contract in governed by no law. However, according to the general and recognized principle that the will of parties must be subject to the limits imposed by law, the contract must be governed by a national law.

Thus, this doctrine supports the idea that provisions on choice of law deal with the opportunity attributed from the law to the parties to express their international private autonomy.

The second and last theory is an alteration of the first one but is in line with the concept of international substantial autonomy, fully recognized by these supporters[78] and is in compliance with the nature conflict law as well.

According to this approach the contractual matter is still ruled by the will of parties, but the function of choice of law diverges depending on the specific case and it is applied a particular mechanism of rule/exception. The general rule is established by provisions on conflicts law, which apply normally to all international contracts, however in the vast area of this contracts there are some of them who would be subject to exceptions and that is the case of international trade contracts.[79] Concerning these agreements the doctrine examined maintains that, exceptionally, the contract on choice of law would not be subject to the limits of the *lex causae* and therefore this decision could be made even if it is in contrast with the *lex causae* itself. The authors recalled admit a "specific freedom of contract"[80] in this sense. However, it is hard to determine whether an international

[77] G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, page 67 ss.
[78] C. FERRY, *La validitè des contrats en droit international privè France / U.S.A. Revue internationale de droit comparè*, Paris, 1989, page 85 ss
[79] *Id.*
[80] G. CARELLA, *Autonomia della volontà e scelta di legge nel diritto internazionale privato*, page 71 ss.

contract could fall into an exception and it revolutionizes the concept of choice of law as a conflict's law, moreover the scope of the choice of law in international contracts shall be considered as uniform, therefore the internal division between international contract and international commercial contracts can't be considered as in compliance with this aim because it would lead to the negative consequence of a diverse application depending on the specific case in a matter that looks for certainty of law.

7. Partial conclusions, The Hague Principles

Following an examination of the principles of party sovereignty and party autonomy in conflicts law, it can be stated that they represent two opposite principles. The first is aimed to represent and protect the will of parties in international contracts, through the establishment of provisions which warrant the opportunity to express choice of law in compliance the freedom of contract. On the other side, the second principle tends to set limits to the exercise of the freedom of contract. After the analysis of several doctrines and a broad referral to positive law that examined the nature, the function and the role of these principles in conflicts law it can be assessed that there are a lot of differences between States concerning choice of law in international contracts. Especially comparing the European system to the American legal order, these differences find their grounds in historical, social and constitutional reasons. However, even if there are substantial differences in the application of choice of law, the principle of party autonomy and the principle of sovereignty and, respectively, freedom of contract and limits to this freedom, play the same role and the same function in all the States.

The function is the same, however the application is different from each system and that would be analyzed in the further chapters. In any case, the revolution in choice of law in international contracts could be played by the 2015 "Hague

Principles of choice of law in International Contracts" . In fact, even if it is a soft law instrument, it establishes an opt-in choice mechanism that could be useful to harmonize national provisions in international contracts. The Hague principles seek this harmonization through two ways:[81] First, they provide a universal model that lawmakers can use to create, supplement or develop choice of law rules, in fact can be considered as a "code of best practice"[82] which could be followed by parties through an expressed or implied choice of law. Second, the Hague Principles are useful to set disputes between litigation and arbitration, in fact art. 3 allows the parties to choose as law applicable not a State law, but rather a non-state law which is "generally accepted on an international, supranational or regional level as a neutral and balanced set of rules."

Because of the importance and the innovation of this new soft law instrument, the further analysis will consider positive European and American law taking also into consideration, as a model for uniformity and evolution, the Hague principles on choice of law in international commercial contracts.

[81] M. PERTEGAS, B.A. MARSHALL, *Party Autonomy and its Limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts, Brooklyn Journal of International Law,* 2014, page 979; *Hague Principles on Choice of Law in International Contracts; Entry on "The Hague Conference on Private International Law"; The Hague Choice of Law Principles, CISG and PICC: A Hard Look at a Choice of Soft Law', American Journal of Comparative Law,* 2018*, page 175-217*

[82] J. NEELS, *The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts*, *Journal of South African Law*, 2015, page 776 ss. ; *Commentary on the Principles on choice of Law in International Commercial Contracts,* 1.5 *Introduction; "Tacit choice of law in the Hague Principles on Choice of Law in International Contracts*"

Chapter II, The Freedom of Choice

1. Freedom in the Hague Principle, article 2

There are many International Conventions in the field of contractual obligations, such as the 1955 Hague Convention on the international sale of goods, the 1980 CISG, or the 1986 Hague Convention on the law applicable to contracts for the international sale of goods. All these Conventions admit and recognize the will of party as the main criterion to determine, in substance, contractual obligations and all these Conventions recognize the existence of international private autonomy.[1] However, the most innovative source of law in the matter of international contractual obligations is showed by the 2015 Hague principles on Choice of Law in International Commercial contracts, because it is in line with the most recent approach of the States which is aimed to safeguard the will of parties in international contracts.

Article 2 of the Hague principles on Choice of Law in International Commercial contracts is named "Freedom of Choice"[2]. It is important to recall art. 2(1) because it reflects the importance attributed to the will of parties in international contracts: " A contract is governed by the law chosen by the parties". The fact that the Principles open with a provision which designates as a general assumption the

[1] G. CARELLA, *Autonomia della Volontà e scelta di legge nel diritto internazionale privato*, page 106-107.

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

relevancy attributed to the will of parties in the contract, leads to the conclusion that a party autonomy approach is favored in the principles, whereas the sovereignty principle of the States is subordinated to the first. In so declaring, these principles affirm the notion of party autonomy with limited exception taking into consideration the fact that party autonomy presupposes the free will of both parties freely expressed. However, even if the principle of sovereignty is not the first goal promoted by The Hague Principles, it is necessarily recalled and applied in other provisions established, such as art. 11(1)[3] which will be examined in chapter 3 as far as it concerns a limit to the principle of freedom of choice. Furthermore, Professor Symeonides believes that "it is a truism that party autonomy presupposes the free will of parties, but it may happen that this principle can be more rhetoric than true, because the specific cases usually imply that a there is a weak party and that party autonomy is almost a euphemism"[4].

In any case, the aim followed by art. 2(1) is to enhance certainty and predictability in international contracts and to reinforce party autonomy in this matter, moreover the principles recognize that the parties into a contract are those who are in the best position to determine which set of legal principles is the most suitable for their transaction[5], therefore it is necessary to attribute them the more power as possible, without breaching the other limits provided by the Principles, in order to better determine their interests.

The freedom of choice established in art. 2 is limited to a specific kind of agreement, that is the Choice of law agreement. Thus, it differs from other types of agreements both at substantial and procedural level. Concerning the aspect of substantiality, the choice of law agreement differs from the main contract

[3] Art. 11(1) "These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties."
[4] S. C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 878.
[5] *Commentary on the principles on Choice of Law in International Commercial Contracts*, Introduction 1.3.

concluded. The latter could be any kind of contract within the scope of Principles[6], however, because the choice of law agreement is separated from the main contract the latter is subjected to a distinct formation. Consequently, if the main contract is invalid because of violations of national provisions, that invalidity does not necessarily affect the validity of the choice of law agreement as it is separate. This conclusion is reinforced by the provision established in art. 7 of the Principles, which assumes that "a choice of law cannot be contested solely on the ground that the contract to which is applied is not valid."

On the other hand, concerning the procedural aspect, the choice of law agreement as established in the Principles is also different from jurisdiction agreements and arbitration clauses agreements. In fact, the latter are disposed only for the purpose of dispute resolution agreements, whereas the choice of law agreement recalls exclusively the substantial law applicable. Therefore, it is true that the freedom to which the Principles refer has to be enveloped in party autonomy, however art. 2(1) can be interpreted as the opportunity given to the parties to put in place a new substantial agreement[7], useful to determine the best interests for the parties in the contract.

Freedom of choice expressed into art. 2(1) is not limited to give the opportunity to parties to choose any applicable law of any state, but rather parties may also choose for "rules of law" as provided in art. 3 of the Principle. This is an important conquest which has been reached in Private International Law, because the Principles represent the first widely accepted source of law (even if soft) that expressly foresee the applicability to the specific contract of non-national sources of law. [8]

[6] Art.1 :" These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts."
[7] *Tertium genus.*
[8] It will be examined later the relationships with Reg. 593/2008 and the 187(2) Restatements.

Another relevant aspect in the freedom of choice, implied in art. 2(1) and expressly stated in art. 2(3), is the power to modify the law specified at any time. However, there must be set limits concerning the formal validity of the contract and the pre-existing rights of the third parties.[9] In fact, the law chosen by the parties governs the validity of the contracts, thus any change of law after the contract's conclusion may affect the formal validity of the contract or may impose different conditions which affect third parties. In this case problems arise if third parties claim rights over the contract which were supposed to be satisfied under the contract before it was modified. In order to avoid retroactive invalidity and to extend the effects over third parties, if the law is modified by the parties after the conclusion of the contract and under the new law that contract would have been invalid, that contract is still valid. [10]

The freedom of choice is also expressed in art. 5, which allows parties to choose the form for which they can dispose the law applicable.[11] This provision assumes that no formal requirement is needed to put in place the contract, and this rule is valid for both express and tacit choice of law. The formal validity must comply with the requirements of at least one law whose application is authorized by the applicable p.i.l. However, again, art. 7 plays an important role because it foresees the severability of the contract on choice of law and implies that the invalidity of the main contract does not affect the validity of the choice of law because they are separate agreements.

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[9] *Commentary on the principles on Choice of Law in International Commercial Contracts*, Art. 2 Freedom of choice, Timing and modification of the choice of law.

[10] *Illustration 2-5 Commentary on the principles on Choice of Law in International Commercial Contracts*, "Party A and Party B conclude a contract and agree that it is governed by the law of State X. Party C guarantees the obligations of Party A. Subsequently, Party A and Party B modify their contract to change its governing law to the law of State Y. Under the law of State Y, Party A has greater liability to Party B than Party A would have had under the law of State X. While this modification is effective as between Party A and Party B, it may not adversely affect the rights and obligations of Party C. Those rights and obligations continue to be governed by the law of State X."

[11] Article 5 Formal validity of the choice of law :"A choice of law is not subject to any requirement as to form unless otherwise agreed by the parties."

By the way the matter of commercial contract, especially internationals, deals with agreements which have an onerous consideration. Thus, even if the national legislator does not provide for that specific agreement a mandatory form, parties are strongly recommended to put in place their agreement in written in order to have a safe evidence.[12]

Even if this recommendation is recognized by the large part of the doctrine for the main contract, thus the substantial contract that parties want to put in place[13], I believe that the same statement could be put in place for choice of law agreements. In fact, as these agreements deal with the identification of the of the substantive law applicable in commercial contracts as well, the rationale may be the same in order to better ensure the certainty and foreseeability of the contract as stated also in the Preamble of the Principles. Furthermore, it is true that art. 5 does not specifically mandate a particular form of choice of law clause and it is also true that most systems neither provide a specific form for choice of law, but the main reason is that these systems consider this clause just one term of the whole contract contained in it[14] and therefore it is obviously recommended the written form.

1.1. Freedom in the European and national context, Regulation 593/2008 art. 3

The national and the European context are strictly linked concerning the international choice of law set of rules, as the national legal order is currently established in compliance with provisions of Regulation 593/2008.

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[12] S. MONTICELLI, G. PORCELLI, *I Contratti dell'Impresa*, *Giappichelli*, Torino, page 23; *I contratti per l'esternalizzazione dei servizi e le tutele*, *in : Europa e Diritto Privato*, 2011; *I contratti strumentali per la circolazione dei beni nel mercato, in I Contratti dell'Impresa,* 2013*; Autonomia private e limiti alla disponibilità della nullità contrattuale; in: Contratto e Impresa,* 2018.

[13] E.g. Sale contract.

[14] S.C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 891.

The first positive provisions concerning freedom of choice in the national context could be found in art. 25 Preliminary Provisions of the 1942 Italian Civil Code, now abrogated[15] . However, in this provision there was no expressed distinction between international and domestic contracts, thus the freedom of choice suffered a legislative gap in this specific field, even if it was generally accepted. In time, law 218/95 was issued and, today, it represents the Italian international private law source. However, as mentioned, [16] today the choice of law on international contractual obligations is ruled by the European Union. Thus, there are two reasons which stand behind the primacy of the Regulation 593/2008. The first reason is technical, so even if art. 57 recalls the 1980 Rome Convention, under the theory of incorporation and because of the fact that the Rome Convention and Regulation 593/2008 have the same object, the international contractual field shall fall within the latter because it supersedes the first one.[17] On the other hand, the second reason is more historical, in fact in time E.U. competences have increased in order to foster the certainty and foreseeability of European trades. There may be another reason however, in fact Rome I Regulation is inspired by the same rationale of the Rome Convention, that is to say empowering the will of parties in international contracts.

Moreover, because of the direct applicability of Regulation 593/2008, law 218/1995 applies indirectly and only if its provisions are not in contrast with the E.U. source of law.

By the way, when Rome I entered into force there were many bilateral agreements which had been already signed by member States that were adhering to other

[15] Art. 25 preliminary provisions to the C.C. :" The obligations arising from the contract are governed by the national law of the parties, if it is common, otherwise the law applicable is the one in which the contract has been concluded. In any case the will of parties can dispose in a different way."

[16] Art 57 l. 218/1995: "The contractual obligations are in any case governed by the Rome Convention of 19 June 1980 on the law applicable to contractual obligations, enforced by the Law of 18 December 1984, n. 975, without prejudice to other international conventions, as applicable."

[17] P. MENEGOZZI, *Il Diritto Privato Internazionale Italiano, , Editoriale Scientifica,* Napoli, 2004, page 177 ss

conventions providing for other provisions regarding the choice of applicable law, thus it was necessary to dispose a norm that was able to avoid any possible conflict of law. To solve this problem art. 25 of the Rome I Reg. finds two different solutions:[18]

1) Concerning Conventions already concluded between member States and third States, Rome I Regulation does not preclude the application of multilateral Conventions governing conflicts of law at the time where the obligation arose.

2) Concerning all the other Conventions concluded by Member States between them, Rome I Regulation shall prevail if they have the same object of the latter.

Thus, art. 25 expresses the will of the European legislator to respect binding agreements between member States and foreign States, however it tends to warrant the goal of uniformity in the European context.

The freedom of choice is firstly affirmed in Recital 11[19] as a general principle that permeates all Rome I Reg. then it is expressly established in art. 3 of the latter. This article provides a freedom attributed to the party that is higher than the one provided by other sources of law[20]. In fact, under the E.U. law even if a contract is objectively domestic, it could obtain the requirement of internationality only because the parties want to apply a different law and it is not necessary any substantial connection with other place, thus it is sufficient a *pactum de lege*

[18] P. DE CESARI, *Diritto Internazionale privato dell'Unione Europea*, *Giappichelli*, Torino, 2011, page 344. ; Art. 25:" This Regulation shall not prejudice the application of international conventions to which one or more Member States are parties at the time when this Regulation is adopted and which lay down conflict-of-law rules relating to contractual obligations. However, this Regulation shall, as between Member States, take precedence over conventions concluded exclusively between two or more of them in so far as such conventions concern matters governed by this Regulation."

[19] Recital 11 Rome I Reg." The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations."

[20] E.g. Restatements on Conflicts of Law 187(2).

utenda[21]. This kind of "artificial internationality"[22] is innovative because it empowers the will of parties and its autonomy in the international context. At the same time, this provision is in line with the E.U. approach to warrant certainty and predictability of contracts by promoting the will of the parties in verifying which law best represents their interests without impairing one of them.[23]

Under the E.U. regulation, it is true that the parties can express their choice of law in an expressed or implied way, however, the choice needs to be clear and transparent. The transparency requirement is mandatory because otherwise the judge could not consider the will of parties as a valid criterion in order to identify the law applicable. E.U. law is in favor to party autonomy, that is demonstrated by attributing to parties the most efficient connecting criterion in order to choose the applicable law. In the event that a choice of law is not clear, that clause won't fall under art. 3 and thus can't be considered as a connecting criterion. In this event, the clause will be considered as "merely transactional" and it won't have the effects which are proper of the choice of law, that is the indirect normative effect. In the end in case of non-transparency, art. 4 steps into and the judge is required to look for a specific connecting criterion, as the latter is one of the norms which

[21] Art. 3 Reg. 593/2008: "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.
The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice made under this Article or of other provisions of this Regulation. Any change in the law to be applied that is made after the conclusion of the contract shall not prejudice its formal validity under Article 11 or adversely affect the rights of third parties.
3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.
4. Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement.
5. The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13.
[22] F. SBORDONE, , *Le Obbligazioni contrattuali*, page 84 ss.
[23] *Id.*

provides supplementary criteria in case of absence of will of the parties,[24] thus the proper choice of law manifested in a comprehensive way becomes necessary in order to prevent an application of the effects established by art. 4.

This interpretation assumes that the nature of the "*pactum de lege utenda*" under Reg. 593/2008 is particular. In fact, the choice of law under this law is not a mere transactional choice because when the parties put in place that clause, their interests are not directly protected by the direct effects of the contract. On the other hand, their interests are not represented by a direct applicability of a foreign law, because as it was mentioned earlier, without a specific choice of law in international contracts art. 4 is enforced.

For this reason, the large part of the doctrine assumes that under this Regulation the choice of law shall be considered as a *tertium genus* clause.[25] The nature of this clause is not transactional, nor regulatory, but rather a clause which lies in between these two concepts and allows the indirect application of foreign law, where it is expressed clearly. Therefore, it may be stated that it has an ambivalent nature in between autonomy and heteronomy and it constitutes a particular clause exclusive of private international law which follows two functions[26]:

1) Regulatory function, exploitable to the interests of the parties to concretize the interests of the international contract.
2) Preventative function, because it is necessary to avoid contrasts concerning the applicable law to the international contract.

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[24] Art. 4 :" To the extent that the law applicable to the contract has not been chosen in accordance with Article 3 and without prejudice to Articles 5 to 8, the law governing the contract shall be determined as follows:
(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed
by the law of the country where the property is situated;"

[25] F. SBORDONE, *Le Obbligazioni contrattuali*, page 90 ss.

[26] *Id.*

1.2. Freedom in the U.S. context, section § 187 Restatements, section 1-301 U.C.C.

In the United States, there may be more conflicts between states at national, federal or international level[27], nonetheless, from a formal point of view the matter of choice of law in international contracts is treated almost in the same way as the matter of conflicts between national States. In fact, the applicable sources of law are the same as section § 187 Restatement's makes no distinction between interstates and international contracts.

However, some limitations established by the U.S. Constitution apply only to interstate conflicts, like the Full Faith and Credit clause established in Art. IV(1) of the U.S. Constitution[28] which provides that States must recognize legislative acts, public records and judicial decisions of the other States within the U.S. Thus, interstate conflicts are solved on the base of the Constitution.

International choice of law are treated similar to the domestic choice of law because of several reasons.[29] These are that 1) international choices of law rarely overcome the localism of state courts 2) the constitutionality claim may consider choices of law as irrelevant because of the constitutional limits, as occurred in *All State Insurance Co. Vs. Hague,* where the U.S. Supreme court dictated that :" for a state's substantive law to be selected in a constitutionally permissible manner that State must have a significant aggregation of contract, creating State interests, such that choice of its law is neither arbitrary nor fundamentally unfair", therefore the U.S. Supreme Court's orientation is in line with a restrictive approach adopted

[27] See Chapter 1, page 3.
[28] Art. IV (1) U.S. Constitution: "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."
[29] M.ZHANG, *Party Autonomy And Beyond: An International Perspective Of Contractual Choice Of Law, Legal studies research Paper Series, Emory International Law Review,* 2006 page 513; *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome, Stetson Law Review,* 2014-2015 ; *Contractual Choice of Law in Contracts of Adhesion and Party Autonomy, 41 Akron Law Review,* 2008.

in the U.S. Constitution. It is true that the case recalled regards an interstate conflict, however this judgement may be transposed at an international level as well, because "the clash between international concern about the need of global trade and constitutional claim about contract's requirements, rarely is won by the first one."[30]

Choice of law in the U.S. context finds its legal grounds on two different sections, section § 187 of the Restatements and section 1-301 of the Uniform Commercial Code and their applicability depends on the specific contract.

The Restatements are a complex collection of affirmed jurisprudence issued in time and they represent a " typical *a priori* rule and a high degree of confidence on judicial abilities on a case by case analysis".[31] There are two kinds of § 187 Restatements, the First and the Second and because of the fact that in the U.S. context inner States have a broad autonomy in determining and interpreting the contract's law matter, every State has the opportunity to apply its own interpretation.

Today Section § 187 Restatement First methodology is followed only by a few States, as its main core obligations are not in compliance with general rules of international law on choice of law, because they do not allow parties to choose the law applicable to the contract.[32]. However, even States that formally still adhere to the Restatement (First)[33] or apply different interpretations according to the specific case, expressly recognize that section § 187 warrants the free choice of law as a basic principle of contract conflicts. Thus, it may be assumed that the formal approach maintained by these States is influenced by the most recent international law receptions and they substantially recognize the principles of the Second

[30] *Id.*
[31] S.C. SYMEONIDES, *Codifying the Choice of Law around the World*, page 164
[32] Beale's approach, see Chapter 1.
[33] Alabama, Georgia, Kansas, Maryland, New Mexico, Florida, Rhode Island, South Carolina, Tennessee, Virginia Wyoming.

Restatement. [34] On the other hand, Restatement Second is followed by the remaining States and its approach is more modern than the first.[35] The freedom of choice established in this section is, compared to the one established in the Rome I Regulation, less warranted.

Restatement Second § 187 divides into 3 subsections, the first two may be useful to put in place general assumptions on freedom of choice. According to § 187(1):

" The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue."

This provision is widely accepted even by States that approach to the First Restatements, because it deals with the freedom of contract and assumes that the parties are free to determine the law to govern their contractual rights, however this is not a rule of choice of law but rather a rule which foresees an incorporation by reference.[36] In fact, this rule merely establishes that parties have power to determine the terms of their contractual engagements and they can do that in two ways. The first is by expressing these terms in the contract, whereas the second consists on incorporating into the contract by reference extrinsic material which may be the provisions of some foreign law. In such instances, the forum will apply the applicable provisions of the law of the designated state in order to enforce the intentions of the parties.[37]

On the other hand, section § 187(2) deals with the case in which is individuated a true conflict of law, thus it states: "The law of the state chosen by the parties to

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[34] P.J. BORCHERS "… courts of all conflicts stripes have flocked to the Second Restatement's broad endorsement of party autonomy in § 187"., *The Internationalization of Contractual Conflicts of Law, Vanderbilt Transnational Law,* 1995*; Conflict of Laws (6th ed. 2018); Conflicts in a Nutshell (4th ed. 2016); The Choice-of-Law Revolution: An Empirical Study, in Economics of Conflict of Laws, Washington and Lee Law Review,* 1992.

[35] Even if the U.S. doctrine, who will be analised in the last chapter, is debating for a new *Third Restatement.*

[36] *Official Comment Restatement (Second) of Conflict of Laws.*

[37] *Id: "*rules relating to construction, to conditions precedent and subsequent, to sufficiency of performance and to excuse for nonperformance, including questions of frustration and impossibility."

govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement[38] directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

Therefore, the rule of this subsection applies only when two or more states have an interest in the determination of the particular issue. The rule does not apply when all contacts are located in a single state and when, as a consequence, there is only one interested state. Subject to this qualification, the rule of this Subsection applies when it is sought to have the chosen law determine issues which parties could not have determined by explicit agreement directed to the particular issue. Thus, taking into consideration art. 3(1) Reg. 593/2008 and § 187(2) exclusively from the perspective of the freedom of choice, it can be stated that the second warrants less freedom to the parties than the first because it makes references to the mandatory requirement of the substantial connection or any other reasonable basis of the chosen State and the fundamental policy of a State which has a materially greater interest than the chosen state in the determination of the particular issue , so that § 187(2) has been defined as the expression of a confined party autonomy.[39]

[38] Examples of such questions are those involving capacity, formalities and substantial validity.
[39] M.E.BURGE, *Too Clever by Half: Reflections on Perception, Legitimacy, and Choice of Law Under Revised Article 1 of the Uniform Commercial Code*, 6*, William & Mary Business Law Review,* 2015, page 367; *American Contract Law for a Global Age, CALI's e Langdell Press,* 2017.

However, there is another section that deserves to be analyzed from this perspective, that is 1-301(a) of the U.C.C., which states that "Except as otherwise provided in this section, when a transaction bears a reasonable relation to this State and also to another State or nation the parties may agree that the law either of this state or of such other State or nation shall govern their rights and duties."

Apparently, this section admits more freedom in the choice of law contract rather than § 187(2) , because it is recalled only one limit established to party autonomy, that is the "reasonable relation" instead of the double limitations imposed by § 187(2) . Furthermore, if section 1-301 is read under its literal interpretation, it requires a reasonable relation with both States and it shall be considered against the liberal stance to party autonomy to which is inspired the U.C.C.[40] Thus, the mandatory substantial relationship shall be interpreted in an extensive way taking into consideration only one State other than the forum State and not both.

Concerning the relationship between § 187(1) and Section 1–301, the latter does not expressly distinguish between a contractual choice of law and incorporation by reference, but the official comments correct this deficiency by stating that the parties are free to displace the U.C.C. waivable rules by incorporating by reference in their contract the law of a state that lacks a reasonable relation or, for that matter, non-state norms, such as the UNIDROIT principles[41], thus the equivalent of § 187(1) is stated in U.C.C. 1-302(a)[42]. In the end, the U.C.C. provisions on choice of law look more libertarian norms then their counterpart in the Restatements in the United States, however what makes the first less applicable than the second is the scope. In fact, the U.C.C. applies and overcomes the Restatement only when

[40] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective*, *Convergence and Divergence in Private International Law- Liber Amicorum,* 2010, page 520.
[41] *Id* note 41.
[42] § 1-302. U.C.C. :"(a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of the Uniform Commercial Code may be varied by agreement."

the specific contract falls into its scope, as established by section 1-102[43] of the latter.

Concerning the relationship between art. 3(1) of Reg. 593/2008 and 1-301 U.C.C., the first prevails over the latter in the matter of freedom of contract because is more warranted in the European context. By the way there has been in the past an important proposal which has not passed because of lack of consent by the vast majority of the States. In fact, in 2001, the U.C.C. Commissioners proposed a major revision of Section 1-301, which drew heavily from the Rome Convention. Besides introducing the European concept of "mandatory rules", the proposed revision would have differentiated between consumer contracts and business-to-business contracts, as well as between international and U.S. interstate contracts, and would have imposed different party autonomy restrictions for each category.[44]

These ideas did not demonstrate successful results among State legislations and, by 2008, only the U.S. Virgin Islands had adopted the proposed revision, thus forcing the U.C.C. Commissioners to withdraw it. Therefore, the American jurisprudence and doctrine is fully aware of the limitations imposed on contractual choice by the national law, however the economical and domestic conflicts look hard to be solved in a brief time[45].

2. Modes of expression: expressed, tacit choice

After having examined the general concept of freedom of choice as established in positive law, it is useful to show a comparison on how the choice of law can be

[43] 1-102 UCC: "This article applies to a transaction to the extent that it is governed by another article of the Uniform Commercial Code."
[44] S.C. SYMEONIDES, *Conflict of Laws, 4th edition*, 2004 page 983-987 ; J. GRAVES, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. 1-301 and a Proposal for Broader Reform*, *Seton Hall Law. Rev*iew, 2006.
[45] This issue will be further developed in Chaper IV.

expressed in the contract and how the different sources of law approach to this issue.

The modes to form choices of law can be expressed or implied in the contract. Whereas the first way has always been agreed by the doctrine and the jurisprudence, the second one has been object of discussion for a long time. For example, during the draft of Reg. 593/2008, there has been a debate on the opportunity to consider the implied choice of law as a tacit but clear and transparent choice, instead of a clause supposed to be interpreted by the presumed will of the parties. Furthermore, the debate was ongoing on the possibility to consider the choice of court equal to the choice of law based on the fact that one of the most significant elements according to which the European judges can verify if there is or not a choice of law, is the forum choice, as it was considered in Germany that used to apply a tacit choice of law equals to the *lex fori*[46] However, the introductive Recital 12[47] of Rome I Reg. can be considered as a left over of the old proposal, as it assumes that the choice of a specific court is one of the elements from which can be deducted the law applicable, even if today it is not an exclusive element, whereas in the past it was.

Another issue was whether it could be considered as an implied choice of law, the fact that the parties recalled in the contract a determinate provision of foreign law. This clause can be considered as a choice of law today only whether it satisfies the requirements established by art. 3(1), thus "The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case." There has been also a provisional change compared to the past Rome Convention, which established that the law applicable should have resulted "in a reasonably certain way" from the provisions of the contract or from the

[46] P. DE CESARI, *Diritto internazionale privato dell'unione europea*, , page 357 ss ; *Codice delle convenzioni di diritto internazionale privato e processuale*, *Giuffrè*, Milano, 1999.
[47] Recital 12, Reg 593/2008 "An agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated."

circumstances of the specific case, whereas nowadays it is stated that the choice must result "clearly". There are two interpretations which has intervened on this modification, according to the first, the provisional change has not brought news in the meaning of the norm. This vision is supported by the *Lawlor Awlor vs Sandvik* in which the English Court of Appeal explained that the change of language was not intended to involve a change of meaning, but simply intended to bring English and German texts in line with the French text of the convention, thus it was and it still is intended as " the contract is taken as a whole point ineluctably to the conclusion that the parties intended it to be governed by that law[48]. On the other side, the opposed interpretation assumes that the slight modification from art. 3(1) of the Rome Convention into art. 3(1) of Rome I is in compliance with the need for certainty that the Rome I Reg. pushes for in order to avoid the event in which the judge individuates a presumed, but not real, will of the parties.[49]

Finally, in order to verify whether the choice of law is clear or not, part of the doctrine has individuated some objective indicators, the occurrence of which does not necessarily entail the choice of law, however they are useful to support a construction of the contract[50] and they take into consideration all the circumstances surrounding the conclusion of the contract:

1) The establishment of a clause which derogates to the jurisdiction;
2) The establishment of a clause by which parties individuate provisions in a different legal order than the *lex forum*;
3) The establishment of standard contracts explicitly dictated taking into consideration the place from where the party who puts in place the standard terms comes from;

[48] P. STONE, *E.U. Private International Law, Edward Elgar Pub. 3rd Revised edition,* 2014, page 299 ; *Territorial targeting in E.U. Private law, in Information & Communication Technology Law,* 2013
[49] P. DE CESARI, *Diritto internazionale privato dell'unione europea*, , page 360 ss.
[50] P. LAGARDE, M. GIULIANO: "*Relazione sulla convenzione relativa alla legge applicabile alle obbligazioni contrattuali* ", Gazzetta ufficiale n. C 282 del 31/10/1980.

4) If there are two connected contracts and for one of them is not provided the law applicable whereas for the other one it is provided, the first may be subject to the law expressly provided by the second, because the parties may have impliedly wanted to subject them to the same law;
5) If the same parties put in place a contract concluded after another contract which has the aim to concretize the interests of the first one, there may be an implied choice of law.

Furthermore, these indicators are in compliance with the general rules of contracts provided by the states, because the implied choice of law has to be individuated through the means of the interpretative rules established by national laws, for example these indicators are in line with the national context, because they are individuated by art. 1362 c.c. and art. 1363 c.c.[51] [52] In so doing, express and tacit choice provisions allow certainty and predictability and let parties know the legal regime to perform its application, facilitating the transaction.

The European Union is very developed and legally advanced on this issue, however on the international side there are many divergences. During the development of the Hague Principles there was a discussion on where applying or not the implied choice, because some States do not have this opportunity in their legal system.[53] Moreover, there are also some countries' legislations that do not have specific provisions on the mode of expression of the parties' choice of law[54] but through the analysis of abstract contract principles identifiable by analogy from general rules on contracts' interpretation, it is understood that tacit choice is

[51] 1362 cc.: "In interpreting the contract it must be investigated the common intention of the parties and not limit oneself to the literal meaning of the words. To determine the common intention of the parties, their overall behavior must be assessed even after the conclusion of the contract "; 1363 cc" The clauses of the contract are interpreted by means of the others, attributing to each the meaning that results from the whole act."
[52] F. SBORDONE, *Le Obbligazioni contrattuali*, page 103.
[53] M. PERTEGAS & B.A. MARSHALL, *Party Autonomy and its Limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts,* 984-985
[54] M.M.ALBORNOZ, N.GONZALEZ MARTIN, *Towards a uniform application of party autonomy for choice of law in international commercial contracts*, *Journal of Private International Law*, 2016, page 444.

allowed. This is the case of the Venezuelan Private International Law Act of 1998(Venezuelan PIL Act), which remains silent on the issue. In fact, Article 29 accepts party autonomy, but it provides no specific indication of its mode of expression.[55]

In the end, because of the non-mandatory nature of these principles, a more liberal approach prevailed even if some of these States were in disagreement because of national divergences[56]. Therefore art. 4(1) of the Hague principles is in line with the provision established by Rome I Regulation, as it was strongly inspired by the latter during the drafting period. Nowadays art. 4 states that: "A choice of law, or any modification of a choice of law, must be made expressed or appear clearly from the provisions of the contract or the circumstances."

Thus, Art. 4(1) as well states that the parties to a contract may expressly or tacitly choose for rules of law. The choice can be made before, at the same time, or after the conclusion of the main contract and is not required the use of particular words in order to give effect to the clause.[57] Moreover, as there is no formal mandatory requirement, art. 4 shall be in compliance with art. 5, thus a choice of law could be done orally as well. The same issues examined in Rome I Regulation apply for art. 4(1) in tacit choice as the first is the more liberal source of law in this matter, therefore the modes of expression of choice have been transposed in the Hague Principles. In the end, what is relevant is that the real intention of the parties must be effective and presumed intention is not sufficient to determine the existence of a choice of law.

The only divergence in the meaning of art. 3 of Rome I and art. 4 of the Hague Principles is that it expressly recognizes the difference between choice of court and choice of law. In fact, art. 4(2) assumes that, "An agreement between the

[55] *Id.*
[56] E.g. China: Article 3 of the Law of the People's Republic of China on the Laws Applicable to Foreign-Related Civil Relations (Chinese PIL Act).
[57] Official Comment, art. 4 Hague Principles: "phrases sufficient are: contract is " governed by" or "subject to" a particular law."

parties to confer jurisdiction on a court or an arbitral tribunal to determine disputes under the contract is not in itself equivalent to a choice of law", in fact even if nowadays it is generally recognized the distinction between choice of court and choice of law, the distinction has never been specified in any provision. Thus, it can be considered as a reception of the most recent doctrinal and jurisprudential approaches. By this way article 4 affirms that such a choice is not in itself equivalent to a choice of law. This express clarification avoids a common point of confusion in practice: the parties' decision to choose a particular court or arbitral tribunal as the forum used for resolving disputes does not automatically lead to the conclusion that the parties have selected the law of that forum as the law governing the contract.[58]

The implied choice is recognized in the U.S. system as well. Restatement Second § 187 and thus 23 American states which follow this approach assume that a reference to legal expressions or doctrines of a particular State, in the contract, is sufficient to be considered as an implied choice.[59] However, differently from Rome I Reg. and the Hague Principles, the Restatements do not foresee in its provisions the opportunity attributed to parties to choose in an implied way the applicable law. Thus, it is necessary to recall some American case law which witness the admission of implied choice of law in the U.S., an example may be provided by the judgement of the Supreme court of *Texas Sonat Exploration co. v. Cudd Pressure Control Inc.*: in this case the contract was a master service agreement which was supposed to be performed in multiple locations. The Supreme Court of Texas's judgment stated that the agreement disposed several provisions that foresaw the application of two different laws depending on where the operations had to be performed. When the latter were performed on navigable waters, maritime law would have applied, and where operations were performed in Texas or New Mexico, Texas law would have applied. During the contract's

[58] M. PERTEGAS & B.A. MARSHALL, *Party Autonomy and its Limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts,* page 987 ss.
[59] *Id* note 59.

performance a dispute concerning indemnity provisions arose in relation to an operation in Louisiana. The appellant argued before the Supreme Court of Texas that the parties had impliedly chosen Louisiana law to apply to operations in Louisiana because of (1) the use of the term "statutory employer," a legal term peculiar to the state of Louisiana, and (2) the inclusion of an additional insured provision in the agreement.[60]

The Court rejected this argument because of three reasons. First of all, the Court assumed that the indemnity provisions were printed in capital letters, typical form of the State of Texas, indicating Texas law. Furthermore, the Court maintained that the additional insured provision was inserted in order to avoid the effect of Louisiana's indemnity law and could not be treated as a sort of implied choice of law. Lastly, the court stated that it not sufficient for parties to put in place "mere implied references" in order to apply Louisiana law to the entire contract, therefore in this case tacit choice of law extendible to the whole agreement should be clearly visible.[61]

Another case in which implied choice of law has been recognized is *Burchett v. MasTec North America Inc.* reasoned by the Supreme Court of Montana. [62]

Here, the Supreme Court agreed with Burchett's argument concerning the interpretation of the facts in compliance with § 187 and maintained that parties chose Montana law to govern their contract. Although the decision to apply Montana law was not expressly stated in the employment contract, the parties agreed that income taxes, unemployment insurance premiums, and wages were to

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[60] *Sonat Exploration Co.v. Cudd Pressure Control, Inc.* Supreme Court of Texas November 21st , 2008.
[61] *Id* note 59.
[62] *Burchett v. MasTec North America Inc.* July 6th , 2004 Background: "Burchett was employed by C&S Directional Boring from March 2000 to January 2001. C&S Directional Boring is now a subsidiary of MasTec. MasTec is a Florida corporation, and the division of its business relevant to this appeal is operated out of Purcell, Oklahoma While working in Indiana, Burchett had a dispute with his supervisor and was fired. Burchett filed a Complaint in the Thirteenth Judicial District Court against MasTec alleging violations of Montana's WDEA, Title 39, Chapter 2, Part 9, Montana Code.

be paid in Montana. For the Court, this choice constituted an expression of the intent of the parties to have all the contract provisions governed by that law and the latter maintained that "a contract provision may be broad enough to indicate the entire contract be governed by the laws of the state governing the particular provision."[63]

Thus, even in the U.S. context can be noticed that the mode of expression of choices of law can be considered as similar to the other systems because implied choice is allowed as well. In fact, even if not expressly stated, the Supreme Courts adopted the parameters established by Professor LaGarde[64] in determining choices of law, specifically, in *Sonat* the Supreme Court analyzed the capital letters, which are by the way considered as common Texan standard terms.

On the other hand, these judgements, as many other in the U.S., are in line with the approach to tacit choice envisaged by the Hague Principles. In *Burchett,* the Court reasoned that the intention of the parties could be clearly individuated by the circumstances of the case, specifically that both wanted perform the most relevant parts of the contract in Montana and this is in line with the provision of art. 4 of the Hague Principles, where it is assumed that "A choice of law must be made expressly or *appear clearly* from the provisions of the contract or the circumstances".

[63] " *Official comment Restatement (Second) of Conflict of Laws*, § 187(1971); "generally, when parties have chosen the state of the applicable law they will generally refer to it expressly in their contract, however even when the contract does not refer to any state, the forum may nevertheless be able to conclude from its provisions that the parties did wish to have the law of a particular state applied."

[64] See note 53.

2.1. Modes of choice expression: depeçage

The process[65] of separating the elements comprising a legal relationship so as to subject them to the laws of several different legal systems is known as *depeçage*.[66] The first source of law which introduced the *depeçage* is the 1980 Rome Convention and its provision has been entirely reproduced in art. 3(1) of the Rome I Regulation[67], according to which " By their choice the parties can select the law applicable to the whole or to part only of the contract." Thus, parties are allowed to choose more laws applicable to different parts of the contract, however there are some divergences concerning the sources examined.

There may be two kinds of *depecage*, direct and and indirect. The first one is wanted by the parties because they may expressly or impliedly choose more laws applicable to the contract, however their intent shall be clearly represented. On the other side, the indirect *depeçage* may occur[68] when the parties choose the law applicable to part of the contract and keep silent concerning the remaining part of the latter. Thus, the technique of the indirect *depeçage* involves the situation in which the parties have exercised the freedom not to choose the applicable law of the contract. In this case the sources examined provide two different solutions. The main examples can be found in a comparison between the Hague Principles and

[65] In view of some authors, the definition of *depeçage* is not clear, e.g. according to S.C. SYMEONIDES, *Issue-by-Issue Analysis and Dépeçage in Choice of Law: Cause and Effect, University of Toledo Law Review,* 2014, Page 8:" Various courts have referred to *dépeçage* as a "mystical doctrine," a plain "doctrine," a "legal theory," an "approach," a "principle," a "rule," a "technique,"or a "process." *Dépeçage* is none of the above. It is not the goal of the choice-of-law process, not even the goal of issue by issue analysis. Rather, dépeçage is the potential and occasional result of issue-by-issue analysis."

[66] M. PERTEGAS, B.A. MARSHALL, *Party Autonomy and its limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts*, page 994-995.

[67] S.C. SYMEONIDES, *Codifying choice of law around the w*orld, page 122.

[68] It does not necessarily occur, e.g. if the parties are bound under the Hague Principles on Choice of Law in Commercial contracts and choose as applicable law to part of the contract the *lex forum,* the other part will be governed by the latter as well.

Rome I Reg.[69] In fact, art. 2(2) of the Hague Principle admits the *depeçage* as well, stating that "parties may choose a) the law applicable to the whole contract or to only part of it; and b) different laws for different parts of the contract" however, it diverges from the Rome I Reg. because the latter provides at art. 4 complementary solutions in case parties decide to choose the law applicable only to part of the contract or in case parties do not decide any law applicable whereas the first does not provide anything.

Under Article 2(2)(a), parties may choose the law applicable to only part of the contract. When the parties make such a partial choice of law, the remainder of the contract is governed by the law otherwise applicable in the absence of choice, whereas Under Article 2(2)(b), parties may also choose the law applicable to different parts of their contract with the effect that the contract will be governed by more than one chosen law.[70]

By the way, the Hague Principles do not provide criteria for determining the law applicable in case of absence of choice, therefore when a partial choice of law has been put in place, the law applicable to the remainder of the contract will be determined by the court or arbitral tribunal of the specific case (the *lex forum*) under the rules that are applicable in the absence of choice. However, art. 2(2) shows a relationship with Article 9 of the Principles, that defines the scope of the chosen law. Art. 9(1) assumes that "The law chosen by the parties shall govern all aspects of the contract between the parties, including but not limited to…". Thus, from a literal analysis can be assumed that art. 9(1) is antithetical to the notion of party autonomy, as the word "all" contradicts Article 2(2) and makes Article 9 an obligatory rule, rather than a supplementary rule of interpretation. When the parties choose a law for the entire contract, the word "shall" addresses the application of

[69] Even if the the depeçage is known and applied in the U.S. as well, trhough the interpretation of 187(2) e.g. see *Sonat* page 20.
[70] *Official Comment on Principles on Choice of Law in Commercial Contracts, art.2.*

the chosen law to all the issues listed in Article 9, even though the choice of law clause may be phrased in a way that suggests a narrower scope.[71]

On the other hand, art. 4 Reg. 593/2008 provides several criteria to determine the law applicable when parties do not have chosen the law applicable to the whole international contract, or whether they do not have chosen the law for the remainder part of the contract.[72] Thus, the indirect *depeçage* is provided in both sources of law, the only difference between them concerns the criteria under which that is determined. The Hague principles apply the law of the *forum*, whereas the Rome I Reg. provides more criteria depending on the specific contract.

The Commentary on Hague Principles, however, notes the risk of contradiction or inconsistency that may result from *dépeçage* in the determination of the parties' rights and obligations and for this reason the parties should ensure that their choices "are logically consistent."[73]

3. The freedom not to choose, absence of choice

As the parties have the freedom to choose the applicable law to the contract, they have the freedom not to choose that. Apart from the possible occurrence of the indirect *dépeçage,* the absence of choice of law in international contracts find different solutions. In the Hague principles, there is no specific provision that rules on the event in which parties do not specify a decision on the applicable law[74] and

[71] .S.C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 895.
[72] E.G. : In a B2B sale contract between and Italian seller and a Spanish buyer, parties choose to apply the Spanish law concerning the location of the payment of the good, whereas they remain silent on the remaining part concerning the delivery of the goods. In this case art. 4(a) of the Rome I applies and:" a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;" therefore the remaining part falls under Italian law.
[73] M. PERTEGAS, B.A. MARSHALL, *Party Autonomy and its limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts*, page 994-995.
[74] *Official Comment on Principles on Choice of Law in Commercial Contracts,* 4.17:" If the parties intentions are neither expressed explicitly, nor appear clearly from the provisions of the

the main reason that explains this legislative choice deals with the goal of the Principles and explains why these have been adopted as a "soft" instrument rather than a binding Convention. In fact, it has been very difficult to find an agreement between States that have different legal orders, especially in the Private law/ International Private law matter.

It has been recognized that a "high degree of convergence that exists among the various systems on the issue of party autonomy is largely absent in selecting the applicable law in contracts that do not contain a choice-of-law clause"[75], thus there may be an opportunity to issue a source of law which deals with uniform solutions in case of absence of choice of law at a later stage as it is far more difficult to attain consensus on a broad instrument that would cover all choice-of-law issues in contract conflicts.[76]

On the other side, the European and the U.S. legal orders contain provision which are aimed to find solution in case the parties do not decide the law applicable at the international contract, respectively stated in art. 4 Reg. 593/2008 and Restatement's Second § 188.

3.1. The European context, art. 4 Reg. 593/2008

Starting from the the European context, if the parties have not chosen the law applicable or if the *electio juris* has been declared inexistent or invalid under the

contract of from the particular circumstances of the case, there is no choice of law agreement. In such a case, the Principles do not determine the law governing the contract."

[75] S.C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 877.

[76] *Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Hague Conference,* April 7th - 9th 2010: "The Council noted that there was support in the Working Group for a comprehensive draft instrument also including rules applicable in the absence of choice. The Council confirmed that priority should be given to the development of rules for cases where a choice of law has been made."

substantial or formal profile or under art. 3(5) of the Rome I reg.[77] then the law applicable is determined by art. 4 of the latter and it sets several connecting criteria depending on the specific contract,[78] excluding contracts of carriage, consumers, ensuring, employment contracts which criteria are defined in art. 5-8. Art. 4(1) refers to the most used connecting criteria which is the residence, and its definition is provided by art. 19 taking into consideration the moment in which the contract has been concluded.[79]

It is necessary to specify that art. 4 imposes presumptions, which can be refuted before the court.[80] On the other hand, the Commission's proposal of 2005 would have converted the presumptions into firm rules and the test of the closest connection would have been eliminated, but this proposal has not been accepted

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[77] Art. 3(5): "The existence and validity of the consent of the parties as to the choice of the applicable law shall be determined in accordance with the provisions of Articles 10, 11 and 13."

[78] Art. 4 Reg. 593/2008: "(a) a contract for the sale of goods shall be governed by the law of the country where the seller has his habitual residence;
(b) a contract for the provision of services shall be governed by the law of the country where the service provider has his habitual residence;
(c) a contract relating to a right in rem in immovable property or to a tenancy of immovable property shall be governed by the law of the country where the property is situated;
(d) notwithstanding point (c), a tenancy of immovable property concluded for temporary private use for a period of no more than six consecutive months shall be governed by the law of the country where the landlord has his habitual residence, provided that the tenant is a natural person and has his habitual residence in the same country;
(e) a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;
(f) a distribution contract shall be governed by the law of the country where the distributor has his habitual residence;
(g) a contract for the sale of goods by auction shall be governed by the law of the country where the auction takes place, if such a place can be determined;
(h) a contract concluded within a multilateral system which brings together or facilitates the bringing together of multiple third-party buying and selling interests in financial instruments, as defined by Article 4(1), point (17) of Directive 2004/39/EC, in accordance with non-discretionary rules and governed by a single law, shall be governed by that law."

[79] Art. 19 Reg. 593/2008: "1. For the purposes of this Regulation, the habitual residence of companies and other bodies, corporate or unincorporated, shall be the place of central administration. The habitual residence of a natural person acting in the course of his business activity shall be his principal place of business.
2. Where the contract is concluded in the course of the operations of a branch, agency or any other establishment, or if, under the contract, performance is the responsibility of such a branch, agency or establishment, the place where the branch, agency or any other establishment is located shall be treated as the place of habitual residence."

[80] P. STONE, *E.U. Private international Law,* page 312.

as it has been criticized and considered as an involution, in contrast to the innovative legal progresses of Rome I Regulation.[81] Nowadays art. 4 is pervaded and inspired by the principle of proximity,[82] this principle assumes that the specific international contract is submitted before the law of the country which has the strictest connection. This is not an abstract criterion, in fact it is necessary that the judge individuates also *ex officio*[83] case by case the elements which lead to the application of the most significant and true connection of the State.

The proximity principle is showed in all sections of art. 4, and its structure individuates more connecting criteria following a specific order, thus the lack of requirements in order to satisfy one criterion leads to the application of the next.[84] In fact, the second criterion which starts up only if art. 4(1) is not applicable, is established by art. 4(2)[85] and that is known as the "characteristic performance criterion". If the contract is not included in the cases described by art. 4(1) or falls into more cases described by the latter because has more elements included in

[81] F.CORTESE, *La Proposta di regolamento Roma I, »: spunti critici su collegamento obiettivo e rapporti con le convenzioni di diritto internazionale privato uniforme, in La Legge Applicabile ai Contratti nella Proposta di Regolamento Roma I, Atti della giornata di studi Rovigo, 31 marzo 2006, a cura di* FRANZINA P., 2006 , page 42; *Riflessioni sull'autonomia come limite: l'equilibrio tra libertà e condizionamento nel diritto dell'Unione europea, tra Unione, Stati membri ed individui, , AA. VV., Liber Amicorum Antonio Tizzano. De la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne, Giappichelli,* Torino, 2018.

[82] U. VILLANI*, Nozioni di diritto Internazionale Privato*, page 39; *Sulla scelta della legge applicabile ai contratti nel regolamento comunitario Roma I, in Scritti in onore di Francesco Capriglione*, *Cedam*, Padova, 2010, page 149 ss; P. LAGARDE, *Le principe de proximitè dans le droit international privè contemporain, in Recueil des cours de l'Acadèmie de Droit International de la Haye*, 1986, page 25 ss. ; P. DE CESARI, *Diritto Internazionale Privato dell'U.E.* :" The principle of proximity finds its legal grounds on the need to ensure to the conflict law, the elasticity necessary in order to render it more respondent to the needs of the internationalization and globalization of the private relationships and to avoid the rigor of a localization *a priori*, through automatic connecting criteria." page, 367.

[83] because deals with the conflict of laws and the judge is supposed to know the law applicable

[84] On the other hand, there are other provisions which establish more connective criteria which could be followed alternatively, e.g. art. 28 of L. 218/95"The marriage is valid, as regards the form, if it is considered as such by the law of the place of celebration or by the national law of at least one of the spouses at the time of the celebration or by the law of the State of common residence at that time."

[85] Art. 4(2) Reg. 593/2008:"Where the contract is not covered by paragraph 1 or where the elements of the contract would be covered by more than one of points (a) to (h) of paragraph 1, the contract shall be governed by the law of the country where the party required to effect the characteristic performance of the contract has his habitual residence."

different hypothesis ruled by art 4(1), the law applicable is the one of residence of the party who has to put in place the "characteristic performance".[86]

The definition of the latter is generally accepted, even if there may be interpretative hardship in some cases. The characteristic performance is usually individuated in the non-monetary performance in onerous contracts or those in which there is a consideration, therefore is that performance which counteracts the payment. An example may be showed in the procurement contract, where the service or construction put in place by the contractor has to be considered the specific performance because it is able to express the social-economical function of the procurement contract,[87] in fact the concept of the characteristic performance represents the function of the legal relationship of the particular case.

However, the concept of characteristic performance is not defined in an absolute way and thus may be found exceptional cases because in some contracts there is not necessarily a particular performance.[88]Another critique which has been put in place[89] concerning this criterion is that it tends to apply the most familiar law exclusively in favor of the party who puts in being the specific performance, without regarding to the interests that the other party may have, thus it does not apply an analysis case by case but rather an abstract presumption and the result is that the strongest part of the contract may be unjustifiably empowered.

Whereas Art. 4(1) and 4(2) individuate the "center of gravity" of the contract,[90] art. 4(3) establishes an exceptional criterion, which is able to disapply the former two. According to art. 4(3) :" Where it is clear from all the circumstances of the

[86] M.MAGAGNI, *La prestazione caratteristica nella Convenzione di Roma del 19 giugno 1980, Giuffrè*, Milano, 1990 ; U. VILLANI, *Aspetti problematici della prestazione caratteristica, Riv. Diritto Internazionale Privato e Processuale,* 1993, page 513 ss.
[87] F. SBORDONE*, Le obbligazioni contrattuali,* page 120.
[88] E.g. the barter contract or the contracts in which there is an exchange of sum of money.
[89] *Id* note 85.
[90] Recital 19(2) Reg.593/2008:" In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contract, the characteristic performance of the contract should be determined having regard to its centre of gravity.

case that the contract is manifestly more closely connected with a country other than that indicated in paragraphs 1 or 2, the law of that other country shall apply" Thus, it is assumed that the judge should verify the circumstances of the specific case, however there is a divergence in the judgement whether the case falls into one or the other section. In fact, if the contract falls under 4(1) or 4(2) the judge is not obliged to motivate in a specific way why these articles have been applied, because of their abstract nature. On the other hand, the application of 4(3) requires a very specific motivation because it takes into consideration particular circumstances which shall be particularly pointed out in the motivation.[91]

Thus, the criteria to determine art. 4(3) are different from the others. However, the parameters to establish if the contract is "manifestly more closely connected with one State" are not unquestionable. Especially, part of the doctrine assumes that there is a relationship between art. 4 and art. 3(1) concerning the implied choice of law.[92]

In fact, this doctrine maintains that a narrow interpretation of art. 4 would lead to an implied choice of law rather than an exceptional criterion that supplement the absence of choice and they assume that if the contract is manifestly more closely connected with one State, is equal to say that there has been an implied choice of law because it appears "clearly from the circumstances of the contract", as art. 3(1) requires. However, there is no room for this interpretation as the vast majority of the doctrine through a literal interpretation of the Regulation affirms the supplementary nature of art. 4(3).

Finally, in case all sections of art 4 can't apply, art. 4(4) states that "the contract shall be governed by the law of the country with which it is most closely connected.", thus it has a residual nature as its effects activate when the case does not fall into the other sections. The judge, in order to apply art. 4(4) must use different interpretations from those used to determine the criteria of art. 4(1) and

[91] *Id,* note 87.
[92] PETER STONE, *E.U. Private international Law,* page 306.

4(2) because it has to evaluate the case examining the specific circumstances, where the abstract criteria are not applicable. The risk is to let the judge decide in a way which could overcome the area of discretion, and thus create prejudice on certainty and foreseeability of law, differently from what happens when the legislator defines the abstract criteria of art. 4(1,2).[93]

3.2. The United States, §188

In parallel to the European context, in the United States the absence of choice of law in international contract is ruled as well. The reference provision is § 188 on conflicts of law and its rules can be compared to art. 4 of Rome I Regulation. The first difference is merely literal and can be shown in §188(1), according to which:" The rights and duties of the parties with respect to an issue in contract are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties under the principles stated in s 6." In fact, whereas art. 4 of Rome I deals with the "closest connection" or the "characteristic performance", § 188(1) recalls the "most significant relationship" which can be fully equated to the closest connection requirement.

The second consideration recalls the scope of the norms, as in Europe are applied different criteria depending on the specific contract put in place by the parties, whereas §188 does not make any distinction between the specific contracts and it applies the same criteria for each of them, in fact the parameters recalled in §188(2)[94] do not foresee typical contracts. This uniform application is in

[93] F. SBORDONE*, Le obbligazioni contrattuali*, page 122.
[94] § 188(2):" In the absence of an effective choice of law by the parties (see 187), the contacts to be taken into account in applying the principles of s 6 to determine the law applicable to an issue include:
(a) the place of contracting,
(b) the place of negotiation of the contract,
(c) the place of performance,
(d) the location of the subject matter of the contract, and
(e) the domicil, residence, nationality, place of incorporation and place of business of the parties.

compliance with the general American conflicts of law legal order because, in contrast to the Rome I Regulation, it does not provide exceptions due to rationalization's reasons.

Furthermore, another distinction deals with the nature of these criteria. In fact, the application of art. 4(1) and 4(2) of Rome I Reg. is based exclusively on abstract parameters and the vast majority of them refers to the residence's requirement, thus there is no evaluation of the specific case if the elements of the norms are satisfied, on the other side § 188 always requires a case by case analysis and this methodology can be deducted in both § 188(1;2) because they recall § 6[95]. Thus, the principles stated in § 6 underlie all rules of choice of law that are used by the judge in evaluating the significance of a relationship, with respect to the particular issue, to the potentially interested states, the transaction and the parties.[96]

§188(1) establishes that "a court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law" thus, it is expressed that in case of absence of choice of law in the contract[97], the court has a constitutional limit which can not overcome, therefore is obliged to apply its own rules of private international law in order to individuate the law applicable to the specific case. However, because of the fact that the statutes which provide for the application of the local law of one state, rather than the local law of another state, are few in number,[98] the courts are used to refer to the factors listed in §188(2) that can be

[95] 6 §: (1) "A court, subject to constitutional restrictions, will follow a statutory directive of its own state on choice of law.
(2) When there is no such directive, the factors relevant to the choice of the applicable rule of law include:
(a) the needs of the interstate and international systems,
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,
(d) the protection of justified expectations,
(e) the basic policies underlying the particular field of law,
(f) certainty, predictability and uniformity of result, and
(g) ease in the determination and application of the law to be applied."
[96] *Official Comment, §6.*
[97] Domestic or international, because it applies to both cases.
[98] *Official Comment, §6(1).*

divided into five groups. Each of this group represents an interest of a determinate subject and the judge, in order to determine the applicable law shall observe these rules and shall give priority to one or more of them, depending on the specific case:

1) The first group is aimed to protect the harmonization of relationships at transnational level, furthermore the official comment recalls the international relations as well and this reference supports the idea that sections § 187 and § 188 refer also to international contracts and are not limited to domestic agreements;
2) The second group recalls the interests of the states involved in the specific issue and the interests of the forum to apply the specific law;
3) The third group involves the needs of the parties, namely the protection of their justified expectations and certainty and predictability of result;
4) The fourth group is directed to implementation of the basic policy underlying the particular field of law;
5) The fifth group deals with the needs to protect the judicial administration.[99]

Therefore, when dealing with the contractual matter, in case of choice of law problems of allocation when there is no choice of law neither expressed or implied put in place by the parties, the judge shall implement the principles established by § 6 with those provided by § 188(2).

4. The connection between the chosen law and the parties, art. 2(4) of the Hague Principles

The freedom of parties to choose the applicable law is applied in a different way depending on the legal system. Some legal orders require a substantial connection between the chosen law and the parties or their transactions, others not. Once again, the Hague Principles demonstrate its innovative scope in art. 2(4). This

[99] *Official Comment, §188(1).*

provision foresees that "No connection is required between the law chosen and the parties or their transaction", thus it warrants to the parties the broadest freedom in choosing the law applicable to the contract, without referring to any other connection, fully in compliance with the aim of the Hague principles in promoting party autonomy in choice of law. Furthermore, this provision is in line with the increasing delocalisation of commercial transactions,[100] in fact, the Hague principles recognize that the parties of a contract shall have the freedom to choose with no binding connections mainly for two reasons. The first is that the parties may want to apply a specific law because it balances the rights and duties of both subjects or because it does not favor any of them, thus its neutrality. On the other side, the second reason may consist on the fact that a specific law provides a favorable regulation for the kind of transaction put in place by the parties.

The first reason has particular consequences in a global economy, where art. 2(4) fits perfectly. In fact, the opportunity to choose the applicable law affects the global market in two ways.[101] The possible negative consequence in choosing a third and neutral law may be the expensive cost for parties, because it obliges them to put in place additional searches and information costs, thus parties' profit maximization is affected.[102] However, among the potential neutral laws, rational parties can be expected to prefer a contract law that is often chosen by the subjects who are used to contract in that specific field. Moreover, the law of the State chosen would benefit from a 'network effect'[103], that is an economical mechanism

[100] *Official Comment on the Hague Principles on Choice of Law in Commercia Contracts, 2.14*
[101] S. VOEGENAUER, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence, European Review of Private Law,* 2013*,* page 24–25 ; *The Harmonisation of European Contract Law: Implications for EuropeanPrivate Laws, Business and Legal Practice*, *Oxford: Hart Publishing,* 2006 ; *The European Community's Competence to Pursue the Harmonisation of Contract Law – an Empirical Contribution to the Debate, Hart Publishing, in The Harmonisation of European Contract Law: Implications for EuropeanPrivate Laws,* 2006.
[102] E.G. transaction costs.
[103] *Id note 103* : "The value of a product or service to a single user depends on the number of other users. The more users adopt the product or service, the greater its social value. Once the number of users of the network has reached a certain threshold ('critical mass'), it will be exponentially more attractive to an increasing number of users and will ultimately become dominant."

which can be applied to legal systems as well. In fact, it has been observed that the larger is the number of transactions governed by a legal regime, the more it can be predicted that others will also opt for that legal order and the consequence is that the market of the law chosen will be improved and implemented, developing the specific transaction and ensuring in a better way the interests of future parties. [104]

As it has been noticed, the Hague Principles admit the broadest freedom of choice of law in the contractual matter, however art. 2(4) as the other sections, is subject to specific limits in order to warrant minimum controls on party autonomy and to avoid *fraude à la loi.* These limits are exceptions to party autonomy, they are the *ordre public* and overriding mandatory laws established by Article 11[105]. Thus, art. 11 is considered a "sufficient counterbalance" to the ability of the parties to choose an unconnected law to apply to their contract.[106]

It is true that the Hague Principles are the most innovative source of law in private international law, however The opportunity to choose the applicable law to an international contract which is not connected to the parties or the transaction is common in some other systems at p.i.l.[107] The most relevant example is Rome I regulation, which is also a model for the Hague Principles from this point of view. Art. 3(1) of reg. 593/2008 recalls the general principle under which parties are free to determine the law applicable to the contract, however the further sections establish several exceptions to party autonomy. Specifically, there are two apparent limits which are underlined by art. 3(3,4):[108]

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[104] *Id.*
[105] It will be analyzed in Chapter III.
[106] M. PERTEGAS & B. A. MARSHALL, *Party Autonomy and its limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts*, page 992
[107] An example may be art. 7(1) CISG: "A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety. Such a choice may be limited to a part of the contract."
[108] Art. 3(3) Reg. 593/2008: "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement."

1) Art. 3(3) recalls the obligation not to derogate the mandatory laws of the State which has all the relevant elements of the contract.
2) Art. 3(4) imposes a bound for intra-European transactions. It demands to the obligation not to derogate the Community laws which has been properly implemented, when all the elements of the contract refer to a specific E.U. member State.

However, differently from section § 187(2) of the Restatements, the limits imposed by art. 3 are considered as *a posteriori* limits, because expressly refer to "the time of the choice". Thus, *a priori*, in the European context it is implicitly recognized the opportunity to choose the applicable law to the international contract with no connection referred to a specific State but the only limits which are required are applied after the conclusion of the contract, without influencing its broad scope.

The only exceptional geographical limits that are imposed *a priori* in Rome I Regulation with the contractually chosen State are established in contracts for the carriage of passengers and insurance contracts. The mandatory call is showed in contracts for the carriage of passengers when art. 5(2) of Rome I says:" The parties may choose as the law applicable …… *only* the law of the country where", the word "*only*" limits the parties' choice to the laws of the country of:

1) The passenger has his habitual residence; or
2) The carrier has his habitual residence; or
3) The carrier has his place of central administration; or
4) The place of departure is situated; or
5) The place of destination is situated.

Art. 3(4) Reg. 593/2008: "Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement."

On the other side, with regard to insurance contracts, Article 7[109] differentiates between contracts covering 'large' risks, wherever situated, and contracts covering other risks situated within the territory of an EU member State, [110] providing art. 7(2) several criteria:

1) The law of any Member State where the risk is situated at the time of conclusion of the contract;
2) The law of the country where the policy holder has his habitual residence;
3) In the case of life assurance, the law of the Member State of which the policy holder is a national;
4) For insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State;
5) Where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

Therefore, it can be so stated that from the structural point of view and concerning the possibility to choose the contract law with no potential limits, Rome Regulation lies in between the Hague Principles and § 187(2) of the Restatements. Thus, on one hand it is located a step back the Hague principles because the latter expressly

[109] Art. 7(2) Reg. 593/2008: "An insurance contract covering a large risk as defined in Article 5(d) of the First Council Directive 73/239/EEC of 24 July 1973 on the coordination of laws, regulations and administrative provisions relating to the taking-up and pursuit of the business of direct insurance other than life assurance shall be governed by the law chosen by the parties in accordance with Article 3 of this Regulation.
To the extent that the applicable law has not been chosen by the parties, the insurance contract shall be governed by the law of the country where the insurer has his habitual residence. Where it is clear from all the circumstances of the case that the contract is manifestly more closely connected with another country, the law of that other country shall apply."
[110] S.C. SYMEONIDES, *Party autonomy in Rome I and II from a comparative perspective,* page 525.

recognize the right attributed to the parties whereas the former recognizes it implicitly. On the other hand, it is a step forward the Restatements, because it pushes for party autonomy and freedom of contract and imposes exceptional geographical substantial a *priori* connections only to specific kind of contracts, whereas in the United States the limit of substantial connection affects the conclusion of all interstate/ international contracts both *a priori* and *a posteriori.*

4.1. The connection between the chosen law and the parties, the U.S. context and the substantial connection under § 187(2)

The freedom to choose the applicable law in the United States *a priori* is less protected than the European counterpart. Art. § 187(2) assumes that: ”The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.”

Concerning the general freedom of contract, what makes the difference from the European and the International model is that the American choice of law needs at least one of these requirements, explicated in § 187(2a) :

1) The *substantial relationship* between the chosen law and the parties or the transaction ; or
2) Any other *reasonable basis* under which the parties have chosen that law.

First, it is necessary to say that the Restatements do not provide a definition of the terms "substantial relationship" and "reasonable basis", thus it has been considered that this legislative *vacuum* is a deliberate policy choice.[111] In fact, this decision is fully in compliance with the American system because it shows a low degree of confidence in the legislator's ability to establish one general rule suitable to all solutions and, on the other side, it demonstrates a high degree of confidence in the courts' ability to do the same on a case-by-case basis. Furthermore, the mandatory requirements are in line with what is established by the commentary to §187, as the provision does only apply "when two or more States have an interest in the determination of the particular issue".

Thus, the substantial relation or any other reasonable basis must be relevant in the sense of creating another State interest in applying its own choice of law[112] and, more important, it must not be fictional. Thus, the mere will of parties in choosing another State law, both foreign or domestic, can not be interpreted by judges as a valid connecting criterion if it is not truly related with that State. Even if the Restatements do not provide a definition of "*substantial relation*", case law and doctrine intervened attributing interpretations of the latter. The purpose of this substantial relationship requirement is to limit and control the exercise of party autonomy in choosing the applicable law, because the U.S. system tends to overview the parties' transactions in order not to evade the otherwise applicable local law. This limitation, however, is restricted to the case in which there is no *a priori* contact established with the foreign nation sufficient to create a substantial relationship.

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[111] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective*, page 517.

[112] G. RÜHL, *Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency, Comparative Research in Law & Political Economy. Research Paper No. 4/2007,* 2007, page 10; *The Problems of International Transactions: Conflict of Laws Revisited. In: Journal of Private International Law,* 2010, page 59-91; *Conflict of Laws in a Globalized World, Cambridge University Press,* 2007.

Substantial relationship means that there must be specific *a priori* factual contacts with the chosen State. These contacts may be different depending on the specific case, however they shall comply with the factors enlisted in section 6, even if it is usually referred to the place of performance of the contract or the domicile of a party because these factors "virtually exhaust all important elements of the transaction and no other State may therefore usually be selected by the parties"[113].What is different from the European context and is shown in section 6, is that the will of parties is not considered *per se* as a connecting criterion, thus the judge can not consider a choice of law substantively related to the parties or the transaction only on that base. In fact, in case of expression of the will of parties with no *a priori* contact falling into § 6, the consequence will be the occurrence of §188 and thus will be applied the criteria established for absence of choice of law.[114]

However, art. § 187(2) enlists another criterion alternative to the requirement of the substantial relationship, that is the "*reasonable basis*" for the parties to choose a law of a specific State or Nation. Under this option, parties may choose a law that has no substantial relationship if there is some other basis that makes the choice reasonable. As anticipated, the Restatements do not provide for definition of this criterion, therefore it is necessary to recall the doctrinal opinions and case law because the regime is subject to flexible interpretations.[115]Thus, the main case in which parties choose a law different from their country deals with the development of the State. In fact, a reasonable basis can be considered a case where the parties conclude and perform the contract in an undeveloped State which is not able to satisfy the interests of the parties, and this event must be construed

[113] E.F. SCOLES ET AL., *Conflict of laws*, page 947-48, 4th *ed.* , 2004; *Cases and materials on conflict of laws*, 19th *ed.* , 1981.
[114] A.D. WEINBERGER, *Party Autonomy and Choice-of-Law:Restatement (Second), Interest Analysis, and the Search for a Methodological Synthesis, Hofstra Law Review,* 1976, " Such a basis exists when the parties are contracting in countries whose legal systems are strange to them as well as relatively immature.", page 8.
[115] G. RÜHL, Party *Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency,* Page 12 ss; *Id* note 116.

according to § 6(1d) of the Restatements, which expressly recognizes as interpretative criterion the protection of justified expectations.

However, there are other situations in which the parties have other reasons that fall into the broad definition of 187(2a). In *Evans v. Harry Robinson Pontiac-Buick, Inc.*[116], both parties, a car dealer and the buyer, were from Arkansas and put in place retail installment agreement, however, the car dealer had its domicile in Texas and in the contract was specifically provided that the buyer should have contacted in case of questions or inquiries, the address and telephone number based in Texas. Furthermore, evidence showed that it was signed a separate agreement in bold which foresaw " To contact the holder of your Contract about this account call the number appearing with the Assignee's name in the ASSIGNMENT section. Additionally, under the GENERAL TERMS section, it is agreed that the contract will be governed by the law of the State of Texas."

Thus, because of the provided evidences from the contract, the Supreme Court of Arkansas assumed that it was irrelevant the fact that both parties were resident in the same State, as the will of parties to apply Texas law was expressed under general terms in a separate agreement and this assignment in combination with the buyer's knowledge of it established a *reasonable basis* with Texas. On the other

[116] Supreme Court of Arkansas. No. 98-191. January 28th , 1999 :" usury case involving a choice-of-law provision in a retail installment contract. After entering the agreement, Evans began to make payments on the Buick Skylark to First Fidelity by mailing the payments to First Fidelity's Texas office, which First Fidelity required. Some months later, Evans stopped making payments and fell into default. He then filed suit in Sebastian County Chancery Court on June 17, 1997, naming Harry Robinson and Autobond, to whom the contract had been assigned when Evans went into default, as separate defendants. Eight days later, the vehicle was repossessed from Evans's place of employment. Evans's complaint alleged that the retail installment contract was usurious under Arkansas Constitution, Article 19, section 13, and that, because Harry Robinson and Evans were Arkansas residents, and the contract was a wholly Arkansas contract, Harry Robinson and Evans could not choose for Texas law to govern their agreement. Evans later amended his complaint to add First Fidelity as a party defendant. The second amended complaint claimed that the subsequent assignment to First Fidelity by Harry Robinson was merely a scheme to cloak its usurious nature. Evans amended his complaint a final time on September 3, 1997, whereby Evans added that Harry Robinson had violated certain federal Truth-in-Lending laws. The prayers for relief of the various complaints asked that the chancellor find the contract void for usury and allow Evans a double recovery for the interest paid on the contract. Evans also demanded the return of his vehicle free of any liens. Finally, Evans requested that First Fidelity be enjoined from putting any provision in its contracts in violation of Arkansas usury law."

hand, there may be situations in which the parties do not have a good reason for a choice of law, and example may be provided by the commentary to Restatement § 187(2a) which assumes that the parties enter into contracts for serious purposes and usually do not provide for choice-of-law clause "in the spirit of adventure" or to provide "mental exercise for the judge". [117] This interpretation as well is in line with the true mandatory *a priori* contacts, thus it must not be merely fictional.Based on these approaches, section § 187 looks quite restrictive. It has in fact been argued that the substantial relationship and reasonability tests allow only a limited freedom of contractual choice, thus improvement to the first *lex loci contractus* is very circumscribed and the requirement that the chosen law must have a significant, objective connection to the parties or their contract can be compared to the various theories of localization which spread in the past.[118] However, there are other approaches of different States which must be considered.

One of them is adopted by several States that have enacted provisions which allow the opportunity to choose the applicable law of the contract, regardless any substantial relationship, exclusively depending on the amount of the transactions and there are two main reasons behind this inner State legislative choice.

The first is that not every State is equal, thus each State has discretion in deciding the legal order concerning private international law matter. The second is an economical reason, in fact several U.S. State legislator preferred to confer a higher freedom of contract to the parties rather than other States when the transaction is relatively onerous in order to satisfy the need to "secure and augment reputation as a center of international commerce"[119] Thus, Texas has enacted a provision that allows a choice of law for transactions which are over $1,000,000.00 regardless of

[117] *Id* note 117.
[118] H. BATIFFOL, *Aspects philosophiques du droit international privè*, 1958, page 83; *Les conflits de lois en matiere de contrats,* 1938 page 38; H.A. GRIGERA NAÓN, *Choice of law problems in international arbitration, Fordham International Law Journal,* 1992, page 155-157; *The Role of International Commercial Arbitration, , 65 Arb. 266,* 1999, page 266.
[119] *Radioactive, J.V. v. Manson*, 153 F. Supp. 2d 462, United States District Court S.D. New York, July 29th 2001.

whether the transaction bears a reasonable relation to that jurisdiction. Furthermore, other States as California, Delaware and New York[120] provide their own legislation, by which impose a specific threshold.[121]

On the other side, another approach is followed by those States that are into the U.C.C., in fact if a contract falls into that scope the U.C.C. shall prevail over the Restatements because of its *lex specialis* nature.

[120] CAL. CIV. CODE § 1646.5:" Notwithstanding Section 1646 , the parties to any contract, agreement, or undertaking, contingent or otherwise, relating to a transaction involving in the aggregate not less than two hundred fifty thousand dollars including a transaction otherwise covered by subdivision (a) of Section 1301 of the Commercial Code , may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not the contract, agreement, or undertaking or transaction bears a reasonable relation to this state." ;
DEL. CODE ANN. tit. 6, § 2708: "a) The parties to any contract, agreement or other undertaking, contingent or otherwise, may agree in writing that the contract, agreement or other undertaking shall be governed by or construed under the laws of this State, without regard to principles of conflict of laws, or that the laws of this State shall govern, in whole or in part, any or all of their rights, remedies, liabilities, powers and duties if the parties, either as provided by law or in the manner specified in such writing are: (1) Subject to the jurisdiction of the courts of, or arbitration in, Delaware; and (2) May be served with legal process. The foregoing shall conclusively be presumed to be a significant, material and reasonable relationship with this State and shall be enforced whether or not there are other relationships with this State. (c) This section shall not apply to any contract, agreement or other undertaking: (1) To the extent provided to the contrary in § 1-301(c) of this title; or (2) Involving less than $100,000." ;
N.Y. GEN. OBLIG. LAW § 5-1401: "Choice of law. 1. The parties to any contract, agreement or undertaking, contingent or otherwise, in consideration of, or relating to any obligation arising out of a transaction covering in the aggregate not less than two hundred fifty thousand dollars, including a transaction otherwise covered by subsection one of section 1-105 of theuniform commercial code, may agree that the law of this state shall govern their rights and duties in whole or in part, whether or not suchcontract, agreement or undertaking bears a reasonable relation to this state. This section shall not apply to any contract, agreement or undertaking (a) for labor or personal services, (b) relating to any transaction for personal, family or household services, or (c) to the extent provided to the contrary in subsection two of section 1-105 ofthe uniform commercial code."
[121] *Id* note 117; P. EDWARDS, *Into the Abyss: How Party Autonomy Supports Overreaching 1rough the Exercise of Unequal Bargaining Power, John Marshall Law Review,* 2003, page 421*; Survey of New York Commercial Law, 53 Syracuse Law Review,* 2003, page 383.

4.2. The connection between the chosen law and the parties, the U.S. context and the substantial connection under 1-301 U.C.C.

Section 1-301 of the UCC provides that, "when a transaction bears a reasonable relation to the forum State and also to another State or nation the parties may agree that the law of either the forum State or of such other State or nation shall govern their rights and duties." This section is substantially akin to the previous 1-105 of the U.C.C., as the proposal of the revised 1-301 has been rejected by the vast majority of the States between 2007-2008. Thus, in contracts covered by current 1-301 of the U.C.C., a reasonable relation with the chosen State is the only express condition for allowing a contractual choice of law. This approach differs from the others examined because it is more liberal, as it is shown by the single limit of the reasonability of the relation imposed, opposed to the double limit of the Restatements. Thus, the right of the parties to choose the governing law is attributed to multi-state and international transactions. Second, the parties are limited in their choices to the law of one of the jurisdictions that bears a reasonable relation to the transaction and there is no distinction between commercial and consumer transactions.

An example is shown in *Dayka & Hackett, LLC. V. Del Monte Fresh Produce N.A., Inc.*[122], where the Arizona Court of appeals provided a broad interpretation of the reasonable relationship established in 1-301 by assuming that "the law of the debtor's jurisdiction governs perfection if the debtor is located in a jurisdiction with a system for recording security interests for priority."[123] In fact, in this case even if the debtors resided in Mexico, evidence showed that Mexico did not have an established system for recording security interests at the time of the agreement between the debtors and the counterpart. Therefore, the court maintained that the debtors were located in the District of Columbia and the laws of that jurisdiction

[122] *Benkendorf v. Advanced Cardiac Specialists,* Arizona Court of Appeal, 269 P.3d 704, January 24th 2012.
[123] *Id.*

governed the perfection of the contract. This case shows how the reasonability test applies differently, in fact, if the case had been interpreted under the Restatement § 187(2), the court would have probably applied Mexican law because the criterion of residence falls into the "substantial relationship", thus it would have prevailed over the "reasonability test". On the other hand, the U.C.C. allows more flexibility and judges are called to apply the specific case considering all the circumstances.

Thus, as Mexican law did not provide specific regulation at the time of the agreement and in addition the debtor had a connection[124] with another State, the Arizona Court of appeal reasonably applied, for the sake of the transaction, the law of that State which provided regulation for the system of recording security interests.

5. Freedom to choose the terms of the contract. The Battle of Forms

In order to put in place a valid agreement it is required that the parties meet their will, which is manifested in the match between offer and acceptance. However, during the course of the 20th century commercial transactions changed considerably compared to the first years of the latter, thus have emerged new forms of commercial contracts that impose the so named "standard terms"[125]. These terms are very common in these kinds of transactions and at the same time are difficult to interpret when the will of the parties is not clearly stated. However, during contract formation and in compliance with the exercise of the freedom of contract, the parties have the opportunity to include in the negotiations of the

[124] Even if it is a weaker connection than the residence criterion.
[125] T. KADNER GRAZIANO, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution, Yearbook of Private International Law,* 2013 page 71 ss.; *Primary drafting responsibility for the official commentary to Article 6, in Hague Principles on Choice of Law in International Commercial Contracts, Official Commentary, Hague Conference of Private International Law,* 2013, page 27-31.; *The Hague solution on choice-of-law clauses in conflicting standard terms: paving the way to more legal certainty in international commercial transactions?, in Uniform Law Review,* 2017, page 351-368.

agreement their own standard terms and this opportunity attributed to the parties finds the legal grounds on the cornerstone of contractual relationships, thus the principle of party autonomy which consents to parties to construct their contractual relationship according to their needs and requirements.[126]

However, problems may arise when under the specific circumstances of the contract is not clear which terms the parties intended to be part of the contract. In fact, it may occur that the terms of the offer differ from the terms of the acceptance because the party who is supposed to accept alters the terms and the offeror does not respond to the change.

More in general, every time in which there is a discrepancy between the terms of the contract, it is said that there is a battle of forms and the issue is relevant both at domestic and transnational level. Battle of forms thus can be considered from a domestic and material point of view or from the perspective of private international law. Concerning the first case in order to determine the applicable solution, what is relevant is the interpretation of the material law provided by the States' legal order. On the other hand, international contracts are subject to a more complicated issue, that is the case in which the parties intended their own construction of standard terms when referring to the contract and interpretations differ one from the other.

Courts in all legal systems experience difficulty in resolving this issue on the basis of general principles of contract law, both at domestic and international level. Furthermore, the matter is plumped by the fact that not every State dispose provisions in their legal order that deal with the battle of forms problems. An example may be the Italian legal order, in fact the general principles established by art. 1326-1327[127] of the Civil Code dispose rules on offer and acceptance, but

[126] S. EISELEN, S.K. BERGENTHAL,*The battle of forms: a comparative analysis, Comparative and International Law Journal of Southern Africa,* 2006, page 1; *The Requirements for the Inclusion of Standard Terms in International Sales Contracts, Potchefstroom Electronic Law Journal,* 2011.

[127] Art. 1326 c.c.: " The contract is concluded when the person making the proposal is aware of the acceptance of the other party. Acceptance must reach the offeror within the term established

the Code and Italian law in general do not specifically deal with material rules on the battle of forms and more important these norms can not be transposed in international contracts when choice of law problems arise, as they are not rules of private international law.

In fact, this is the point at issue. Thus, as each Country is free to follow its own rules on battle of forms, if it whishes, questions may be arisen when the transaction is international and the States provide different solutions on the applicability and the interpretation of the "standard terms". The Hague Principles on Choice of Law on International Commercial contracts are very important from this perspective, because rules on battle of forms as a choice of law in transnational contracts have never been challenged before any State because of its complexity.

Before providing its solutions and in order to better understand the innovations proposed by the Hague Principles, it is necessary to examine the various theories used to solve the battle of forms from the material perspective. I believe that an analysis of the United States legal order [128] in this context is the most appropriate because American case law and the U.C.C. adopted basically all the approaches which can be found separately in other courts of other States, thus American law provides a *mixtum* of approaches all in a single country.

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by him or in that necessary according to the nature of the deal or according to the uses."; 1327 cc: If, at the request of the offeror or due to the nature of the deal or the uses, the service must be performed without a prior reply, the contract is concluded in time and in the place where the execution began."

[128] Even if the U.S. is not the only legal order that deals with the battle of forms. E.G. Australia, N.C. SEDDON/ M.P. ELLINGHAUS, *Cheshire and Fifoot's Law of Contracts 9th Australian ed.* 2009; England, G. TREITEL*, The Law ofContracts (12'h ed.),* London 2007, E. PEEL, *The Law of Contract, 12th ed.*, London, 2007, China, L. BING*, Contract Law in China*, Hong Kong et al. 2002.

5.1. The material Battle of Forms, an analysis from the American perspective

The American legal order is used to the issue of battle of forms. Before the formation of the U.C.C, divergences between the terms of the contract were solved exclusively under the common law, thus a bunch of black letter law has been imprinted in the Restatements. From 1952 on when the U.C.C. was issued, American States started to adopt it in order to warrant a uniform law application in specific matters. Thus, the relevant section of the U.C.C. concerning the battle of forms is 2-207, which applies in commercial sales contract and provides a *mixtum* of the battle of forms theories applied differently depending on the specific case.

Thus, American case law shows that there are more ways in which a battle of forms can be resolved, at least four[129], depending on the judge's interpretation and on the specific State's legal order.

The first solution adopted by common law American courts when the issue does not fall within the U.C.C. is the *mirror image rule*. According to this theory, in order to validate the agreement, it is necessary that the offer and the acceptance match, thus the terms imposed in the first must be the same of those established in the latter. In case of divergence between these these two acts, the acceptance that contains additional or different terms from the offer is treated as a counter offer, therefore if the recipient of the counteroffer starts performing the contract without objecting on the new terms, a contract has been formed because the beginning of the performance constitutes acceptance of the terms of the final offer in the series triggering the effect that the last set of terms prevails and becomes part of the contract. Because of the fact that the counter offer prevails on the previous offer,

[129] *Id* note 129.

the solution adopted is called last shot rule, as a corollary of the mirror image approach.[130]

The traditional mirror image approach is shown in *Ardente vs Horan*[131], here the Supreme Court of Rhode Island judged in favor of Horan, the defendant, assuming that "a valid acceptance that is capable of forming a valid contract must be definite and unequivocal and must not impose additional conditions or limitations on the offer, unless such conditional language is clearly independent of the actual acceptance."[132] In fact, the court found that Ardente's letter imposes additional conditions that alter his acceptance under the mirror image rule as his letter of acceptance is conditional, and thus operates as a rejection of the Horans' offer that is incapable of creating a valid contract. Thus, his letter operates as counteroffer with additional terms and no contractual obligations are created.

On the other hand, when the transaction falls into the U.C.C. scope, according to 2-207[133] the latter provides different approaches depending on the interpretation

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[130] E.A. FARNSWORTH, C. SANGER, N.B. COHEN, R.R.W. BROOKS. L.T. GARVIN, *Contracts cases and materials, 8th edition Foundation Press*, 2013, page 201; V. FORTI, *La battle of forms nel diritto comparato, in Diritto internazionale*, 2006, page 5.

[131] Supreme Court of Rhode Island 366 A.2d 162 (1976), "William and Katherine Horan, the defendants, offered to sell residential property in the city of Newport and Ernst Ardente, the plaintiff, bid $250,000 for the property. The Horans' attorney communicated that the bid was acceptable and prepared a purchase and sale agreement which he forwarded to Ardente. The latter executed the agreement, and his attorney forwarded it back to the Horans. Ardente also included with the agreement a check for $20,000 and a letter asking if certain furniture and fixtures were a part of the transaction and requesting that they remain with the property. The Horans refused to sell the items listed by Ardente and returned the unsigned purchase and sale agreement and the $20,000 deposit to Ardente. The Horans refused to sell the property to Ardente, and Ardente brought suit seeking specific performance."

[132] *Id.*

[133] Section 2-207 U.C.C. "(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
(2) The additional terms are to be construed as proposals for addition to the contract between merchants such terms become part of the contract unless:
(a) the offer expressly limits acceptance to the terms of the offer;
(b) they materially alter it; or
(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.
(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In

of the contract. Because of the fact that results diverge on the specific cases and different rules may be applied, Section 2-207 represents a *hybridism*[134] in battle of forms and no other Country has a similar provision.

The first part of section 2-207(1) shows the *first shot rule*, which can be considered as an opposite rule compared to the common law approach. Whereas the latter requires a perfect match between offer and acceptance, the first admits the divergence between the terms of the offer and those of acceptance in order to form the contract if the two requirements imposed by 2-207(1) are satisfied. First, it must be a definite and seasonable expression of acceptance and second, it must reach the recipient within a reasonable time. In this event, the terms of the contract are essentially those of the offer and the additional terms are included in the agreement. However, the last shot rule is subject to a limit provided by the second part of 2-207(1), the overcoming of which forbids the application of the rule, imposed by the same norm. Thus, it does not apply if the "acceptance is expressly made conditional on assent to the additional or different terms".

Section 2-207(2) as well reasserts the different approach compared by the common law, stating that if the parties to the contract are both merchants[135], the additional terms "automatically become part of the contract" However it sets limits to the first shot rule when there are determinate circumstances. Thus, (a) the offeror has stated in his offer that he will agree only on the basis of his terms; (b) the additional terms will materially alter the existing contract; or (c) the offeror has already objected or objects within a reasonable time.

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such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

[134] T. KADNER GRAZIANO, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution,* page 78.

[135] U.C.C. Section 2-104, " a merchant is defined as a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction or to whom such knowledge or skill may be attributed by his employment of an agent or broker or other intermediary who by his occupation holds himself out as having such knowledge or skill".

The main example of the application of 2-207(1) is provided in *Dorton v. Collins & Aikman Corp.*[136] and this is also the case where the court established the prevalence of the U.C.C. by stating that "the mirror image rule of the common law, which treated an acceptance with different or additional terms as a counteroffer, has been replaced."[137] According to the Court's analysis, an acceptance that contains additional or different terms is effective under 2-207(1). Furthermore, according to 2-207(2) in agreements between merchants, the different or additional terms are deemed accepted, unless they materially alter the agreement. If, however, the offeree's acceptance was made expressly conditional on acceptance of the additional or different terms, there must be assent to those terms, or the acceptance is not effective and no contract is formed[138].

Lastly, another consequence of the application of 2-207 may be the *knock-out rule.* This rule is not expressly stated in the U.C.C. as the latter provides solutions when the terms disposed in the acceptance are additional, however it does not expressly foresee regulation for the case in which terms added are *different.* Therefore, case law and doctrine hold that different terms knock each other out and the contract is governed by the terms common in substance and the different terms are replaced by the default rules of the U.C.C.[139]

The application of the knock out rule has been used in *Northrop Corporation v. Litronic Industries*[140] where the court eliminated from the contract both terms

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[136] *Dorton v. Collins & Aikman Corp*., United States Court of Appeals for the Sixth Circuit 453 F.2d 1161, January 6th 1972 :" Dorton, plaintiff, who did business as Carpet Mart, purchased carpets from Collins & Aikman Corp, the defendant, for three years before bringing an action against Collins for fraud and misrepresentation regarding the quality of the carpets. Collins moved to enforce an arbitration clause that was printed in small print on the reverse side of all of its sales acknowledgment forms. These forms were sent to Dorton in response to Dorton's telephone orders and were received by Dorton in almost all cases prior to Dorton's receipt of the carpet shipment. Dorton accepted each of the carpet shipments without objecting to the terms on the sales acknowledgment forms."

[137] *Id* note 140.

[138] *Id* note 140.

[139] G. RÜHL, *The battle of the forms: Comparative and economic observations*, page 200.

[140] *Northdrop Corp. v. Litronic Industries*, United States Court of Appeals for the Seventh Circuit, 29 F.3d 1173 July 18th 1994 : " Litronic Industries, the defendant, sent a written offer to Northrop Corporation, the plaintiff, to sell Northrop printed wire boards. The offer contained a 90-day

imposed by the parties and replaced them with U.C.C. 2-309. The court stated that section 2-207(2) of the U.C.C. only specifically addresses additional terms, and not different terms, thus it is a matter of the Court to decide which approach adopt and, in this case has been adopted the majority view[141]and thus knocked both terms out.

5.2. The international Battle of forms, first approaches and the Hague Principles

After examining all the substantive approaches which could be encountered in domestic battle of forms, the issue shall be transposed at an international level. There are yet many problems in qualifying the best approach in interstate transactions in the U.S. context and these problems are even more difficult to solve in international agreements. In fact, if every State follows its own approach on resolution of standard terms[142] and parties into an international contract refer to its own standard terms, which law should be applied? Because of the fact that there was no black letter law until 2015, judges who were called to solve the specific cases applied the same theories transposed at an international level, however there was no uniform criteria and each State could apply its own interpretation.

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warranty on the boards. Northrop informed Litronic by phone that it accepted the offer and would send Litronic a formal purchase order. Based on previous business with Northrop, Litronic was familiar with Northrop's purchase order form, which provided for a warranty that contained no time limit. Northrop received the boards but did not complete its testing of the boards until six months later. Northrop returned the boards to Litronic, claiming they were defective. Litronic refused to accept the returned boards because its 90-day warranty had lapsed. Northrop claimed it had an unlimited warranty under the terms of its purchase order. Northrop brought a diversity suit against Litronic.

[141] There are other two approaches concerning the regulation of the "different terms", mentioned by the Court in this judgement:" 1) the leading minority view assuming that the different terms included in the acceptance are ignored; 2) under California's approach, UCC § 2-207(2) is interpreted to treat different terms the same way as additional terms, with new terms in an acceptance becoming part of the contract if they are not materially different from those included in the offer."

[142] E.G. Canada applies last Shot rules and Swiss applies first shot rule.

One of the first way to solve international conflicts consists on simplifying the issue by applying the *lex fori.*[143]*,* however nowadays this option shall be considered as residual because of several reasons.

1) The first is showed by authoritative doctrine who assumes that *"*applying the *lex fori* is however an imperfect solution and reliance on the law of the forum raises an obvious forum shopping objection"[144], in fact the application of the latter is not in compliance with the aim of uniformity to which international private law is inspired and the forum is often chosen for procedural reasons that do not share a link between the contract and the *lex fori*;
2) Another reason is that the law of State where the court is based may lead to a solution completely different to those referred by the parties' Countries[145], thus the will of parties can be impaired under this perspective;
3) Finally, the last reason deals with a black letter rule established in time by many sources of law[146], included the Hague Principles[147]. Today is in fact a general principle of international private law the severability between choice of law and choice of courts, thus the fact that the parties have chosen a determinate law does not entail the choice of a determinate court and *viceversa.*

[143] T. KADNER GRAZIANO, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution,* page 82 ss.
[144] S. MAIRE, *Die Quelle der Partei autonomie und das Statut der Rechtswahlvereinbarung im internationalen Vertragsrecht,* Basel 2011, page 151 ; *Id* note 148.
[145] E.G. a case where party A refers to the standard terms of the State X which applies the last shot rules and party B refers to the standard terms of the State Y which applies the first shot rules. As the court is unsure on which law apply it decides to interpret the case according to the law of the forum, which refers to the knowck out rule.
[146] UNCITRAL Model Law on International Commercial Arbitration, Article 16:" Competence of arbitral tribunal to rule on its jurisdiction (1) The arbitral tribunal may rule on its own jurisdiction, including any objections with respect to the existence or validity of the arbitration agreement. For that purpose, an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract. A decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause."
[147] The Hague Principles, art. 7:" A choice of law can not be contested solely on the ground that the contract to which it applies is not valid."

Another common approach to solve the international conflicts is to apply the *knock out rule.* This approach has been examined in the domestic context and it has been transposed in private international case law if parties use conflicting choice of law clauses in their standard terms. In this case the choice will be ineffective and the different choice of law standard terms are knocked each other out in the same way as the domestic context. The consequence is that the applicable law is determined according to objective connecting factors.[148] However, this theory has been criticized because of the fact that no will of parties is respected and this way of resolution of the conflict rejects the expectation of both parties[149] In this uncertain context, the Hague Principles intervened for the first time ever in the history of private international law in the field of international battle of forms. Thus, it is necessary to provide an analysis of article 6. This provision is very concrete, as it individuates all the possible conflicts of choice of law and it shows solutions in order to solve the specific cases. Art. 6(1) assumes that:" Subject to paragraph 2,

a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to;
b) if the parties have used standard terms designating different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law."

Concerning its structure art. 6(1) differentiates between two situations: Art. 6(1)(b) shows those in which the parties have used "standard terms" designating different applicable laws whereas Art. 6(1)(a) deals with all other situations[150]. Furthermore this provision can be divided into two sections, the first describes solutions for

[148] L. COLLINS, DICEY, MORRIS *the Conflict of Laws, Sweet & Maxwell,* page 32-103; C.M.V. CLARKSON/ J. HILL, *The Conflict of Laws* , *3rd ed. , Oxford* 2006, page 184; *Id* note 148.
[149] *Id* note 148.
[150] *Commentary on Hague Principles on International Commercial Contracts*, 6.1.

false conflicts whereas the second deals with true conflicts. Furthermore, the commentary on art. 6 provides examples in order to better comprehend the solutions adopted.

The false conflict may occur when the contract falls into the scope of art. 6(1a). According to the latter case if a party has proposed an offer to an international contract by choosing a specific law referring to its interpretation of standard terms, and the other party refers to its standard terms without challenging or choosing another law applicable, then it shall be considered that the recipient has "purportedly agreed" to the law chosen by the offeror. This case shows a false conflict because there is not an expressed will by one of the parties, thus it is generally recognized an implied consent[151]. The norm is not innovative however, as it is also supported by an extensive interpretation of art. 10 of the Rome I Regulation[152] which assumes that "The existence and validity of a contract, or of any term of a contract, shall be determined by the law which would govern it under this Regulation if the contract or term were valid.". To this aim, art. 10(1) first part recalls the opportunity to assume the existence of *any term* of the contract by the law that would govern it and in this case it must be considered as the law purportedly agreed to by the party that has not explicated its choice.

Another false conflict is found in art. 6(1b) 1st part of the Hague Principles, which describes the case in which both parties select as applicable law in the standard terms two different laws. However, under both of these laws the conflicts are solved in the same manner, thus there is no true contrast between the parties' intent.[153]

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[151] T. KADNER GRAZIANO, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution,* page 88.
[152] *Id* note 155, 6.2.
[153] *Commentary on Hague Principles on International Commercial Contracts*, Scenario 1:" Party A makes an offer and refers to its standard terms, which contain a clause designating the law of State X as the law applicable to the contract. Party B expresses acceptance of the offer and refers to its own standard terms, which designate the law of State Y as the applicable law. With respect to battle of forms scenarios, the domestic laws of State X and of State Y both provide that the standard terms last referred to prevail (last-shot rule)."

On the other hand, art. 6(1b) 2nd; 3rd part describe true conflicts of law situations. Under both of these provisions the parties to a contract select as applicable law in its standard terms two different laws that apply two different rules which define the battle of forms, however, the consequences of these cases are the same as the Hague Principles propose as applicable solution the *knock out rule*. In fact, in the case specified in art. 6(1b) 2nd part, the diverse laws in standard terms selected by the parties apply, respectively, the first shot rule and the last shot rule[154] Thus, the choice of law clauses in both standard terms are disregarded and the applicable law is identified through the application of rules that apply in the absence of contractual choice. Thus, Article 6(1)(b), 2nd part, establishes a knock-out rule at private international law level.[155] The same result occurs in 6(1b) 3rd part, which specifies the situation in which one or both of the laws selected apply in its standard terms the knock out rule[156], therefore the law applicable shall be considered as the one which would be applicable in case of absence of choice of law as no effective choice has been put in place.

Lastly, the knock-out rule is applied also in contracts where one or both parties refer to standard terms of a chosen law that does not provide regulation on domestic battle of forms. However, it is true that the Hague Principles recall in these situation the law in absence of choice, but it is necessary to recall that the scope of the Hague Principles does not extend up to decide the law applicable in the absence of choice[157], thus that law must be determined through the rules established by domestic private international law according to the specific case.

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[154] *Commentary on Hague Principles on International Commercial Contracts*, 6.16 Scenario 2: " Party A, the offeror, designates in its standard terms the law of State X, and Party B, the offeree, designates the law of State Y. One of the designated laws follows the first-shot rule, while the other law follows the last-shot rule.

[155] *Commentary on Hague Principles on International Commercial Contracts*, 6.17

[156] *Commentary on Hague Principles on International Commercial Contracts*, 6.18 Scenario 3:" Party A designates in its standard terms the law of State X, while Party B designates the law of State Y. State X follows a knock-out rule, while State Y follows a different rule, such as the first-shot rule, or the last-shot rule."

[157] S.C. SYMEONIDES, *The Hague Principles on Choice of law for International Contracts: Some Preliminary Comments,* page 877.

All the rules examined in Art. 6 establish regulations at an abstract level which should apply from a general perspective with no reference to the specific contractual situation, as it is sufficient to verify the legislative choice of the State dealing with standard terms. However, there are two circumstances in which shall be taken into consideration the "specific case". The first deals with the situation of some countries providing hybrid theories, like the U.S. context examined in the previous paragraph. Concerning these Countries the Hague Principles provide exceptionally a focused interpretation according to the specific case because it is necessary a judicial analysis that ascertains the specific substantive law applicable for the battle of forms issues. Furthermore, the specific analysis is expressly needed under art. 6(2), that foresees " The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1" Thus, the latter provides an exception to the general and abstract rules established by art. 6(1) when is required "under the circumstances."[158]

6. Choice of Non-State law

Another important way to express the freedom of contract is showed in the opportunity attributed to the parties to choose as applicable law a non- State law. Nowadays subjects who put in place commercial transactions may have an interest to apply non-State norms because they are created to satisfy the needs of commercial practices and these are in compliance with the globalization of the economy[159]. These are systems of transnational relevance called rules of law[160], they are different from sources issued by the States and can be considered as a

[158] *Id* note 158, 6.20.
[159] F. SBORDONE, *Le obbligazioni contrattuali*, page 106-114.
[160] *Official comment to the Hague Principles, 3.1*:" the term "rules of law" is used to describe rules that do not emanate from State sources.

complex of rules created by practice which application has been constantly repeated in time[161]. In fact, the latter fall within party autonomy's limits and find their origin in the *lex mercatoria,* which started to affirm in the end of XIX century[162] when international transactions enhanced.

The main aim of non-State laws is to uniform substantive law at international level in order to simplify transactions, however they are usually put in place in form of soft law and the only ways to attribute them binding nature is to implement them in national laws or to specify these rules into a contract. Thus, if these are recalled in international agreements, non-State law can be relevant from two perspectives that are in compliance with the distinction between *kollisionrechtliche* and *materiellrechtliche.* According to the latter, non-State laws can be put in place at contractual terms level, this means that they are included and limited to the content of the contract through the technique of incorporation by reference and the consequence is that these norms are subject to the mandatory provision of the law chosen, therefore they are dismissed in case of non-compliance with imperative norms of the specific case. On the other hand, if parties intend non state norms in the sense of *kollisionrechtliche,* the recalled set of rules will be considered applicable as a choice of law and the consequence is that the contract won't be subject to the mandatory law of the State of the specific case, because parties have chosen non state norms as governing law.

However, in contrast with the overwhelming use in commercial practice, non state norms are most of all associated with the first nature because of two reasons and both of them deal with the nature of private international law. Thus, non-state laws have not the same importance of international private law because the latter is considered a special law which applies in specific situations and second, p.i.l. rules

[161] They are consistent with the element of *diuturnitas* and, depending on the specific case, they may share the *opinio juris* as well.
[162] P. DE CESARI, *Diritto internazionale privato dell'unione europea*., page 352 ss.

on conflict of law[163] whereas the main aim of non State norms is to promote uniformity in substantive issues.

The distrust of States towards non-State law lies its grounds on the fact that these norms stem from a different entity which can potentially follow interests of specific classes that conflict with general and equal interests. In fact, it is true that some of these norms are drafted by intergovernmental bodies like UNIDROIT[164] UNCITRAL[165], which are potentially neutral, however these are not the only sources of non-State norms and there are some which may be unbalanced. For example, in the United States there are some non- state norms that are drafted by certain specific entities such as American Arbitration Association (AAA), or the New York Stock Exchange (NYSE) which provide norms that are applicable towards subjects who exploit the specific services or to other subjects that have not participated to the drafting, therefore there may be a discrepancy of interests between the drafters and the people subjected to these norms.[166]

Evidence of States' distrust is showed by the fact that the vast majority of them tend to localize the contract and do not allow parties to choose non-State norms as contractual law, at least challengeable before a court, because they want to control the true interests of the parties through certain, foreseeable and clear laws which are supposed to be put in place exclusively by them. For these reasons choice of law as a non-State norm is admissible only if parties put in place an arbitration clause in the agreement, in order to delocalize the contract[167] in contrast to the aim of localization used by the international private law rules. In fact, arbitral courts are extremely flexible and by delocalizing the contract, parties can ask to the

[163] *Id* note 164.
[164] The Unidroit Principles of International Commercial Contracts, 2d ed., 1997.
[165] UNCITRAL Model Law on International Commercial Arbitration 1985.
[166] S.C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 892 ss.
[167] *Id* note 164.

arbitrators to rule on the specific case through the interpretation of general principles of law, rules of law and state law as well. [168]

Dealing with this matter, the European Union and the U.S.A. have almost a similar approach apart from one exception provided in the American context, whereas the Hague Principles tend to overcome the traditional theories within some limits.

6.1. Choice of non state law in the E.U and U.S.A., a uniform approach

The E.U. and the U.S.A. provide almost uniform approach in the matter. According to the first, there is no specific rule that deals expressly with non-state law at choice of law level, even if it is generally accepted that Rome I Regulation does not recognize the opportunity to choose as law applicable to the contract a law different from a State law. In fact, art. 3 of Rome I recalls the freedom of parties to choose the law governing the contract and does not specify the nature of this law, thus from an interpretation of the sole art. 3 there could be room for parties to choose a non-State law as the source governing the contract. However, art 3 shall be read in compliance with Recital 13 which assumes that :"This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." Recital 13 explicitly refers to incorporation by reference, thus it is impliedly established that non-State norms can not be chosen as law applicable to the contract.

In reality during the draft of Rome I the Commission put in place a proposal for the Regulation that included at art. 3(2) the possibility to choose as applicable law sources different from State laws, according to which "The parties may also choose

[168] P. BERNARDINI, *L'arbitrato commerciale internazionale*, *Giuffrè*, Milano, 2000, page 391 ss.; *The Role of the International Arbitrator, Arbitration International*, 2004, page 113; *The Law Applied by International Arbitrators to State Contracts", in Law of International Business and Dispute Settlement in the 21st Century,* 2001.

as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community"[169].

The scope of the Commission was to further promote parties' autonomy by authorizing subjects to choose as the applicable law a non-State body of law. However, this freedom was limited only to specific sets of rules that, according to the Commission , were able to assess the certainty and predictability of the contract such as "UNIDROIT principles, the Principles of European Contract Law (PECL) or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognized by the international community."[170] Furthermore, in order to avoid protection *vacuum*, if the rule of law adopted in the specific case lacked relevant norms, the judge could interpret the case in compliance with the general principles or, failing such principles, in accordance with the law applicable in the absence of a choice under this Regulation.[171] However, several problems arose from the proposal of art. 3(2), especially States[172] distrust towards these soft law instruments precluded the adoption of this draft and only choice of State law prevailed. In the end the Commission decided not to adopt a similar provision admitting choice of non-State norm as applicable to the contract and recital 13 was drafted in order to find a compromise, admitting only incorporation by reference in compliance with the freedom to determine the content of the contract.[173]

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[169] Commission of the European Communities Brussels, 15.12.2005 650/2005, final 2005/0261 (COD) *Proposal for a Regulation of The European Parliament and The Council on the law applicable to contractual obligations (Rome I).*

[170] *Id* note 170.

[171] M.M. ALBORNOZ & N. GONZALEZ MARTIN, *Towards the uniform application of party autonomy for choice of law in international commercial contracts*, page 450.

[172] Germany, United Kingdom and Finland opposed for the vast majority; MARRELLA F. , *Prime note circa la scelta del diritto applicabile alle obbligazioni contrattuali nella proposta di Regolamento di Roma I, in La Legge Applicabile ai Contratti nella Proposta dei Regolamento Roma I, Atti della giornata di studi Rovigo, 31 marzo 2006*, a cura di P. FRANZINA, 2006, page 35 ss.

[173] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a comparative perspective*, page 539.

On the side of the U.S. system, the latter rejects to consider non- State norms as a valid choice of law as well. First of all, section 187 of the Restatement must be interpreted in compliance with section 3 of the latter, which expresses the definition of State as : ”a territorial unit with a distinct general body of law.”[174] By this definition, the U.S. courts and legislators are aware of the fact that there could be more sources of law and State law is only one of them. However, concerning the exercise of party autonomy section § 187 is entitled “Law of the *State* chosen by the parties”, thus yet from this provision can be assumed that the U.S. legislator and courts interpretation refer only to the State law as applicable law to the contract, excluding non-State norms. In any case, for the same reasons examined in Rome I, the Restatements allow incorporation by reference of non-State law.

Support to this theory is provided by the distinction between § 187(1)[175] and § 187(2)[176] which adopt a similar approach to Recital 13 of Regulation 593/2008. However whereas Recital 13 expressly recognize the incorporation by reference provided by parties, section § 187(1) implicitly admits it. It is true that the latter expressly refer to the “law of the State chosen by the parties”, but it is generally accepted in the U.S. that the will of parties relating to a non-State norm falls into 187(1) as an “issue the parties could have determined by explicit agreement” providing an incorporation by reference and not a rule of choice of law, as the Official comment to the Restatement witnesses. Furthermore, evidence is also provided by the Reporter's notes to § 187(1) which expressly state that the parties

[174] *Id* note 174.
[175] 187(1):”The law of the state chosen by the parties to govern their contractual rights and duties will be applied *if the particular issue is one which the parties could have resolved by an explicit provision* in their agreement directed to that issue.”
[176] 187(2) first part: ”The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even *if the particular issue is one which the parties could not have resolved by an explicit provision* in their agreement directed to that issue” .

"may also stipulate for the application of trade association rules or well known commercial customs."[177]

Also § 187(2) expressly recalls for State law. However, whereas the official comment of § 187(1) and the vast majority of the doctrine admit incorporation by reference of non state norms, § 187(2) is interpreted in a restrictive way and it does not consent non-State law to govern the contract as applicable law. Evidence that the Restatements drafters did not contemplate the contractual choice of non-State norms is provided by the repeated use of the word "State" in the requirements and limitations expressed in the second part of 187(2):

1) The *State* of the contractually chosen law must have a substantial relationship to the parties or the transaction, or there must be another reasonable basis for the parties' choice;
2) the application of the chosen law must not be contrary to a "fundamental policy" of the *State* whose law would be applicable in the absence of the parties' choice; and
3) the latter *State* must not have "a materially greater interest than the chosen State in applying its law."[178]

In any case, it is necessary to recall the source of law hierarchy and to remind that the Restatements are not mandatorily followed by courts and States, thus they can decide to rule differently from each other. That is the case of Oregon, which is one of the most "liberal" States in the U.S concerning choice-of-law codification for contracts because it takes a favorable position towards non-state norms.[179] In fact, in the Oregon provision of choice of law[180], it is expressly stated the word "law" rather than the words "law of a state." Furthermore, it is true that this choice is

[177] S.C. SYMEONIDES, *Contracts Subject to Non-State Norms*, *American Journal of Comparative Law,* 2006, page 217 ss.
[178] 187(2) second part; *Id* note 178.
[179] *Id* note 178.
[180] Oregon Codification on Conflicts Law Applicable to Contracts, *Comments on section 7(3):* In exercising this autonomy, parties may select model rules or principles. For example, parties to an international contract may choose to have it governed by the Unidroit Principles of International Commercial Contracts.

subject to the same limitations as the choice of State rules but within those limitations, the parties' choice may extend beyond *jus dispositivum*[181] so that the result assumed a different position taken by the Oregon choice of law compared to the second conflict of law of Restatement. The latter admits choice of non-State norm only through incorporation by reference, whereas the first admits non state norms as a choice of law. This legislative choice taken by the State of Oregon is very innovative and represents a big step towards the development of freedom of contract in interstate/international contracts, but unfortunately it has been adopted only by this State in the American context and did not spread upon the rest of the territory because of its disruptive innovative power versus the traditional approach taken by other States.

The last U.S. source of law which deserves a broad analysis is section 1-301 of the U.C.C. that overcame 1-105 U.C.C.[182] The latter deals with choice of law and concerning choice of non-State norms it substantially reaches the same conclusion of section § 187(2) because it focuses on "state law" as well. It is true that section 1-301 formally differs from § 187 because it does not expressly provide the distinction between issues that parties could have/could have not resolved by an explicit provision, but is also true that 1-301 replaced 1-105 and the official comments to the latter did not displace the doctrine of incorporation.[183] Furthermore, evidence is supported by the U.C.C. 1-103[184] which recalls

[181] *Id* note 178; S.C. SYMEONIDES, *Codifying Choice of Law for Contracts: The Oregon Experience*, *Rabels Zeitschrift Fuer Auslaendisches Und Internationales Privatrecht*, 2003, page 67.

[182] 1-301 U.C.C. : " (a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties."

[183] S.C. SYMEONIDES, *Contracts Subject to Non-State Norms.*

[184] 1-103 U.C.C.:" (a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.

(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.

specifically the "law of the merchants" and the general principles that can be specified by the parties in the contract.

6.2. Choice of non-State law in the Hague Principles, the compromise

Article 3 of the Hague Principles as well dispose a provision concerning choice of law of non State norms. The drafting of the latter had been assigned to a technical Working sub-group that identified three possible ways to deal with non-State law in the proposed instrument, because of the complexity of the issue and the different opinion of the States on the matter it was necessary to find a compromise. [185]

The first option was in compliance with the majority position expressed by the States concerning the issue of rules of law. Thus, it basically admitted the opportunity to recall non-state norms as applicable law to the contract only before an arbitral court. On the other side, the second possibility aimed to extend the reference to non-State law into the judicial sphere and this goal was considered very difficult to reach, because only a few States admit in their national legal order non-State law as a choice of law. Finally, the last option foresaw a neutral provision of the Hague Principles, which was supposed to remain silent regarding the designation of non- State law and this approach would have been the one more in compliance with the nature of the Principles, thus a soft law instrument as a "code of best practice". [186]

In the end the Working Group opted for a revised second proposal because it wanted to be in compliance with the innovative strength of the Hague Principles. To this aim, the Working Group was inspired by art. 10 of the 1994 Inter-American

[185] L. GAMA JR & G. VE SAUMIER, *Non-State Law in the Proposed Hague Principles on Choice of Law in InternationalContracts, in El Derecho Internacional Privado en los Procesos de Integracion Regional,* page 41 ; *The Hague Principles and the Choice of Non-State Rules of Law to Govern an International Commercial Contract, Brooklin Journal of International* Law, 2014, page 9 ss.
[186] Hague Conference on Private International Law, *Report of the Second Meeting of the Working Group on Choice of Law in International Contracts.*

Convention on the law applicable to International Contracts[187], which represents the most liberal approach concerning choice of law of non-State norms in international contracts but that has been unfortunately ratified by only two States, Mexico and Venezuela. It is true that the Principle opted for a judicial protection of non-State norms, however the Working group reached a compromise in the formulation of the provision by referring to "rules of law" instead of non- state norms and by imposing the limit of the "law of the forum". Furthermore, the aim of art. 3 is different from other States' goal because the principles to which this soft law instrument is inspired widen the scope of the party autonomy to allow parties to choose non-State rules of law to govern their contract in circumstances where their dispute is subject to litigation before a court,[188] therefore the aim is to overcome the ways of incorporation by reference or the arbitration clause and to apply a true choice of law before a national court. The final formulation of Art 3 states that: "The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise." Thus, art. 3 is important because is willing to consider choice of non-State norms as law applicable to the contract, however not every source can be considered as such.

First of all, whereas the Commission Proposal of art. 3(2) of Rome I Regulation expresses a strict scope by considering as law applicable only specific non State norms, thus the "UNIDROIT principles, the Principles of European Contract Law (PECL) or a possible future optional Community instrument", Art. 3 of the Hague Principles is more general and has a broader scope, by recalling the opportunity to choose as law applicable every rule of law which is generally recognized beyond national level, thus excluding specific local laws or other sources that lack this

[187] Art. 10 of the Inter-American Convention on the law applicable to International Contracts:" 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."
[188] M. PERTÉGAS & B.A. MARSHALL, *Party Autonomy and its limits: Convergence through the New Hague Principles on choice of law in international commercial contracts,* page 996.

requirement. In this broad definition are therefore admitted international treaties and conventions, such as CISG, but also non-binding instruments formulated by established international and supranational bodies recalled by the European Commission in the Proposal of Rome I, such as UNIDROIT and PECL[189] .

Second, art. 3 provides other mandatory requirements that rules of law, as a valid choice of law must possess. Thus, the "rules of law" must be a set of rules and not a small number of provisions, therefore mere and ambiguous principles of *lex mercatoria* that are not supported in a written form and are not ascertained and established sources of law do not fall under art. 3. Furthermore, this set of rules must be "neutral", as the source of the "rules of law" is generally recognized by an impartial body that must satisfy the general interests without preferring a specific part. Finally, the neutral set of rules must be "balanced", protecting in this way the equal bargaining power in commercial transactions.[190] The last part of art. 3 which deserves to be analyzed is the limit imposed at the end of the provision, where it is stated "unless the law of the forum provides otherwise." In fact, the compromise that has been reached takes into consideration the vast majority of national laws that do not allow choice of law in disputes before courts, therefore if the forum State provides laws which are not in compliance with the choice of non-State law promoted by Principles, party autonomy is disregarded. [191]

In the end, article 3 shows very innovative approaches compared to Rome I and the U.S. § 187 Restatements. Whereas the latter almost excludes choice of law of non- State norms before national courts, the Principles are aware of the importance of the latter in international commercial transactions not only from a substantive level, but also and especially from the private international law perspective. Increasing these rules of law at p.i.l level would enhance and facilitate party

[189] *Official comment to the Hague Principles,* 3.4, 3.5,3.6 ss.
[190] *Id* note 193; G. VE SAUMIER, *The Hague Principles and the Choice of Non-State Rules of Law to Govern an International Commercial Contract, Brooklin Journal of International L*aw, 2014, page 16.
[191] *Official comment to the Hague Principles,* 3.14.

autonomy international contracts between parties, however the Working Group of the Hague Conference was forced to find a compromise in order to rule on the matter and to find an agreement between the signatories States, thus the formulation of art. 3 substantially does not overcome the approaches of the U.S. and the E.U. system, due to the limitation imposed by the *lex forum* that may overwhelm the non-State clause established by the parties of the international contract.

By the way, because of the non-binding nature of the Principles, the hope is that national States will implement in their national legal orders non-State law at private international level and evidence of this hope is showed by the same provision of art. 3. In fact, it assumes as a general principle the opportunity to choose rules of law as applicable to the contract and in the last part provides the clause "unless…" it is thus significant because this norm wants to express *at first place* the fundamental importance of non-State norms in international contracts, enhancing this rule at black letter law level, but on the other side the Principles recognize the vast majority opinion of the States and foresees *at second place* the aforementioned limit, hopefully derogated by national State.

Chapter III, Limits to the Freedom of Choice

1. Limits to the freedom of choice, an expression of sovereignty

The counterpart of the principle of party autonomy in contractual relations examined in this thesis is the principle of sovereignty and its limits that imposes to the freedom of contract. It is important to reassess the relationship between the principle of sovereignty and the limits that the latter establishes to subjects in contractual activities, in fact parties can not be completely free to determine their will at both substantial and at private international law level. The Rules of substantive law must impose a specific control exercised by the sovereign authority, because the parties to a contract may evade the fundamental substantive law by exploiting the low knowledge of the counterpart, thus impairing the latter. However, transposed at international level, the same rationale is valid also for rules of private international law that must individuate limits to the freedom of parties to choose the applicable law.

The relation between sovereignty and the freedom of contract is therefore hierarchical because States have an interest to control the contract every time in which arises the need to protect determinate weaker parties or fundamental principles of a determinate country in order to prevent that other foreign rules individuated in the specific case disapply the mandatory norms of the forum State or the economical or social principles lying the ground of the public order. However, also other States sharing a specific connection with the transaction or the parties may have an interest to apply its own mandatory rules, even if parties have not foreseen this event in the agreement. The mandatory rule which have a particular connection with the contract is called *lex causae* and that is generally the rule which would have been applied in case of absence of choice of law.

Thus, the choice of law clause will be regularly enforced if the application of the chosen law would remain within the limitations of the *lex fori* and in some circumstances, depending on the specific case, the *lex causae* as well. On the other hand, it will not be enforced if the application of the chosen law would exceed the limitations of both the *lex fori* and the *lex causae.*[1]

There are 4 limits that States generally impose to subjects who want to enter into a contract, even if every country may focus only on some of them and these are:

1. Overriding Mandatory rules of the forum (*lex forum*) ;
2. Overriding Mandatory foreign rules (*lex causae*) ;
3. Imperative norms (simple mandatory rules) ;
4. Public order (of the forum State or foreign State).

However, limitations to party autonomy vary from one State to another and at this point there will be taken into consideration the specific limits imposed by the European, International and American systems, because all of these introduce limits concerning the freedom to choose the applicable law to the international contract and can be divided into three groups.[2]

The first group attributes the role of the *lex limitatis* exclusively to the *lex fori* and the public order, such as transactions falling under the American source of law of the U.C.C. On the other hand, because of the fact that the U.S. is a multi-State legal order, there are inner-States or other relevant American sources of law which do not fall over this group and refer to the second. In fact, the second group consists of systems that assign the role of *lex limitatis* to the *lex causae* and the public order. Examples of systems which belong to this cluster are Section § 187(2)(b) of the Restatements and some exceptional codifications of Louisiana and Oregon.

Finally, the third group can be considered as the most modern and at the same time the most "restrictive" system towards the expression of party autonomy, at least

[1] S. C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 883 ss.; *Codifying Choice of Law Around the World.*
[2] *Id* Note 1.

concerning the matter of limitations, because finds a balanced solution between the first and the second above briefly exposed. Therefore, it identifies a double limitation of the *lex fori* and the *lex causae* and this solution has been adopted by the Rome I Regulation and has been almost readopted by the Hague Principles with slight differences.

2. The concept of mandatory rules

Mandatory rules constitute one of the most important limits to contractual choice of law and they can be divided into two sections and relevant subsections. The first division adopted by some systems[3] is between the *overriding* mandatory rules and the *simple* ones, according to this distinction simple mandatory rules are those rules of contract law that may not be evaded by the contractual choice of another law, whereas overriding mandatory rules can not be evaded by a contractual nor a judicial choice of law[4], therefore the effect of the latter is to enhance the limitation of the freedom of contract because their application cannot be circumvented by a choice of law of another country and this feature renders these provisions internationally binding[5] as far as they are able to overcome both the boundaries of the contractual and the judicial agreement, for these reasons they deserve a deepening.

In fact, regarding to the latter can be individuated a sub-distinction constituting two different limits, these are the overriding mandatory rules of the forum State and the foreign State's overriding mandatory norms.

[3] E.G. Rome I Regulation.
[4] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective*, page 529.
[5] L.M. VAN BOCHOVE, *Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law, Erasmus Law Review*, 2014, page 3; , *Choice of law in consumer contracts as unfair term in the sense of Directive 93/13, International Business Law Journal 2017,* page 431-438.

The first limit imposed to the freedom of contract in international agreements is individuated in the mandatory norms of the *forum* State and the latter are relevant as far as is taken into account a distinction between choice of court and choice of law.

Thus, the fact that the parties litigate before a tribunal does not mean that they want to apply the law of that State and there may be a diverse choice of law. In this case, mandatory rules of the *forum* State may be taken into account. These rules represent a particular expression of interests that the legislator assumes as essential. In contract law, generally these interests deal with economic-political interests of the State, which may refer to the protection of weaker parties or refer to competition and trade agreements. At a general level this provision represents a preventative limit[6] to the explication of the will of parties, because its application is defined as *a priori* when the forum has been identified, nonetheless the foreign applicable law chosen by the parties and independently from the content of the contract, thus foreign law can be applied only if mandatory rules of the *forum* State are applied.

At the same time, they express a positive limit[7] because their aim is not to preclude the application of foreign law, but it is the one to ensure in any case the application of that specific law related to the *forum* State. Thus, the scope of these rules is self-limited meaning that is circumscribed to the event in which the contract falls within the *forum* State different from the chosen law by the parties. Furthermore, even if these norms are considered as an *a priori* limit, they are not specifically enlisted and they have to be individuated case by case depending on the contract and on the law chosen, because it may happen that the foreign law that the parties want to apply shares the same *rationale* of a mandatory rule of the forum State, thus there

[6] U. VILLANI, *Nozioni di diritto internazionale privato*, page 62-67; *La legge applicabile alla sostanza dei contratti nel regolamento del 17 giugno 2008 (Roma I), in L'internazionalizzazione delle piccole e medie imprese. Aspetti economici e giuridici (a cura di A. Nifo), Edizioni Scientifiche Italiane, Napoli,* 2010, p. 193 ss.; G.BARILE, *Ordine pubblico (diritto internazionale privato), in Enc. dir., XXX, Milano,* 1980, page 1106 ss.
[7] *Id* note 6.

is no need to apply the latter. In fact, the last general requirement is that these norms are not necessarily applied if it is not requested by the specific case, there must be a justified reason.

On the other side, overriding mandatory rules can refer to foreign States. In fact, there are some legal orders that provide the opportunity to apply to the contract in certain circumstances the law of one or more foreign countries, if specific conditions are met.[8] Lastly, mandatory rules are imposed at a national level and every system may propose their own interpretation and provisions of mandatory rules, even if it is widely accepted that these rules can have and international or supranational origin.

2.1. Overriding mandatory rules, influences on national context and art. 9 Rome I Regulation

Starting from the national context, the general norm concerning the relevancy of mandatory rules in private international law is art. 17 of L. 218/1995[9] , which can be applied in all the matters covered by the scope of that law. However, as it is specified by art. 57 of the same law, the contractual matter is governed by the most recent European source of law dealing with this field and Italian national law shall thus be superseded by Regulation 593/2008. By the way, at a European level, a broad definition of mandatory rules was still existing because it can be found in

[8] See art. 9(3) Rome I Regulation, art. 11(3) Hague Principles.
[9] Art. 17 L. 218/1995: " . The prevalence over the following provisions of Italian laws is reserved, which, in consideration of their object and their purpose, must be applied despite the reference to foreign law. "

judgements *Ingmar*[10] and *Arblade*[11]. In the first case the E.C.J. was asked by the national court whether Articles 17 and 18 of Directive 86/653/EEC, which guarantee certain rights to commercial agents after termination of agency contracts, must be applied where the commercial agent carried on his activity in a Member State although the principal is established in a non-member country, which in this case is California, and the parties put in place a choice of law derogating to the norms of the European Union.[12] Here, the Court maintained that these articles could not be derogated by an agreement of the parties because the aim of them is to protect the freedom of establishment and to control the trade avoiding undistorted competition together with unlawful operations in the internal market for all commercial agents.

Thus, as the Court assumed, "irrespective of the law by which the parties intended the contract to be governed",[13] there are norms that must be applied whenever the situation is closely connected with the European Union, and in this case, even if parties have chosen California law as the law governing the international contract, there is evidence that the commercial agent put in place his activity in the territory of a Member State.

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[10] *Ingmar,* European Court of Justice, on Judgement C-381/98, 5th Chamber 9 November 2000, facts:" By order of 31 July 1998, received at the Court on 26 October 1998, the Court of Appeal of England and Wales referred to the Court for a preliminary ruling under Article 177 of the EC Treaty a question on the interpretation of Council Directive 86/653/EEC of 18 December 1986 on the coordination of the laws of the Member States relating to self employed commercial agents. That question has been raised in proceedings between Ingmar GB Ltd , a company established in the United Kingdom, and Eaton Leonard Technologies Inc. a company established in California, concerning the payment of sums claimed to be due on account, in particular, of the termination of an agency contract".

[11] *Arblade*, European Court of Justice, on Judgement C-369/96, November 23rd 1999, Facts:" Two French construction companies carried out works in Belgium. To that end, they deployed 17 and 9 workers respectively in Belgium. Managers of both companies were prosecuted before the Belgian courts for noncompliance with obligations imposed by Belgian legislation, in particular to pay posted workers the minimum remuneration fixed by collective labour agreement, pay "timbres-intemperies" and "timbres-fidelite" contributions for each worker and to keep a special staff register and an individual account for each worker."

[12] *Id* note 5.

[13] Par. 25 of the preliminary ruling in *Ingmar.*

On the other side, in *Arblade* was asked to the E.C.J. whether rules of the Belgian labour and social security law, which were considered as mandatory rules under that law, could legally restrict the movement of services under article 49 of the EC Treaty. Even if the case does not deal specifically with international choice of law, but rather with compliance of a national with European law, this judgement is relevant because the Court attributed a fundamental importance to the law of the national States as well. Specifically, the Court assumed that "concerning the classification of the provisions at issue as public order legislation that term must be understood as applying to national provisions compliance with which has been deemed to be so crucial for the protection of the political, social or economic order in the Member State concerned as to require compliance there with by all persons present on the national territory of that Member State and all legal relationships within the State"[14]. Therefore, in this statement the E.C.J. recalled the need to apply those provisions which are crucial for the protection of the legal order of a specific Member State and this recital has become part of today's Regulation 593/2008.

The concept of mandatory rules is introduced in the afore mentioned Regulation in Recital 37[15], which does not only mention the existence and the validity of these norms, but on parallel reasserts the party autonomy approach. In fact, the formulation of the latter recalls the application of limits to freedom of contract only when "exceptional circumstances" occur. Thus, from the exception fostered by recital 37 can be deducted that the general rule to which Rome I Regulation is inspired is always the freedom to choose the applicable law to the international contract.

[14] Par. 30 of the preliminary ruling in *Arblade.*

[15] Recital 37 Reg. 593/2008: "Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions. The concept of 'overriding mandatory provisions' should be distinguished from the expression 'provisions which cannot be derogated from by agreement' and should be construed more restrictively."

However, because of the fact that every State may have their own definition of "mandatory rules" and in order to promote the aim of harmonization in choice of law, art. 9(1) of Rome I Regulation provides a uniform notion that is not established on the other hand in L. 218/1995 according to which :"Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation". Art. 9(1) is very specific because it provides a restrictive interpretation since its formulation. In fact, the text of the article refers to "provisions" instead of "rules". Through this specification art. 9(1) focuses on formal laws issued by the States and avoids all the possible different interpretation which can be addressed to the term "rule". Moreover, art. 9(1) is pervaded by *Arblade,* in fact reference is made to the "political, social or economic interests of a member State". However, while in *Arblade* the European Court of Justice exclusively used the wording "political, social or economic organization" Article 9(1) starts with "such as" indicating that this list is not exhaustive but simply exemplary[16]. In any case even if it is not a peremptory list, nowadays it is widely accepted that exceptional mandatory rules shall deal only with public interests.

Furthermore, the provision sets an end to the dispute between several opinions who maintained that mandatory rules could pursue both public and private interests, *versus* those who maintained that only public interests could be at stake[17]. The first approach is pursued by Courts in the *Ingmar* case, where the E.C.J. maintained that mandatory norms could have been warranted towards private commercial activities.

[16] B. VOLKER, *Rome I Regulation a mostly unified private international law of contractual relationships within most of the European Union, Journal of Law and Commerce*, 2011, page 258.
[17] B.UBERTAZZI, *Il regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, *Giuffrè*, 2008 page 122-123; *La legge applicabile alle obbligazioni contrattuali nel regolamento "Roma I", in: Diritto internazionale privato e cooperazione giudiziaria in materia civile,* 2009.

On the other hand, other prevailing opinions maintained that even if mandatory norms could refer to the protection of privates, they must have necessarily their legal ground on a higher level, thus the public general interest[18] and this line was already assumed by art. 8 of the Proposal of Rome I[19], specifically reassessed in today's art. 9(1). Furthermore, it is assumed that these norms prevail not only over the law individuated by the parties, but also over the law identified through the objective criteria established by the Regulation.[20]

Beyond the definition exposed in art. 9(1), the remaining part of the norm shows how Rome I regulation belongs to the third group above mentioned[21], in fact it foresees positive law concerning both the *lex fori* and *lex causae* limitations.

The first limit is provided by art. 9(2), according to which " Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.", however the most innovative approach is represented on the other side by art. 9(3) :" Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application." It has been noted

[18] A.BONOMI, *Conversion of the Rome Convention on Contracts into an EC Instrument : Some Remarks on the Green Paper of the EC Commission,Yearbook of private international law,* 2003 page 53-97; *Article 9 - Overriding Mandatory Rules, dans Magnus Ulrich, Mankowski Peter (eds.), Rome I Regulation, Otto Schmid*, 2017; *Le norme di applicazione necessaria nel regolamento "Roma I", in Boschiero N. (eds.) La nuova disciplina comunitaria della legge applicabile ai contratti, Giapichelli*, 2009. page 173-189.; N. BOSCHIERO, *Ordine pubblico "internazionale" e norme di applicazione necessaria, in Trattato di diritto internazionale privato e comunitario, a cura di Preite F. Gazzanti Pugliese di Cotrone A., Torino*, 2011; *I limiti al principio d'autonomia posti dalle norme generali del regolamento Roma I. Considerazioni sulla "conflict involution" europea in materia di contrattuale*, in, *La nuova disciplina comunitaria della legge applicabile ai contratti (Roma I), Giappichelli Editore, Torino*, 2009, page 67-147.
[19] COM 650/2005 final - COD 261/2005 art. 8: "A *lois de police* is a mandatory provision whose respect is considered crucial by a country for the safeguarding of its political, social or economic organization, to the point of requiring its application to all situations that fall within its field of application, whatever the law applicable to the contract according to this regulation."
[20] P. DE CESARI, *diritto internazionale privato e dell'unione europea,* page 398-399.
[21] See page 2.

that overriding mandatory rules of the forum State represent an exception to the general principle of freedom of contract, if this is true, art. 9(3) is a developed exception which applies only if more circumstances occur, thus at the same time the Regulation authorizes and limits the application of foreign rules.[22] In fact, usually art. 9 does not allow the application of mandatory rules of another State, however, the latter norm admits them depending on the specific case. They are applied only if they belong to the country in which the contract must be performed and only when their application forbids the performance of the contract.

Furthermore, the particular exceptional nature of art. 9(3) may be highlighted through a comparison with 9(2). In fact, whereas the latter expressly refers to the "application" of the law of the forum, art. 9(3) provides a much narrower formulation by affirming "to give effect" to foreign mandatory provisions. [23] Thus, the distinction between these two articles, concerning the form, is relevant because the term "application" refers to the whole law and it is established as a general rule, whereas the wording "give effect" combined with all conditions foreseen by the remaining part of the provision is in line with its exceptional nature.

However, art. 9(3) has been criticized from two perspectives both of them dealing with the restrictive scope of the latter[24] and nowadays the matter is object of discussion after *Nikiforidis.* The first objection that can be moved against this provision is that the State of performance of the contract may not be the only one which could be interested in applying its overriding mandatory rule, because there may be one or more extra States even if not specifically related to the performance of the agreement that may have an interest to apply their own mandatory provisions. Thus, part of the doctrine complains about the fact that art. 9(3) is very restrictive from the point of view of international cooperation. On the other side,

[22] M.LEHMANN, J. UNGERER, *Applying or taking account of foreign overriding mandatory provisions- sophism under the Rome I Regulation*, *Yearbook of private international law*, 2017-2018 page 59 ss; A.BONOMI, *The Rome I Regulation, Orro Schmidt*, 2017 page 135 ss.
[23] *Id* note 19.
[24] *Id* note 19.

the second objection to art. 9(3) concerns the fact that the latter allows the application of overriding mandatory rules of the foreign State of performance only from a negative perspective, that is to say as far as the as the contractual application of these mandatory norms renders the contract unlawful. It has been therefore observed that the application of exclusive provisions leading to contractual nullity and the non-application of all those positive rules regarding the foreign State of performance that could render the contract more in line with public interests and could avoid contractual imbalances, is unfair. In fact, if both rules were applied there would be an enhanced protection of the weaker parties in the contract, moreover according to this theory the *rationale* in taking into consideration the negative norms is the same of the one which may be adopted for positive norms because there is a common connecting factor, that is the place of performance of the contract.

On the other hand, the current formulation of art. 9(3) and the protection of the general principle of the will of parties has to be taken into consideration because the latter could be steered by the enforcement of rules that parties into a contract would have neither thought. Thus, reasserting the exceptional nature of overriding mandatory rules, the European legislation and Court's judgements always have favored a restrictive approach concerning interpretation of art. 9(3), but in 2016 *Nikiforidis*[25] raised some issues. Here, the European Court of Justice adopted a particular extensive interpretation of art. 9(3) by assuming that "restrictions of art. 9 of Rome I Regulation do not prevent foreign overriding mandatory provisions from being taken into account as a matter of fact". Thus, apart from the negative

[25] *Hellenic Republic vs Nikiforidis* Case C-135/15, 19th October 2016:" The claimant was a Greek national employed as a teacher at a Greek primary school in Germany. It was agreed that the contract it was governed by German law. In response to the economic crisis in Greece, the European Council issued a decision requiring Greece to reduce its public wage bill. The resulting measures introduced by the Greek legislature had the effect of reducing the claimant's annual salary, for the period October 2010 to December 2012, since under Greek law the claimant was considered a public-sector employee of the Hellenic Republic. The claimant started proceedings in the German courts seeking to recover his loss in salary on the grounds that his employment relationship was conducted in Germany and subject only to German law.

limit imposed by 9(3), the Court admitted the opportunity for judges to take into consideration "as a matter of fact" substantive foreign law relevant to the specific case.

The E.C.J. judgement is at the same time innovative and ambiguous, because it allows courts to regularly refer to the overriding mandatory rules of a foreign country, without considering them as a law, but rather as a substantive regard. This interpretation may be able to create disharmonies between States, thus interfering with the aim of uniformity and "predictability of the outcome of litigation, certainty as to the law applicable and free movement of judgements" as provided in Recital 6 of Rome I. In fact, after this judgement doubts arose concerning the distinction between *application* of a foreign law and *take it into account as a matter of fact*. Even if someone[26] assumed that the practical difference between these two concepts, for the aims of the decision, is "almost imperceptible", on the other side the vast majority of the doctrine maintained[27] that the meaning of *taking into account* depends on the specific provisions established by the *lex causae* and thus the effects depend on the specific legal order under a case by case analysis, impairing legal certainty.

2.1.2. *Simple mandatory rules, Regulation 593/2008*

Rome I Regulation proposes another set of limitations to freedom of contract and that is composed by simple mandatory rules. These norms differ from the "overriding mandatory rules" because their threshold of application is lower than the latter, by the way nonetheless this divergence these norms are still imperative

[26] Opinion of Advocate General SZPUNAR, April 20th 2016, par. 17.
[27] M.LEHMANN, J. UNGERER, *Applying or taking account of foreign overriding mandatory provisions- sophism under the Rome I Regulation*, page 59 ss; A. BONOMI, *The Rome I Regulation on the Law applicable to contractual obligations, Yearbook of private international law,* 2008 ; *Overriding Mandatory Provisions in the Rome I Regulation on the law applicable to contracts, Yearbook of Private International Law,* 2009.

and operate from an internal perspective of the chosen legal system[28]. If parties decide to apply a specific legal order, they can not evade these rules, on the other hand they can escape to this duty only by selecting another legal order.[29]

The European legislator preferred to foresee multiple layers of limits in order to protect different kind of interests deserving a specific protection.[30] To this aim, Rome I disposed several provisions which can be divided into two groups. The first cluster of simple mandatory rules is put in place for *all* contracts in compliance with the scope of Rome I regulation and it is foreseen by art. 3(3) and 3(4).[31]

According to the first : "Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement." In compliance with a party autonomy approach, the scope of the Regulation has been also extended to domestic contracts which own an element of internationality, expressed by the will of parties, to apply a foreign law[32], in fact, in order to internationalize the contract, it is sufficient for parties to put in place a valid expressed or implied choice of law. However, because the legislator pushes for subjects not to overcome determinate rules that should have been mandatorily

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[28] An example of simple mandatory rule if parties decide to apply Italian law is Art. 1490(2) of the Italian Civil Code:" The agreement with which the guarantee is excluded or limited has no effect, if the seller has in bad faith concealed the defects of the *res* to the buyer.

[29]N.BOSCHIERO, *Limiti al Principio d'autonomia posti dalle norme generali del regolamento Roma I,* page 77.

[30]S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective,* page 522; A.BONOMI, *Overriding Mandatory Provisions in the Rome I Regulation on the Law applicable to Contracts*; L.RADICATI DI BROZOLO, F. SALERNO, *Verso un nuovo diritto internazionale privato dei contratti in Europa, in* P. FRANZINA, *La legge applicabile ai contratti nella recente proposta di Regolamento Roma* I, 2006 ; "*Party Autonomy and Mandatory Rules in a Multistate World», International Law Forum-Forum de droit international,* 2004, page 88-94; *Internazionalizzazione, giurisdizione e norme di applicazione necessaria", L'internazionalizzazione dei mezzi di comunicazione e la sovranità statale, Atti del VII Convegno della Società Italiana di Diritto Internazionale,* Napoli, 2003.

[31]The latter have been already mentioned in Chapter 2, page 31 dealing with the freedom to choose the applicable law. However, these articles can be also examined from the perspective of limitations because they specifically impose restrictions to international agreements when determinate circumstances are met.

[32]*Id* note 27.

applied due to the fact that *all contacts* of the transaction are located in a single country, the latter has established a limit to the contractual freedom and that is explicated in the application of the domestic mandatory rules of that country in which all the connecting factors are met, preventing frauds to the law[33]. By the way, the legislator is fully aware of the protection of the freedom of contract and for this reason the limit is applied only when "*all*" elements and not "*most*" are related to a single country, in compliance with the exceptional nature of mandatory rules over the general freedom to select the applicable law.[34]

A similar *rationale* is provided by art. 3(4) according to which:" Where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement". Thus, as art. 3(3), art. 3(4) has been put in place in order to prevent fraud of laws, but differently from the first, the latter is specifically foreseen for European mandatory norms and applies only to intra-EU contracts choosing non-EU law. Furthermore, another difference from art. 3(3) is that art 3(4) requires that all the other elements of the contract are fully localized in one or more member States, except for the only choice of law that has been put in place referring to a third State, whereas art. 3(3) assesses that all elements relevant to the specific case must refer to a single country.[35] On the other side, the European legislator has also foreseen other simple mandatory norms which, differently from those above examined that apply to all contracts, are specifically

[33] P.DE CESARI, *Diritto Internazionale Privato della Unione Europea,* page 360.
[34]See Recital 37 Rome I Regulation.
[35] N.BOSCHIERO, *Limiti al Principio d'autonomia posti dalle norme generali del regolamento Roma I,* Page 104 ss.; L.M. VAN BOCHOVE, *Overriding Mandatory Rules as a Vehicle for Weaker Party Protection in European Private International Law ;* B.UBERTAZZI, *Il Regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali,* page 61 ss; F.J. GARCIMARTÍN ALFÉREZ, *The Rome I Regulation; El Reglamento «Roma I» sobre ley aplicable a las obligaciones contractuales: ¿Cuánto ha cambiado el Convenio de Roma de 1980?, Diario de la ley,* 2008.

provided for special contracts in order to protect presumably weak parties that find themselves in a disadvantageous bargaining position compared to the counterpart, in compliance with the wording of Recital 23[36]. Thus, whenever a transaction falls into the scope of these provisions, the freedom of contract promoted by art. 3(1) is substantially restricted in order to better protect the weak party. These contracts are identified from article 5 to 8 of Rome I Regulation and refer to contracts of carriage[37] (Art. 5), consumer contracts[38] (Art. 6), insurance contracts[39] (Art. 7), and individual employment contracts[40] (Art. 8).

[36] Recital 23 Rome I Regulation:" 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."

[37] Art. 5(2.2) Regulation 593/2008:" The parties may choose as the law applicable to a contract for the carriage of passengers in accordance with Article 3 only the law of the country where: (a) the passenger has his habitual residence; or (b) the carrier has his habitual residence; or (c) the carrier has his place of central administration; or (d) the place of departure is situated; or (e) the place of destination is situated."

[38] Art. 6 Regulation 593/2008: " (1) Without prejudice to Articles 5 and 7, a contract concluded by a natural person for a purpose which can be regarded as being outside his trade or profession (the consumer) with another person acting in the exercise of his trade or profession (the professional) shall be governed by the law of the country where the consumer has his habitual residence, provided that the professional:(a) pursues his commercial or professional activities in the country where the consumer has his habitual residence, or (b) by any means, directs such activities to that country or to several countries including that country, and the contract falls within the scope of such activities.
(2). Notwithstanding paragraph 1, the parties may choose the law applicable to a contract which fulfils the requirements of paragraph 1, in accordance with Article 3. Such a choice may not, however, have the result of depriving the consumer of the protection afforded to him by provisions that cannot be derogated from by agreement by virtue of the law which, in the absence of choice, would have been applicable on the basis of paragraph 1.

[39] Art. 7(3) Regulation 593/2008 : "In the case of an insurance contract other than a contract falling within paragraph 2, only the following laws may be chosen by the parties in accordance with Article 3: (a) the law of any Member State where the risk is situated at the time of conclusion of the contract; (b) the law of the country where the policy holder has his habitual residence; (c) in the case of life assurance, the law of the Member State of which the policy holder is a national; (d) for insurance contracts covering risks limited to events occurring in one Member State other than the Member State where the risk is situated, the law of that Member State; (e) where the policy holder of a contract falling under this paragraph pursues a commercial or industrial activity or a liberal profession and the insurance contract covers two or more risks which relate to those activities and are situated in different Member States, the law of any of the Member States concerned or the law of the country of habitual residence of the policy holder.

[40] Art. 8(1) Regulation 593/2008: " An individual employment contract shall be governed by the law chosen by the parties in accordance with Article 3. Such a choice of law may not, however, have the result of depriving the employee of the protection afforded to him by provisions that cannot be derogated from by agreement under the law that, in the absence of choice, would have been applicable pursuant to paragraphs 2, 3 and 4 of this Article.

2.2. The U.S. context, Fundamental policy compared to mandatory rules. § 187 Restatements, other interpretations, Section 1-301 U.C.C.

Concerning the issue of mandatory rules, the United States' legal order adopts a different solution from that promoted by Rome I. In fact, the U.S. system proposes two different approaches, in compliance with its multi-State legislative level, and both of them diverge from Regulation 593/2008.

The first approach in the U.S. context is provided by Restatement Second § 187(2). Apart from the general freedom of contract warranted to the parties by section § 187(1) and the mandatory geographical requirements of the "substantial relationship" or the "reasonable basis" examined in chapter II, § 187(2b) individuates a substantial limitation to the expression of party autonomy in international and interstate contracts by assuming that: " the application of the law of the chosen State would be contrary to a *fundamental policy* of a State which has a materially greater interest than the chosen State in the determination of the particular issue and which, under the rule of § 188, would be the State of the applicable law in the absence of an effective choice of law by the parties."[41]

Thus, it can be noted that the Restatements belong to the second group mentioned above[42] because they individuate as main limitation to the international contract the *lex causae.* Even if there is no specific definition of the latter, this provision specifies the necessary concurrent requirements for the application of the limits to the freedom of contract. Therefore, it can be deducted that there is a relevant *lex causae* if :

1. There is a law that would be applicable under section § 188 if parties did not put in place a choice of law;
2. That law of the State must have a materially greater interest compared to the chosen State;

[41] Restatement Second, Conflicts of Law § 187.
[42] See page 2 Chapter III.

3. There must be a contrast between the fundamental policy of this law and the contract under the law of the chosen State.

Once individuated these requirements, it is necessary to provide definitions of fundamental policy and materially greater interest[43], because are peculiar to this system and are different from the approaches provided by Rome I and the Hague Principles. Concerning the first requirement, official comments to Restatement assume that "to be 'fundamental,' a policy must in any event be a substantial one."[44] Thus, it is foreseen that a fundamental policy can not deal with a merely formal issue, such as the one of capacity, because it must concern a substantial matter. However, also between the substantial issues there must be a selection and not every violation of substantive law is able to be included in the fundamental policy limitation, hindering the choice of law. In fact, the Comments underline that neither general basic rules of contract law, such as those concerned with the need for consideration,[45] can represent the ground for fundamental policy.

On the other hand, the Restatements provide a few examples on sources of law that include a fundamental policy, as instance those statutes which make one or more kinds of contracts illegal or which are designed to protect a person against the oppressive use of superior bargaining power.

The concept of fundamental policy is included in the most general one of public policy, however because it has a threshold that may be compared to the one of the European overriding mandatory rules above examined and because it differs from the American concept of "strong public policy", the fundamental policy limitation is analyzed in this paragraph as it lies in between these two issues. Furthermore,

[43] Nor the provision, nor the law establish definitions of these terms, therefore they should be identified in the comments of Restatement second and in case law.
[44] *Official Comment Restatement (Second) Conflicts of law, section* § 187.
[45] *Official Comment Restatement (Second) Conflicts of law, section* § 187:" A executes and delivers to B in state X an instrument in which A agrees to indemnify B against all losses arising from B's liability on a certain appeal bond on behalf of C, against whom a judgment has been rendered in state Y. The instrument recites that it shall be governed by the law of Y. It is valid and enforceable under the local law of Y but is unenforceable for lack of consideration under the local law of X. In an action by B against A, the instrument will not be held invalid for lack of consideration.

evidence of its divergence it is expressly stated in its peculiar feature of "fundamental", as it must be ascertained the threshold the overcoming of which leads to dismissal of choice of law.[46] In fact, because there is no specific definition setting a scope to this limit, the risk may be that Courts might interpret any divergence between the choice of law put in place by the parties in international or interstate contracts and the *lex causae* by dismissing the first, impairing the freedom of contract.

To this aim, case law is the only source of law which provides concrete application of fundamental policy. At a general level, it has been noted that even if there is a slight discrepancy between the chosen law and the public policy of the *lex causae* State, the choice put in place by the parties will be respected. Evidence is provided by *Naylor vs Conroy*[47] where the Superior Court of New Jersey assumed that even if the *lex causae* of the specific case was New Jersey law and even if under this law a contract made on Sunday is void under the provision of New Jersey State 2A:171-1[48], the Court considered that the contract was signed, executed and

[46] P.HAY, P.J. BORCHERS, S.C. SYMEONIDES, *Conflicts of laws, 5th Edition*, 2010, page 1102; *Conflict of Laws: Private International Law Cases and Materials*, *15th Edition*, 2017; *Conflicts in a Nutshell* 4th *Edition*, 2016.

[47] *Naylor v. Conroy*, New Superior Court of New Jersey Appellate division 387 134 A.2d 785, September 20th 1957 facts : "The record discloses that on Sunday, February 12, 1956, a contract was partially prepared in New Jersey for the sale of real property situate here with plaintiff as purchaser and defendants as vendors. At the defendants' home in New York City the contract was completed by adding the consideration and a more specific description, and duly executed by both parties on Sunday, February 12, 1956, although it was dated February 13, 1956. Immediately after the parties executed the contract the plaintiff gave to the defendants a check for $100 representing the down payment as called for, which check was likewise dated February 13, 1956. At the oral argument it was conceded that the said contract was duly executed and delivered in New York City on Sunday, February 12, 1956. On the following day, February 13, the contract was acknowledged by plaintiff in New Jersey before an attorney-at-law of this State and duly recorded in the Bergen County Clerk's Office. However, no acknowledgment by defendants, or any other act which might be deemed ratification of the contract on a secular day, appears of record. "

[48] New Jersey Statute, 2A:171-1:" No traveling, worldly employment or business, ordinary or servile labor or work either upon land or water, except works of necessity and charity, and no shooting, fishing, not including fishing with a seine or net, which is hereinafter provided for, sporting, hunting, gunning, racing, frequenting of tippling houses, or any interludes or plays, dancing, singing, fiddling or other music for the sake of merriment, playing at football, fives, ninepins, bowls, long bullets or quoits, nor any other kind of playing, sports, pastimes or diversions shall be done, performed, used or practiced by any person within this state on the

delivered in New York and from the circumstances it has emerged that parties opted for N.Y. law. Therefore, because New York law admits the validity of a contract for the sale of land made on Sunday and because is generally accepted that Sunday contracts are not considered against public policy, if they are valid by their proper law, they are enforceable elsewhere. Thus, in this case the New Jersey Superior Court maintained that the violation of New Jersey's public policy was not as "fundamental" to render the contract invalid only under the law of New Jersey and it stated that it is necessary that an agreement should be "abhorrently against the public policy"[49] of the State of *lex causae* to be invalidated.

However, under the § 187(2b) interpretation, there is not only one criterion to which a fundamental policy can be identified,[50] in fact there are other tests that are established by the Courts in order to to determine whether a contract hinders the fundamental policy or not, some of them refer to the situation in which the agreement is "immoral" towards the policy of the *lex causae*[51] and others refer to the "offense caused to justice of public welfare"[52].

By the way, moving from the Restatements to other American sources of law, other definitions of "fundamental policy" can be identified in the U.S. context in the States of Louisiana and Oregon, which have provided autonomous codifications of choice of law, foreseeing differences from section § 187(2b). First of all, both codes' provisions abandon the "substantial relationship requirement" concerning the freedom to express the law applicable to the contract and second, they provide

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Christian Sabbath, or first day of the week, commonly called and hereinafter designated as Sunday."

[49] *Id* note 31.

[50] *Machado–Miller v. Mersereau & Shannon,* 43 P.3d 1207, 1211 "To announce that a policy or a right is 'fundamental' is to announce a conclusion and not a premise, and the reasoning that leads to the conclusion is almost always obscure, hopelessly subjective, or expressed in verbal formulations that are of little help... Further, whether a particular interest is deemed fundamental under such indeterminate formulations depends on the level of generality at which the Court chooses to identify it. To the extent the interest is described at a high level of generality, it is likely to be fundamental, and *vice versa*."

[51] *Intercontinental hotels Corporation vs Jack Golden*, Supreme Court of New York, June 20th 1962.

[52] *Loucks vs Standard Oil Co*., New York Court of Appeals, July 12, 1918.

a different version of "fundamental policy", maintaining the same threshold of the Restatements. Thus, the Louisiana Civil Code provides that the applicable law is subject to the public policy limits of the *lex causae* and defines the latter in this context as "strongly held beliefs of a particular State".[53] Similarly, the Oregon Statute recalls the definition of "established fundamental policy" of the otherwise applicable law.[54]

However, all these approaches, including the special codifications of Louisiana and Oregon, individuate a threshold that is relatively high, the limit of which is provided by the Comments of the Restatements, because it expressly foresees that a fundamental policy as intended by § 187(2b) can not be so "strong" to be equated to the traditional limit imposed by § 90[55].

In the end, even if all these approaches show slight differences among them, the minimum threshold established by all Courts considering the level of fundamental policy is pretty much the same among all the American systems examined. On the other hand, the maximum threshold is provided by the combined interpretation of § 187 and § 90 in order to distinguish the fundamental policy from the traditional public order.

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[53] *Comments on Louisiana Civil Code*, art. 3540; Art. 3540:" All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

[54] Oregon Statute 15.350: "The law chosen by the parties pursuant to ORS 15.350 (Choice of law made by parties) does not apply to the extent that its application would:
(a) Require a party to perform an act prohibited by the law of the state where the act is to be performed under the contract;
(b) Prohibit a party from performing an act required by the law of the state where it is to be performed under the contract; or
(c) Contravene an established fundamental policy embodied in the law that would otherwise govern the issue in dispute under ORS 15.360 (General rule).
(2) For purposes of subsection (1)(c) of this section, an established policy is fundamental only if the policy reflects objectives or gives effect to essential public or societal institutions beyond the allocation of rights and obligations of parties to a contract at issue."

[55] Restatement (Second) Conflicts of Law, 90: " "No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum."

The second requirement is that the fundamental policy shall refer to the State which has "materially greater interest". This feature is satisfied when there is a State different from the chosen law that, because owns the vast majority of contacts to the transaction, has an interest to apply its law in order not to avoid the application of its mandatory provisions. From a comparative perspective, section § 187(2b) differs substantially from Rome I. In fact, the concept of public policy can be considered as similar to the one of "overriding mandatory provision" but not exactly on the same way and it has been noted[56] that the threshold of fundamental policy under § 187 lies in between the "overriding mandatory rules" and the "mandatory rules" established by Rome I Regulation, even if more closely connected to the firsts.

Thus, the fundamental policy's threshold can be treated as higher than the one imposed by the simple mandatory provisions because the latter are related only to special kinds of contracts or situations expressly designated by art. 3(3) and 3(4) of Regulation 593/2008 and have a very limited scope, whereas the Restatements refer to general principles nestled in the States' statutes and have a broader scope including all contracts with no differentiation among each other. On the other hand, the limit set by art. 9 of Rome I concerning overriding mandatory provisions is higher than that imposed by the Restatements because art. 9 expressly circumscribes the relevancy of these norms to cornerstone principles of a State, thus public, political, social and economic interests, furthermore it admits that these laws override *in any case* the law chosen by the parties. The last expression is the most significant compared to the American methodology, in fact Restatements Second has always to be interpreted according to the specific case

[56] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective*, page 530; *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple, Brooklyn Journal of International Law,* 2014, page 1123 ss.

and there is no abstract rule that is always valid at a general level, in compliance with a common law approach.[57]

Moreover, whereas the Restatements provide mandatorily the application of only one law other than the chosen one if the circumstances described by section § 187 are met, Rome I Regulation foresees that there may be enforced more than one law other than the chosen law by applying the overriding mandatory provisions of the law of the forum State and the law of the State of performance, if all conditions expressed under 9(2) and 9(3) are met. Lastly, it is necessary to recall that the comparisons here provided should be interpreted at general level, because in specific and exceptional cases American Courts are able to override the Restatements, as happened in *Lehman Bros. Commercial Corp. vs Minmetals Int'l Non-Ferrous Metals Trading Co,* where the court held that a contract that was illegal under the law of the place of performance, in this case China, was unenforceable in the law of the State of New York even if the parties opted for a different law under which the international agreement is valid, thus the Court overcame the ruling of § 187(2b) because took into account three different laws of distinct States in order to decide the case.

Still in the American context another approach is taken by the U.C.C. concerning the limits to choice of law in interstate and international contracts dealing with the transactions falling into its scope. In fact, the definition provided by section 1-301 of the U.C.C.[58] does not mention the rule of the fundamental policy of the materially interested State and it assumes that "for the matter other than those covered by…. Subsection (c), the forum's version of the Code applies to

[57] If New Jersey Statute, 2A:171-1 in *Naylor vs Conray* had been considered an overriding mandatory provision under the meaning of Rome I Regulation, that law would have been applied and the contract would have been considered as invalid because of the mandatory application of that provision, nonetheless the contrary choice of law expressed by the parties.

[58] Section 1-301 U.C.C: "(a) when a transaction bears a reasonable relation to the forum state and also to another state or nation the parties may agree that the law of either the forum state or of such other state or nation shall govern their rights and duties.
(b): In the absence of an effective choice of law agreement and for the matters other than those covered by the aforementioned choice of law provisions listed in subsection (c), the forum's version of the Code applies to transactions bearing an "appropriate" relation to the forum state".

transactions bearing an *appropriate relation* to the forum State". Thus, Section 1-301 of the U.C.C. does not foresee a provision which justifies the application of the *lex causae* , but on the other hand expresses a preference for the application of the law of the forum. For this reason, the U.C.C. belongs to the first group of systems which apply as *lex limitatis* the *lex fori.* However, as it has been noted above, American Courts may find exceptions to the general rule[59] established by the U.C.C. and relevancy has been attributed to the public policy limitation taking into consideration the *lex causae* in the specific cases, even if falling under the U.C.C.[60]

2.3. The Hague Principles, article 11 overriding mandatory rules

Nonetheless the Hague Principles on Choice of Law on Commercial Contracts is a soft law instrument that pushes most for freedom of contract in international agreements, the latter is aware that party autonomy to select the governing law can be limited, every time in which that law would have the effect to contravene certain fundamental norms[61]. In compliance with this awareness, the drafters of the Hague Principles provided five paragraphs within article 11, dealing with the overriding mandatory rules and the public policy of both the forum State and third States. However, this article does not deal only with issues before litigation, in fact 11(5) proposes the protection of mandatory rules and public policy also before arbitral courts. Concerning the aspect of mandatory rules, art. 11 dedicates two sections:

1. "These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties.

[59] *Id* note 37.
[60] *Leasing Service Corp. vs Diamond Timber,* 1983 ; *Mell v. Goodbody & Co*.,1973; *Fairfield Lease Corp. v. Pratt*, 1971; *Boatmen's Bank of Cape Girardeau vs Adams*, 1989; *Delhomme Indus., Inc. v. Houston Beechcraft, Inc*,1982. *American Honda Finance Corp. vs Bennett*, 1989;
[61] Commentary to the Hague principles, 11.1.

2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law."

Thus, art. 11(1;2) expressly admits the opportunity to refer to the mandatory rules of the forum State and those of foreign countries and, as exposed in the commentary, it is not necessary that they are put in place in a particular form or that they are expressly stated.[62]

Art. 11 is inspired by Rome I Regulation, therefore there can be noted several commonalities with the latter but at the same time also differences. First, both Principles and Regulation 593/2008 use the term "overriding mandatory" in order to highlight the elevated level of these norms, however whereas the second at Recital 37 foresees an expressed distinction between overriding and simple mandatory rules, the first does not propose it in its provisions and its Commentary neither mentions this difference[63]. Thus, there may be problems of interpretation whether the rule established in art. 11(1) of the Principles should be considered closer to the meaning of the "simple" mandatory rules of Rome I, or instead the "overriding" mandatory rules in compliance with art. 9 of Rome I.[64]

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[62] Commentary to the Hague principles, 11.17 :" It is not necessary that an overriding mandatory provision should take a particular form (i.e., it need not be a provision of a constitutional instrument or statute), or that its overriding, mandatory character should be expressly stated."

[63] The commentary only establishes the existence of overriding mandatory rules with no reference to simple mandatory rules. At paragraph 11.16 :" The Principles do not define the term "overriding mandatory provisions". The term…. is generally understood to refer to provisions of law that must, according to their proper construction, be applied to the determination of a dispute between contracting parties irrespective of the law chosen to govern the contract. They are mandatory provisions in the sense that it is not open to the parties to derogate from them by the terms of their contract or otherwise. They are overriding provisions in the sense that a court must apply them even if the parties have chosen a law other than that of the forum to govern their contractual relationship."

[64] S.C. SYMEONIDES, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 887 ; A.DICKINSON, *Oiling the machine: overriding mandatory provisions and public policy in the Hague Principles on Choice of Law in International Commercial Contracts, Uniform Law Review,* 2017; *Commentary on the Hague Principles on Choice of Law in International Commercial Contracts, Art 11 (Overriding mandatory rules an public policy),* 2015; *The Role of Public Policy and Mandatory Rules within the Proposed Hague Principles on the Law Applicable to International Commercial Contracts' Paper for Hague Conference Working Group on the Law Applicable to International Commercial Contracts,* 2011.

In fact, it has been noted that the use of the word "overriding" in art. 11(1) of the Principles does not necessarily imply that it refers to the same interpretation of Rome I because also the "simple" mandatory rules are "overriding" in the sense that they "override" a contrary agreement.[65] However, a deeper analysis shows that the term "overriding" mandatory rules in art. 11(1) can not be equivalent to the term "simple" mandatory provisions as used in Rome I because the latter adopts this wording in the special consumer contracts in art. 6(2) and employment contracts in art. 8(1), both exempted from the scope of the Principles as foreseen by art 1 of the latter.[66] Thus, art. 11 even if does not expressly provide the difference as delineated in Rome I, can be compared to the same, or at least very similar threshold of the overriding mandatory norms as established in Regulation 593/2008.

Another difference concerns the concept of law recalled in both sources of law. Whereas art. 9 of Rome I exploits the term " provision", art. 11 of the Principles recalls the term "rule". This divergence is fundamental because it highlights the broader scope of the latter compared to the first. In fact, art 11 is not limited to State law, but includes also non- state law choices[67], therefore the scope is extended to the opportunity to apply overriding mandatory rules, different from State law. Furthermore, evidence is provided by art. 11(5)[68] that expressly refers to mandatory provisions of "a law" and does not specify that rule as a State law, however in compliance with the non-mandatory nature of the principles, it must be respected any limit imposed by the forum State according to art. 3 of the Principles.

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[65] *Id* note 27.

[66] *Id* note 27; Art. 1 : "These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts.

[67] Expressly admitted in art. 3 of the latter."

[68] Art. 11(5): "These Principles shall not prevent an arbitral tribunal from applying or taking into account public policy (ordre public), or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so."

Another important comparison concerns the relationship between 11(2) and 9(3), dealing with foreign overriding mandatory provisions. In fact, whereas the latter affirms the opportunity to "give effects" to these norms only when exceptional and limited circumstances occur, art. 11(2) is very much more liberal from this perspective because it allows the forum court to "*apply or take into account* overriding mandatory provisions of another law." Thus, the Principles recognize the distinction between "application" and "taking into account", which has been previously exposed in *Nikiforidis,* and accept both criteria depending on the specific legal order of the forum. Furthermore, the Hague Principles refer to overriding mandatory foreign rules not as a "developed exception" like that provided by 9(3) requiring multiple conditions to be applied, but rather it is a "regular exception" in the manner of the overriding mandatory rules of the forum. Finally, Rome I Regulation limits the opportunity to consider mandatory norms among two possible laws, that is to say the law of the forum and the one of the other State under the exceptional circumstances proposed by 9(3), whereas the Hague Principles refer to a *third* State as well, without indicating any special circumstances except for the fact that the decision must be taken by the forum State.

On the other hand, both the Hague Principles and Rome I treat the issue of overriding mandatory provisions of the forum and the foreign State in the same article but in two separate paragraphs. The drafters preferred to treat the matter of overriding mandatory norms separately, on the basis that where the Hague Principles are used as a model, legislators may wish to make separate reference to the role of overriding mandatory provisions of the forum and of a third country[69]. Another commonality with Rome I is that both dispose that it is for the law of the

[69] M. PERTEGAS B.A. MARSHALL, *Party autonomy and its limits: convergence through the new Hague Principles on choice of law in international commercial contracts*, page 1000 ss. ; M.M. ALBORNOZ, N. GONZALEZ MARTIN, *Towards the uniform application of party autonomy for choice of law in international commercial contracts;* J.LANDBRECHT, *The Hague Conference on Private International Law: Shaping a Global Framework for Party Autonomy, International Business Law Journal,* 2017.

forum to determine whether and when the overriding mandatory provisions of a third legal system are taken into account, however whereas the Principles provide it expressly at art. 11(2), Rome I does not explicitly mention the competence of the forum State.[70]

On the other side, the Hague Principles are much different from the Restatements compared to the divergences with Rome I Regulation. First of all, according to the division provided above,[71] whereas the Principles belong to the third group considering as relevant limitations both the *lex fori* and the *lex causae,* the Restatements can be included in the second group aforementioned, thus they only focus on the limitation caused by the *lex causae.* In fact, under the Restatements, only in case of contrast with the fundamental policy of the State that has a materially greater interest the limitations imposed to freedom of contract would be able to override the law chosen by the parties. Furthermore, the forum law is not relevant in terms of "fundamental policy" unless the law of the forum would otherwise be the applicable law according to the criteria established by the section § 6; § 188 to identify the otherwise applicable law. On the other side, the Hague Principles take into consideration the mandatory rules of either the forum or of another State or both of them[72]. Another distinction may concern the nature of these limitations to freedom of contract. In fact, the Principles agree with the exceptional nature of the limits imposed to freedom of contract because it is a source of law fully addressed to the development of party autonomy in international private law and these rules provide an essential "safety valve" without which national lawmakers might be reluctant to allow the application of the chosen law.[73] On the other side, section § 187(2b) tends to consider the

[70] L.J. SILBERMAN, *Lessons for the USA from the Hague Principles, Uniform Law Review,* 2017, page 429.
[71] See Page 2.
[72] L.J. SILBERMAN, *Lessons for the USA from the Hague Principles,* page 428; *US Report on Conflict of Laws, in Encyclopedia of Private International Law*, 2637; (American) *Conflict of Laws Revolution, in Encyclopedia of Private International Law, Edward Elgar,* 2017.
[73] *Comments on Hague Principles,* 11.8 ; furthermore 11.9 points out that : "In the present context, although the qualifications in Article 11 do restrict the application of the law chosen by the parties,

substantial limitation of the fundamental policy of the State which has a materially greater interest as the regular consequence of a choice of law. Thus, the Restatements' limitations are not as exceptional as they are considered in the Principles and the will of party is necessarily influenced by other State's interests.

3. The public order

Another limit which States use to impose toward the exercise of freedom of contract is the public order. First of all, public order is a concept that finds its grounds on that complex of values under which society is based, in fact its preliminary nature deals with the relationship between society and its concrete "public manifestations" of the people who live in a determinate historical period. In time, the concept of public order started to develop in further branches. One of them refers to the legal orders of the States and nowadays it can be considered as the "legal architecture" of all juridical systems, creating specific schemes and structures.[74] however this limitation is not circumscribed to national legal orders as all systems of private international law and also in international conventions contain this clause. Thus, the clause of public order is present in every legal system in order to warrant the protection of indispensable values that must be safeguarded.

There are two kinds of public order and it is necessary to point out this distinction because only one of them is related to international choice of law. Thus, the public

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they are intended to buttress the principle of party autonomy. By acknowledging and defining the exceptional circumstances in which a national court or arbitral tribunal may legitimately override the parties' choice in the exercise of the power conferred on them by Article 2(1), the provisions described in the following paragraphs serve as important control mechanisms, which should serve to reinforce the confidence that a legal system reposes in the parties by allowing them that choice. Without provisions of this kind, which protect the integrity of a legal system and the society that it represents, the freedom of the parties to choose the law applicable to a contract might not be accepted at all and, if recognised, would be at risk of being undermined or negated on insubstantial or spurious grounds."

[74] P.LOTTI, *L'ordine pubblico internazionale, la globalizzazione del diritto privato e i limiti di operatività degli istituti giuridici di origine estera nell'ordinamento italiano*, *Giuffrè*, 2005, page 10 ss.

order can be examined from an internal or from an international perspective.[75] The first is peculiar to each specific system and in the contractual field is considered as that principle which individuates all the norms that can not be derogated by private contractual autonomy, the breach of the latter leads to invalidity of contract.

On the other side, the international public order deals specifically with international private law. Thus, because rules of p.i.l. are merely internal to the legal system to which they refer, more definitions of int. public order are provided by the systems. However, even if definitions and applications may be slightly different from each system, the heart of this concept is generally identified as the complex of fundamental principles of the national legal order taking into consideration also the social, economical, political and constitutional values. It is an indeterminate concept because it is influenced by the flow of time and it is hardly circumscribable from an abstract point of view, therefore its application to the concrete case should be identified time by time depending on the circumstances.

Furthermore all States attribute the same functions to the international public order and these are its *neutralization* and *filter* function.[76] The first is satisfied if the int. public order of the forum is incompatible with the foreign law that parties want to apply, thus the selected foreign law will be neutralized in favor of the protection of the law of the forum, in compliance with its public order. It can be noted that there is a substantial difference of nature between the neutralization function of the international public order and overriding mandatory rules. In fact, whereas the

[75] U. VILLANI, *Nozioni di diritto internazionale privato,* page 55-62; P.LOTTI, *op. cit.* ; F.MOSCONI, *Qualche considerazione sugli effetti dell'ordine pubblico, Rivista Diritto Internazionale Privato Processuale,* 1994 ; M. PASSARELLA PULA, *L'ordine pubblico internazionale: baluardo o paralisi del diritto internazionale privato?, Vita not. ,* 1994.

[76] P.LOTTI, *op. cit;* N. PALAIA, *L' ordine pubblico «Internazionale», CEDAM, Studi e Pubblicazioni della Rivista di Diritto Internazionale Privato e Processuale,* Padova, 1974 *;* G. SPERDUTI, *Ordine pubblico internazionale e ordine pubblico interno, Rivista di Diritto Internazionale*, Milano, 1962; *Evoluzione storica e diritto internazionale privato, CEDAM,* 1970; G. BARILE, *I principi fondamentali della comunità statale ed il coordinamento tra sistemi (l'ordine pubblico internazionale), Rivista di Diritto Internazionale Privato e Processuale,* Padova, 1969.

first is considered as a negative limit to application the of foreign law because its aim is not to apply those norms which are inconsistent with specific features of the forum State, the seconds are treated as positive a limit because its aim is to impose the application of specific mandatory provisions that represent crucial political social, economical interests.[77]On the other side, the filter function is satisfied when foreign law is in compliance with the international public order of the forum State, therefore it acts as a filter opening a gap which allows the application of that law in a system that does not directly know that kind of norm.

At a general level, the public policy limitation has to be considered distinguished from the concept of mandatory rules[78]. In fact, even if both concepts tend to protect the application of specific contingent rules and in any case parties can not derogate to them, wherever they are mandatory rules or rules of public order, there is a substantial divergence between them and it refers to the time in which this clauses operate.[79] Thus, the firsts intervene before the conflict of laws arises or are applied in order to solve the conflict just arisen and this is the reason why they are considered as preventative limits to the expression of freedom of contract. On the other hand, the public policy clause intervenes after the conflict of laws analysis is conducted when a foreign law is already deemed applicable and, in contrast to the mandatory rules, it is considered as a subsequent limit not only to the expression of freedom of contract, but also to the judicial analysis already put in place solving the conflict.

At this point there will be examined positive law concerning the establishment of provisions related to the public order, as will be noted all the Countries examined show reference to this fundamental clause, however a significant and innovative divergence is put in place by the Hague Principles.

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[77] U. VILLANI, *Nozioni di diritto internazionale privato,* page 55-62.
[78] Only at general level, because in the specific cases where the concept of overriding mandatory rules is not expressed, this distinction is less significant and falls apart, such as in the U.S. legal systems.
[79] C. KESSEDIJIAN, *Public Order in European Law, Erasmus Law Review,* 2007.

3.1. The public order, national and European context

In the Italian legal order, provisions relating to public policy find their origin in art. 31 of the preliminary provisions of the Civil Code.[80] When L. 218/1995 was issued, it overcame art. 31 with its provision, still valid nowadays, disposed at art. 16, providing that:" Foreign law is not applied if its effects are contrary to public order. In this case, the law referred to by other connective criteria established for the same abstract case is applied. Failing this, Italian law applies.", therefore nowadays art. 16, together with the judgement of the Constitutional Court 18/1992 in which the latter provided the definition of international legal order[81], compose the structure of the norms imposed by the national State concerning the issue of public policy. However, the definition of public policy provided by the Constitutional Court shall be integrated with the one foreseen by the European Court of Justice in the *Eco Swiss* case.

In that occasion,[82] the E.C.J extended the definition of public order including all those provisions and European principles which aim is to protect trade and competition in order to harmonize the intra-European market.[83] Thus, nowadays the national context is pervaded by the European notion of public order and

[80] Art. 31 Preliminary provisions of the C.C. : " Despite the previous laws, in no case the laws and the acts of a foreign state, the orders and the deeds of any institution or body, the private provisions and the conventions are introduced in the territory of the State, when they are contrary to public order or to morality. The corporate order is an integral part of the public.
[81] Judgement 18/1992 Constitutional Court:" The international public order is composed by the fundamental rules put in place by the Constitution and by the laws and by the legal institutes to which the legal order developes and also by the evolution of the society. "; *Id* note 58.
[82] *Eco Swiss*, European Court of Justice 1st June 1999 In Case C-126/97, facts : "By order of 21 March 1997, received at the Court on 27 March 1997, the HogeRaad der Nederlanden (Supreme Court of the Netherlands) referred to the Court for a preliminary ruling under Article 234 EC five questions on the interpretation of Article 81 EC. Those questions have been raised in proceedings brought by Benetton International NV for stay of enforcement of an arbitration award ordering it to pay damages to Eco Swiss China Time Ltd for breach of a licensing agreement concluded with the latter, on the ground that the award in question was contrary to public policy within the meaning of Article 1065(1)(e)of the Wetboek van Burgerlijke Rechtsvordering by virtue of the nullity of the licensing agreement underArticle 81 EC".
[83] P. DE CESARI, *Diritto Internazionale Privato dell'Unione Europea*, page 402-404.

concerning choice of law in international contracts, this clause has been grafted in recital 37 of Regulation 593/2008 in the part in which admits together with the aforementioned overriding mandatory rules, under extraordinary circumstances, the application of exceptions based on public policy and in art. 21 of the latter, providing that " The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."

However, there are a few distinctions between the definition provided by art. 16 of L. 218/1995 and the one of art. 21 of Rome I Reg. At first, art. 21 of Reg. 593/2008 expressly forbids the application of the foreign law chosen by the parties only in case of " manifest incompatibility" with the public order of the law of the forum, on the other hand art. 16 of L. 218/1995 only states that foreign law does not apply in case of "contrariness to the public policy of the forum State". In any case, this difference is relevant only from a formal perspective, because nowadays even courts and doctrine tend to interpret art. 16 as in compliance with the European counterpart, thus taking into consideration only significant violations of public policies.[84]

On the other hand, a consistent divergence deals with the procedural aspects of these articles, in fact if a violation of the *ordre public* has been found by the national judge, deciding under art. 16 of L. 218/1995, the subsequent step that the latter has to take is to consider whether there are other connecting criteria that could refer to the application of another foreign law. If these are not present, or if the law subsequently recalled is against public international order as well, Italian law applies. In contrast, if the national judge is called to decide the case under art.

[84] U. VILLANI, *Nozioni di diritto internazionale privato,* page 55-62; G.SPERDUTI, *Ordine Pubblico internazionale e ordine pubblico interno, Riv. Dir. Int*., 1954, page 82 ss. B.UBERTAZZI, *Il Regolamento Roma I sulla legge applicabile alle obbligazioni contrattuali*, page 123-126; A. CHONG, *The public policy and Mandatory Rules of Third Countries in International Contracts* J.P.I.L. 2006; '*Transnational Public Policy in Civil and Commercial Matters'*, 2012, page 88-113; *Conflict of Laws, in HW Tang, M Hor and N Poon (eds), Reading Law in Singapore,* page 193-201.

21 of Rome I Regulation and if in the specific situation there is a conflict between the law chosen by the parties and the public order of the forum State, the law of the latter is *immediately* applied, thus there is no room for the judge to look at other connecting criteria to solve the case, even if there are.[85]

3.2. The public order , American context

The issue of public order is challenged in the U.S. context alternatively in two sections of two different sources of law. The traditional approach is taken by section § 612 Restatement (First) on Conflicts of Law[86], according to which :" No action can be maintained upon a cause of action created in another State the enforcement of which is contrary to the strong public policy of the forum". This first theory is in line with the territorial approach proposed by Beale, therefore it pushes for the application of the law of the forum State in the vast majority of cases, with the consequence that the issue of public policy under this approach does not assume a particular relevance *per se,* because all the First Restatements are loyal to the general principle under which is foreseen that conflicts of laws are always solved by applying the *lex fori.*

However, even if today it is almost not applied anymore, an analysis of interpretations provided by the Courts on the First Restatements is useful to determine the definition of public order provided by the latter and is fruitful to see the evolution of this concept until Restatement Second. Thus, the definition of public order under the meaning of Restatement first has been provided in a case which dealt with tort law, nevertheless it deserves to be mentioned because the

[85] *Id* note 64; N.BOSCHIERO, *Verso il rinnovamento e la trasformazione della Convenzione di Roma, Problemi Generali, in* P.PICONE, *Diritto internazionale privato e diritto comunitario,* Padova, 2004 ; A. BONOMI, *Overriding Mandatory Provisions in the Rome I Regulation on the Law Applicable to Contracts,* page 139 ss.

[86] L.E. LITTLE, *Conflict of laws cases, materials and problems, , Wolters Kluwer, 1st edition,* 2013, page 502-503; *Conflict of Laws Structure and Vision: Updating a Venerable Discipline, Georgia State University Law Review,* 2014.

issue of public policy is relevant and uniform for both torts and contracts choice of law as well, furthermore in this case Justice Cardozo provided a notion of the concept of public order that nowadays is still taken into account by Courts.

In *Loucks v. Standard Oil Co.*[87] Judge Cardozo concluded that the court should apply Massachusetts law, rather than New York law, because it did not "violate some fundamental principles of justice, some prevalent conception of good morals, some deep-rooted tradition of the common weal."[88]What is relevant for the contract's analysis is Judge Cardozo's consideration over the requirements established in order to invoke a public policy exception. In fact, what is mandatorily required is that there must be a significant violation of the principles expressed by the moral, tradition, and of course Constitution, statutes, and the case law of the forum State.[89] The expression put in place by Justice Cardozo is important because it tends to overrule what has always been confirmed by Restatement First, thus after this judgement many discussions raised upon the opportunity for a State to interpret Restatement First in a way more in compliance with international and interstate community[90], increasing flexibility in the application of foreign law in the forum State and, from the contractual perspective,

[87] *Loucks v. Standard Oil Co.* Court of Appeals of New York 120 N.E. 198, July 12th 1918, Facts:" Everett Loucks was killed in Massachusetts through the negligence of employees of Standard Oil Co. of New York (Standard Oil) (defendant). Loucks, his wife, and their two children resided in New York; Standard Oil was also based there. The administrators of Loucks's estate (plaintiffs) filed suit against Standard Oil in a New York court, seeking to recover under a Massachusetts statute that imposed liability on employers where the negligence of their employees caused death. The statute authorized damages of up to $10,000, to be based on the degree of culpability. New York law provided a different, civil remedy for death caused in that state. The Special Term of the Supreme Court allowed the case to proceed with the application of Massachusetts law. The Appellate Division reversed. Plaintiffs appealed."

[88] Id note 68.

[89] J. B. CORR. *Modern Choice of Law and Public Policy: The Emperor Has the Same Old Clothes; Interest Analysis and Choice of Law*, *University of Miami Law Review,* 1985 ; *The Dubious Dominance of Domicile,Utah Law Review,* 1983.

[90] Judge Beach on territorial approach of public policy : "It would be an intolerable affectation of superior virtue for the courts of one state to pretend that the mere enforcement of a right validly created by the laws of a sister state 'would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law,' or would be of such evil example as to corrupt the jury or the public."

enhancing party autonomy.[91] In fact, more modern approaches started to develop by attributing a high degree of flexibility in the use of public policy and Courts began to assume that it was not sufficient a slight divergence between foreign law and forum law to justify the application of public policy[92] until finally the issue has been clarified in the 1971 Restatement Second.

In fact, the second relevant approach concerning the matter of public order is provided in section § 90 of Restatement (Second) on Conflicts of Law, according to which :" No action will be entertained on a foreign cause of action the enforcement of which is contrary to the strong public policy of the forum". Even if the formulation is akin to the one of its predecessor, in the contractual field the latter should be compared and interpreted in compliance with section § 187 of the Restatements and the new concept of "fundamental policy" in order to understand the divergences with Restatement First.

Whereas in the past the jurisdictional trend was to apply, as a limitation to the party autonomy, the *lex fori* in the vast majority of conflicts of law cases, nowadays courts tend to apply the law of the State that has a materially greater interest and which fundamental policy has been breached, thus the *lex causae*. So, whereas in the past the concept of public order enucleated in section § 612 of Restatement First was not innovative in the U.S. legal system in the sense that, in compliance with a territorial approach, the *lex fori* would have been applied in any case nonetheless the non-occurrence of incompatibilities of the foreign law with the public order of the *lex fori,* nowadays section § 90 of Restatement Second acquires an innovative strength. In fact, because the current jurisdictional trend is to take

[91] Professor Weintraub, for example, wrote: "There is ... nothing wrong with a traditional definition of public policy as everything found in the laws of the forum if the policies underlying those laws are utilized to assist in articulating a reasoned choice between the law of the forum and the law of some foreign jurisdiction."

[92] *Gutierrez v. Collins,* 583 S.W.2d 312, 321 Texas Appellate Court 1979: "It is true that the laws of Texas and Mexico still differ in several aspects. . . . However, these differences by no means render the laws of Mexico violative of public policy. Each must be considered on its own merits…. Texas courts will not enforce a foreign law that violates good morals, natural justice or is prejudicial to the general interests of our own citizens."

into account and eventually apply the *lex causae,* today section § 90 operates as the *last limit*, thus once the specific law has been identified, if it is in compliance or has a slight divergence with the public policy of the forum that is applied. On the other side, if it conflicts with the "strong" policy of the forum, the foreign law is not applied. Furthermore, this new perspective of section § 90 is also in line with the official comments of the Restatements that expressly distinguish the "fundamental policy of the materially more interested State " from the "strong policy of the forum State".[93]

Concerning the functioning of section § 90, two main doctrines have been opposed in time.[94] According to the first, also adopted by some courts, section § 90 is unnecessary because of its relationship with section § 6(2b;c) of Restatement Second[95]. Thus, in compliance with this view a court may simply and exclusively rely on the latter in concluding that public policy reflected in a foreign law is in contrast to its own and "considerations on public policy are expressly subsumed within the most significant relationship approach".[96]

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[93] *Official Comment Restatement Second* § 187:" To be "fundamental" within the meaning of the present rule, a policy need not be as strong as would be required to justify the forum in refusing to entertain suit upon a foreign cause of action under the rule of § 90." *; Official Comment to Restatement Second § 90* :" A mere difference between the local law rules of the two states will not render the enforcement of a claim created in one state contrary to the public policy of the other."

[94] L.E. LITTLE, *Conflict of laws cases, materials and problems,* page 502-503.

[95] Restatement (Second) Conflicts of Law section § 6(2b;c):"When there is no such directive, the factors relevant to the choice of the applicable rule of law include
(b) the relevant policies of the forum,
(c) the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue,"

[96] *Phillips vs General Motors Corp*. 995 P.2d 1002, 1015 (mont. 2000), :"for choice of law purposes, the public policy of a state is simply the rules as expressed in its legislative enactments and judicial decisions, that it uses to decide controversies…. The purpose of a choice of law rule is to resolve conflicts between competing policies. Considerations of public policy are expressly subsumed within the most significan relationship approach. (Restatement 6 2 b;c mandating consideration the relevant policies of the forum state and other interested states) in order to determine which state has the more significant relationship, the public policies of all interested states must be considered. A public policy exception to the most significant relationship test would be redundant.

On the other hand, another and more widely accepted approach affirms that these Sections shall be considered as autonomous. In fact, it is true that section § 6(2b;c) lists as a relevant factor to identify the applicable law the policy of the forum, however, it does not highlight the importance of the public order of the forum as it lists it together with all other factors determining the principles of choice of law. On the other side section § 90 pushes for a special protection of the exclusive law of the forum therefore, in compliance with this view, § 90 has a narrower scope than the § 6 and adopts the concept of public policy outside of the scope of section § 6(2b;c).

Moreover, this approach is in line with the system of the U.S. choice of law under the Restatements. Thus, under the combined interpretation of the principles established by section § 6 and § 187 in order to set a limit to the freedom of contract, where the forum State has a materially greater interest in the specific case becoming at the same time the *lex causae*, it will apply its own law. In opposite, if the latter is not the more materially interested State, it will be applied the law of another State that has a greater interest in the case as long as that law does not hinder the forum's public policy. Finally, if a State that has an interest in the case which law applicable is contrary to the forum's public policy, the forum can dismiss the case under section § 90 in compliance with its nature of negative limit.

In the end, from a comparative perspective, the high threshold limitation established by section § 90 of the Restatements is different from the one established by the Oregon and Louisiana Statute because both clarify that references to the "strong policy of the otherwise applicable law" indicate a *much lower* threshold than the traditional one established by section § 90[97]. Whereas on the European side, section § 90 is the equivalent of the one provided by art. 21 of

[97] L.J. SILBERMAN, *Lessons for the USA from the Hague Principles.*

Regulation 593/2008[98] because both of them are considered as the last limits with the same binding strength which may be able to disapply a choice of law.

3.3. The public order, the Hague Principles

The issue of public order is challenged in the Hague Principles on Choice of Law on Commercial Contracts as well. To this aim, art. 11(3;4) recites:

(3) "A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (*ordre public*) of the forum.

(4) The law of the forum determines when a court may or must apply or take into account the public policy (*ordre public*) of a State the law of which would be applicable in the absence of a choice of law. "

Article 11(3) reasserts the trend followed by the vast majority of legal systems, included those examined above, thus attributing relevance to the public order of the *lex fori.* To this aim, the Official Comment on the Hague Principles lists three requirements that must be met in order for article 11(3) to apply. first, there must be a policy of the forum State of sufficient importance to justify its application to the specific case, second the chosen law must be manifestly inconsistent with that policy and thirdly, the manifest incompatibility must arise as last limitation, when the dispute is already before the court.[99] On the other side, Article 11(4) attributes to the law of the forum, the opportunity to apply in the specific case the public

[98] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective*, page 530.
[99] *Official Comments to the Hague Principles,* 11.23; M.M. ALBORNOZ, N. GONZÁLEZ MARTIN, *Towards the uniform application of party autonomy for choice of law in international commercial contracts*, page 454-455.

policy of another State which law applicable is the one that would be identified in the absence of choice of law.[100]

From the structural point of view there is a distinction between art. 11(2) and art. 11(4), in fact unlike the first, the latter permits reference only to the law of the State which would be applicable to the contract in the absence of a choice of law by the parties, as determined by the forum's own private international law rules, whereas art. 11(2) admits the application of any other rule of any other State, if the forum State believes in its relevancy.[101] In any case in determining the public policy of the law of the third country applicable in case of absence of choice, due to the fact that the Hague Principles do not foresee provisions if neither an expressed or tacit choice of law specific to the international contract has been put in place by the parties, it is necessary to refer to rules of private international law of the specific system in order to verify the law otherwise applicable. Furthermore, in compliance with the soft law nature of the Principles, they result very flexible as art. 11(4) takes into consideration three possibilities attributed to the courts: "may or must apply or take into account", therefore art. 11(4) points out its broad scope by referring to all types of interpretations used by different States[102].

The rules on public order explicated in the Hague Principles can be compared to those established by Rome I and the Restatements. Starting from the first, from a formal point of view whereas Regulation 593/2008 decided to deal with the issue in a separate provision provided by art. 21, the Hague Principles adopted an inclusive approach putting together all substantive limitations to party autonomy in art. 11. On the other hand, concerning the substance of these provisions, the concept of public order established in art. 11(3) of the Principles is similar to that provided by art. 21 of Rome I Regulation and both of them make express reference

[100] *Official Comments to the Hague Principles,* 11.28.
[101] *Official Comments to the Hague Principles,* 11.29.
[102] E.G. Rome I Reg. art. 9(3):" *give effect* to mandatory rules of the State of performance" ; art. 9(2) of the latter :" Nothing in this Regulation shall restrict the *application* of the overriding mandatory provisions of the law of the forum.

to the applicability of "manifest incompatibility". By this referral, it is recalled the irrelevance of light incompatibilities between the forum State and the law of the forum, as it is required in both cases a high threshold showing how the application of the chosen law must violate a fundamental policy of the forum in order to apply the public order exception[103].

By the way, the most significant difference is shown between art. 21 of Rome I and art. 11(4) of the Principles. Thus, whereas the first allows the application of the exclusive public policy of the forum, the Principles admit the opportunity to apply or take into account not only the public policy of the forum State, but also the one of the State which law would have been otherwise applicable if it had not been a choice of law.

On the other side, article 11(3,4) should be compared to section § 90 of the Second Restatement on Conflicts of law. First of all, the concept of "fundamental notions of public policy" used in the Hague Principles is definitely similar to the one of "strong policy" adopted by section § 90, because both make reference to a high level of intensity of the policy. Furthermore, evidence of this similarity is supported by the fact that it must be excluded from the comparison the "fundamental policy" under the Restatement as established in section § 187 because it refers to a lower level than the one established by section § 90.

By the way, it can be observed the same consideration examined in the parallel among Rome I and the Principles by assuming that there is a significant distinction between the application of public policy in the Principles and in the Restatements, thus, whereas the latter admit only one *ordre public*[104] limitation to

[103] M. PERTEGÁS & B.A. MARSHALL, *Party Autonomy and its Limits: Convergence through the new Hague Principles on Choice of Law in International Commercial Contracts* Page 998-1002; A.DICKINSON, *Oiling the machine: overriding mandatory provisions and public policy in the Hague Principles on Choice of Law in International Commercial Contracts*; A.CHONG, *The Public Policy and Mandatory Rules of Third Countries in International Contracts , Journal of Private International Law,* 2006; J. LANDBRECHT, *The Hague Conference on Private International Law: Shaping a Global Framework for Party Autonomy, International Business Law Journal,* 2017.

[104] Under the traditional definition.

the freedom of contract put in place by the *lex fori,* the first consents the application of both limitations stemming from both public polies of the forum State and the State which law would be applicable in case of absence of choice of law, if the forum State agrees.

In the end, the Hague Principles, in compliance with its "code of best practice" nature, individuate a multi-layered options regime[105] because the aim is to accommodate the vast majority of States which may have different legal traditions and codifications from each other. Especially, the provision proposed by art. 11(4) of the Principles has been criticized by part of the doctrine because it allows the application of mandatory rules and public order of more than one State, imposing a double limitation that may let the party autonomy fall apart, reducing consistently the freedom of contract.[106] However on the other side, although article 11 restricts the application of the law chosen by the parties, it is necessary to consider the latter in the context of the aim of the Principles, always pushing for freedom of contract in international agreements, for this reason the limitations above exposed are enforced only in exceptional circumstances in which a national court or an arbitral tribunal may legitimately override the parties' choice exercised in compliance with the freedom attributed by Article 2(1).[107] Under this perspective, art 11 as a whole represents an important control mechanism, which "should serve to reinforce the confidence that a legal system reposes in the parties by allowing them that choice."[108]

[105] L.J. SILBERMAN, *Lessons for the USA from the Hague Principles*, page 430.
[106] The same norm is valid also before an arbitral tribunal, as established by art. 11(5).
[107] *Official Comment to the Hague Principles,* 11.9.
[108] *Id* note 85.

Chapter IV, Conclusions

1. Same function, different results

In the previous chapters have been examined the fundamental issues concerning choice of law in international contracts under provisions established by Rome I Regulation, the American approaches especially Restatement Second Conflicts on Conflicts of Law and the Hague Principles on Choice of Law on Commercial Contracts.

On one side It has been observed how the freedom of choice is expressed in international agreements in compliance with the general principle of party autonomy, whereas on the other side have been analyzed solutions proposed by these systems concerning the limits of freedom of contract in the exercise of their sovereign powers. It has been noted how the principle of party autonomy and sovereignty struggle in order to determine their own interests and have been observed several differences and commonalities between these legal orders. However, the last analysis of the issue will take into consideration from one point of view the partial conclusions put in place at the end of Chapter one, Thus, even if there are substantial differences in the application of choice of law in the systems examined, the principle of party autonomy and the principle of sovereignty play the same role and the same function in all the analyzed legal orders.

By the way, from another point of view, the partial conclusions afore mentioned should be implemented with an analysis *ex post* examination of these systems. In fact, even if functions operated by the principle of sovereignty and party autonomy are the same, the way in which the analyzed legal orders work are so divergent that there are necessarily diverse consequences on the application of laws.

Specifically, can be put in place two conclusions. The first is that Rome I Regulation and the approaches established in the American context can be considered as two patterns representing, respectively, the protection of party autonomy and sovereignty. On the other side, the last conclusion deals with the balanced solution adopted by the Hague Principles pushing for a party autonomy approach and how could better develop the unification of international private law.

2. Regulation 593/2008 as pattern of party autonomy, American choice of law approaches as pattern of sovereignty

The first conclusion deals with the relationship exposed between Rome I Regulation and the American approaches. Following to this comparison, it can be noted that Regulation 593/2008 is the pattern of the party autonomy approach, because the vast majority of its provisions are put in place in order to promote the freedom of contract. On the other hand, the American system is the legal order most representative of the principle of sovereignty because it tends to satisfy the States interests rather than the party autonomy approach.

As it has been observed, the American system is composed by different approaches due to the fact that each State has full authority in determining the private law/ private international law policy. It can be noted that every approach tends to attribute preeminence to the principle of sovereignty rather than party autonomy, however even if sovereignty prevails, solutions adopted by the States provide different degrees of freedom of contract and some of them may overcome the liberality proposed by Rome I. By the way, the Restatement Second approach nowadays is the one more popular among U.S. States and that is the one which has more divergences with Rome I Regulation.

Evidence is shown since the very beginning of the analyzed provisions, the scope. Thus, art. 1[1] of Rome I Regulation limits the scope of this source of law showing how it is completely dedicated on international contracts and it attributes the opportunity to internationalize the contract only by stating it in the agreement, therefore objectively domestic contracts may become international in force of the mere will of parties expressed or implied. This requirement is probably among the most important differences between these two legal orders, in fact the opportunity to warrant the "artificial internationality"[2] means to attribute a wide autonomy to the parties, because through the exercise of their power of will they are able to overcome the boundaries imposed by the States, at least partially, promoting many advantages in an internationally friendly market[3]. I believe that this is a fundamental goal that Rome I has reached and this feature enhances the Regulation's liberal stance.

On the other hand, Restatements Second does not distinguish between interstate contracts and international contracts and it simply limits to apply the same provisions for both cases in order to solve a conflict of law. The absence of an expressed distinction affects the functioning of transactions and this is one of the reason why many authors are pushing for a collection of Third Restatements,[4]

[1] Art. 1 Regulation 593/2008:" This Regulation shall apply, in situations involving a conflict of laws, to contractual obligations in civil and commercial matters.
[2] F. SBORDONE, *Nozioni di Diritto Internazionale Privato*, page 84 ss; see page 7 chapter 2.
[3] S. VOEGENAUER, *Regulatory Competition through Choice of Contract Law and Choice of Forum in Europe: Theory and Evidence, European Review of Private Law, 2013,* page 24–25; see page 29 chapter 2.
[4] F. K. JUENGER, *A Third Conflicts Restatement, Indiana Law Journal* , 2000; R.J. WEINTRAUB, *The Restatement Third of Conflict of Laws: An Idea Whose Time Has Not Come, Indiana Law Journal,* 2000; S. C. SYMEONIDES, *The Need for a Third Conflicts Restatement (And a Proposal for Tort Conflicts), Indiana Law Journal,* page 440-441*;* R. MICHAELS, *The Conflicts Restatement and the World (Symposium on the Third Restatement of Conflict of Laws), AJIL Unbound, Duke Law School Public Law & Legal Theory Series,* 2016 *;* A. HILL, *For a third conflicts restatement - but stop trying to reinvent the wheel, , Indiana Law Journal,* 2000; J.W. SINGER, *Pay no attention to that man behind the curtain : the place of better law in a Third Restatement of conflicts, Indiana Law Journal,* 2000, ; J.M. GRAVES, *Party Autonomy in Choice of Commercial Law: The Failure of Revised U.C.C. § 1-301 and a Proposal for Broader Reform, Seton Hall Law Review,* 2006.

which I personally support[5]. In fact, in a complex system like the U.S. one composed by States that pursue their own interest and furthermore have a full authority in determining their own rules on choice of law in the matter of private international law, it is fundamental to divide issues of interstate (still domestic) and international contracts because the application of the same rules for both transactions , even if reasonably adopted in the specific case law, is not advantageous for international agreements. In fact, the U.S. convergence between rules provided for interstate and international contracts may be considered as a kind of *application by analogy,* because Restatements Second assumes that they share the same rationale, therefore same rules could be applied in the specific case.

However, I believe that this application by analogy is inconsistent with the aim and the nature of international agreements. In fact, the nature of interstate contracts is still a domestic one and the rationale behind these agreements is to protect the will of parties, in compliance with limits imposed by inner States expressing their own sovereignty in the overall context of the national American interest. On the other hand, the nature of international agreements is transnational and different from the first because there may be more than one Country interested in applying its own law, therefore the risk is to apply more limitations imposed by two different States and to consistently reduce the contractual freedom. Thus, because in international agreements the risks of applying multiple limitations to specific contracts are higher, a party autonomy approach would be better warrant the

[5]I agree with the position assumed by Professor Symeonides concerning the opportunity to collect a new Restatement. The fact is that Restatement second, even if much more liberal than Restatement First, is not in keeping up with the times is due to several factors all of them dealing with hardship in finding a uniform interpretation in conflicts of law matter. In fact, from one point of view the Restatements Second have attracted Courts of 25 States of the U.S. territory in order to abandon the traditional approach of the First Restatement, which was considered as too stale, whereas from another point of view it blocked the development of other alternative choice-of-law methodologies such as those of Currie or Leflar . By the way, because nowadays times and economy have changed, it has arisen a need of uniformity towards the issue of conflicts of law in the U.S. country that may be satisfied through a new Restatement that formally accepts the distinction between interstate and international contracts and separates the regimes. Moreover, it is also required an adequate system updated to the most recent conflicts of law cases and providing more specific and uniform definitions.

interests of the parties. Concerning the effects of these approaches, it can be noted that Rome I Regulation is so much more in favor of party autonomy compared to the Restatements.

On the same line, there are many norms that prove how Regulation 593/2008 is more liberal than the Restatements. In fact, the prevalence of freedom of contract is showed in a combination of provisions, first of all Recital 11[6] that attributes to the freedom to choose the applicable law the degree of "cornerstone principle" of the system of conflicts of law. After assuming the preeminence of this principle, Rome I Regulation puts in place several provisions that are pervaded by the will to protect the freedom of contract in a reasonable way. Thus, art. 3(1)[7] first part is in compliance with the provision of Recital 11 because it reasserts the primacy of freedom of contract and it dedicates on that a firm provision, assuming that the contract is governed by the law chosen by the parties. Moreover, the subsequent articles are put in place to warrant in an efficient way the exercise of the freedom of contract, thus art. 3(1)[8] second part admits the opportunity to put in place the choice of law both in an expressed or implied way, whereas art. 3(1)[9] third part allows the technique of *depeçage.*

Also on the side of limitations, it can be noted that Regulation 593/2008 tends to limit to the less extent as possible the freedom to decide the applicable law at the contract. First of all, in compliance with Recital 37[10], the limits imposed by the overriding mandatory rules, simple mandatory norms and the issue of public policy are *exceptional* in the sense that they apply in specific circumstances expressly regulated by provisions of Rome I, but only to the extent that the application of the

[6] Recital 11:" The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.
[7] Art. 3(1) first part:" A contract shall be governed by the law chosen by the parties"
[8] Art. 3(1) second part:" The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case.
[9] Art. 3(1) third part: " By their choice the parties can select the law applicable to the whole or to part only of the contract.
[10] Recital 37(1):" Considerations of public interest justify giving the courts of the Member States the possibility, in exceptional circumstances, of applying exceptions based on public policy and overriding mandatory provisions.

law chosen by the parties breaches some fundamental norms which are relevant in the specific case, rendering extraordinary the application of the latter. In fact, in compliance with art. 9(2)[11] and art. 21[12], overriding mandatory rules and public policy of the forum are applied as a limitation to the specific case only when there is an incompatibility between the law chosen and, respectively, the "provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organization", and the public order of the forum.

Moreover art. 9(3)[13] identifies the second limit of the overriding mandatory rules of the foreign State of performance of the contract but, again under the exceptional circumstances, only when the application of those overriding mandatory provisions renders the performance of the contract unlawful. Another exceptional limit, which applies in fact to all contract regulated by the scope of the Regulation only when *all* other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen[14], or in a E.U. member State[15] consists on the application of the laws of those countries which can not be derogated by agreements, also known as simple mandatory rules.

However, Rome I it is not only more liberal but it is also more protective than the Restatements toward specific parties which are considered as presumably weak, such as consumers and employers. Thus, even if the scope of the Regulation is focused on the civil and commercial contracts, the vast majority of which are

[11] Art. 9(2):" Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum. unlawful.
[12]Art. 21: "The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (*ordre public*) of the forum."
[13] Art. 9(3):" Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application."
[14] Art. 3(1).
[15] Art. 4(1).

intended to be business to business[16], art. 5-8 of Rome I extend the scope also to special contracts foreseeing diverse legal positions for parties into these agreements and for this reason are subject to a special regime, limiting the freedom of choice.

On the other side, Restatements Second can be considered as the pillar of the principle of sovereignty. Starting from the very beginning of section § 187(2)[17], it can be noted that the freedom of contract is subordinated to the clause *unless* therefore it appears since the formal perspective that the law chosen by the parties is not the only criterion in order to establish the law applicable to the interstate/international contract in choice of law. Thus, from the general outlook of freedom of contract, whereas Rome I attributes the primacy to the contractual freedom of parties, the Restatements give prevailing importance to the interests of the States in applying its own laws to the contract, because there is a common sense and an alarm that parties to interstate contracts that choose a different law from that to which are connected, want to avoid mandatory rules otherwise applicable.

Through an exegesis of section § 187, can be noted that the latter is pervaded by the principle of sovereignty and in contrast to the E.U. Regulation 593/2008, the need to control party autonomy rules on the freedom of contract itself. This primacy is showed by the fact that qualifications of the "substantial relationship" and the "reasonable basis"[18] of the State of the *lex causae* are not considered as exceptional as in the E.U., rather they are proper *ordinary rules* of American conflicts of law, the non- compliance of which renders the choice of law unlawful,

[16] Also known as B2B contracts.

[17] § 187(2):" The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, *unless*……"

[18]§ Art. 187:" Unless…..(a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties."

so unenforceable. Thus, the requirement of substantial connection with the State of *lex causae* established by section § 187 is opposed to the absence of connection between the chosen law and any other third State provided by art. 3(1) first part of Rome I.

Furthermore, section § 187 imposes two extraordinary limitations, thus the law of the chosen State must not violate the "fundamental policy" of the law of the State which is "materially greater interested" than the chosen State. As it has been examined, these concepts have not been explicated in the provision established by § 187, nor in the comments of the latter, therefore there are more interpretations of these two terms provided by the courts. By the way, even if interpretations provided by case law are not uniform, all of them comply with the primacy of the principle of sovereignty over the freedom of contract. The fundamental policy has also been compared to the concept of simple and overriding mandatory rules in the European context and it has been noticed how it lies in between these two limits: on one hand the fundamental policy as represented by the Restatements has a lower threshold than the one established by overriding mandatory rules, whereas on the other side the simple mandatory rules are below the threshold provided by the U.S. fundamental policy.[19] Finally, the limits established by section § 90 of the Restatements and art. 21 of Rome I Regulation coincide.

Whereas the principle of sovereignty is more protected in Restatements Second, it has been observed that other American sources of law provide a wider margin of choice to the parties in interstate/international contract, therefore they steer from the absolute prevalence of sovereignty and attribute more power the the freedom of contract. On a degree, starting from the approach more in compliance with the principle of sovereignty,[20] can be recalled:

[19] S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective,* page 530 ss.; *Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple,* page 1123 ss.
[20] Taking into consideration that the first is the approach of Restatement § 187.

1. Section 1-301 of the U.C.C.[21], which reduces limitations to party autonomy by establishing only the limit of the reasonable relation instead of the alternative double limitations imposed by § 187(2) ;
2. The State of Louisiana[22], which has established its own codification of choice of law, eliminates the requirement of substantial relationship to the chosen State providing an enhancement of freedom of contract. By the way, contacts between parties and the law of the State otherwise applicable are relevant to determine the extent of protection of the public policy of the State of the *lex causae* ;
3. The State of Oregon[23] is the most liberal American State concerning choice of contractual norms in conflicts of laws. The latter does not only remove the requirement of the substantial relationship to the chosen State, but it also admits the opportunity for parties to select as applicable law a non-State law, as provided by the comments on section § 7[24]. This means that,

[21] 1-301(a;b) U.C.C: a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties.
(b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state."; see page 13 Chapt. 2.

[22] Art. 3540 Louisiana Civil Code:" Art. 3540:" All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that law contravenes the public policy of the state whose law would otherwise be applicable under Article 3537.

[23] Oregon Conflicts Law Applicable to Contracts, Section § 7: " (1) Except as specifically provided by section 3, 4, 5, 6 or 8, chapter 164, Oregon Laws 2001, the contractual rights and duties of the parties are governed by the law or laws that the parties have chosen. The choice of law may extend to the entire contract or to part of a contract.
(2) The choice of law must be express or clearly demonstrated from the terms of the contract. In a standard-form contract drafted primarily by only one of the parties, any choice of law must be ex- press and conspicuous.
(3) The choice of law may be made or modified after the parties enter into the contract. Any choice of law made or modified after the parties enter into the contract must be by express agreement.
(4) Unless the parties provide otherwise, a choice of law or modification of that choice operates retrospectively to the time the parties entered into the contract. Retrospective operation under the provisions of this subsection may not prejudice the rights of third parties.

[24] Oregon Conflicts Law applicable to Contracts, Comments on section § 7(3) :" In exercising this autonomy, parties may select model rules or principles. For example, parties to an international contract may choose to have it governed by the Unidroit Principles of International Commercial Contract."

potentially, parties are able to avoid both limitations of mandatory State laws, fundamental policies of the *lex causae* and public order of the forum State if select non-State law governing the contract.

Even if the principle of sovereignty prevails over all these approaches, first of all the Second Restatements, neither of them foresees a special protection for subjects "presumably weak", such as consumers and employees, as provided by the Rome I Regulation. In fact, I agree with Professor Symeonides by assuming that the American approach "tends to err on the side of under-regulation rather than over-regulation like Rome I".[25] However, because the U.S. approaches limit in a substantial way party autonomy of *all* contracts, it may be observed that even if presumably weak parties do not have specific protection provisions they are in any case warranted by the efficient ordinary limitations imposed by U.S. approaches. Moreover, I believe that from a certain perspective the U.S. solutions overcome the one provided by Rome I. In fact, it is true that the latter attributes specific protection to presumably weak parties, but it is also true that it does not take into consideration those subjects who are parties to particular B2B transactions, where it is generally recognized that one of them is weaker than the other one even if they have the same qualification. On the other side, the American perspective by imposing the same substantial limitation to all contracts, even if does not specify special provisions for determinate subjects, it warrants an overall protection for all parties to interstate/international contracts. To this aim, it deserves to be mentioned the case of franchising contract.[26]

There are many definitions and specifications of franchising, by the way it can be considered as the agreement where one party (the franchisor) grants another party

[25] *Id* note 21.

[26] By the way, the same reasoning is can be extended to all B2B contracts which foresee a substantially weaker party; L. GARCIA GUTIERREZ, *The Structure of Franchise Contracts as a Premise for Understanding the Rules on Applicable Law, Yearbook of Private International Law,* 2008 , page 233-244; S.C. SYMEONIDES, *Party Autonomy in Rome I and II from a Comparative Perspective*; M.E. ANCEL, *The Rome I Regulation and Distribution contracts, Yearbook of Private International Law, 2008,* page 226 ss.; P. EDWARDS, *Into the Abyss: How Party Autonomy Supports Overreaching 1rough the Exercise of Unequal Bargaining Power.*

(the franchisee) the right to use its trademark or trade-name as well as certain business systems and processes, in exchange of a sum of money paid in installments. Thus, a franchise contract does not qualify as a consumer contract under Article 6(1) of Rome I because it is not a contract "outside the trade or profession", as both franchisor and franchisee are entrepreneurs.

However, it neither qualifies the franchisee as a party in need of protection under Recital 23[27], even if in the vast majority of franchise agreements the franchisee is considered as the weak party because it may be influenced by the better economic position of the franchisor to accept offers that he wouldn't have accepted, if he had been in a better or at least equal economical condition. To this aim, the laws of the State which have typified franchising, foresee norms in order to protect the franchisee from the misuse of power of the franchisor.[28] However, nonetheless States have provided this defense mechanism, subjects are easily able to overcome these mandatory rules by selecting a law that complies with rules established by

[27] Recital 23 Rome I Regulation:" 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."

[28] E.G. Italian L.129/2004 sets several provisions which are supposed to be in favour of the franchisee.
Art. 3 (1;2): " The commercial affiliation contract must be drawn up in writing under penalty of nullity. For the establishment of a commercial affiliation network, the franchisor must have experienced its own commercial formula on the market"; Art. 6:" The franchisor must maintain, at any time, towards the aspiring affiliate, a behavior inspired by loyalty, correctness and good faith and must promptly provide, to the affiliated aspirant, any data and information that he deems necessary or useful for the purpose of the stipulation of the commercial affiliation contract, unless it is objectively confidential information or the disclosure of which would constitute a violation of the rights of third parties.
The franchisor must motivate the affiliated aspirant to fail to communicate the information and data requested by the franchisor. The aspiring affiliate must at any time, towards the franchisor, behave in a manner that is based on loyalty, correctness and good faith and must provide the franchisor with all information and data whose knowledge is promptly and in an accurate and complete manner. is necessary or appropriate for the purpose of stipulating the commercial affiliation contract, even if not expressly requested by the franchisor.";
Furthermore, in order to better protect the legal position of the franchisee, the current doctrine and jurisprudence admit the application by analogy of the provisions concerning withdrawal from the contract established by L. 192/1998, where the interests of the franchisee can be compared to those of the sub-supplier under the same *rationale.*

Regulation 593/2008. Thus, Art. 4(1)(e)[29] of Rome I dedicates only one provision to the franchising contract, ruling on the situation in which there has been no choice of law and the legislator opted for the application of the law of the State of habitual residence of the franchisee. However, substantially, art. 4(1)(e) is unlikely to be applied because of two reasons.

The first is due to the fact that the vast majority of franchise contracts foresees a choice of law, even if it is tacit. Usually these clauses are foreseen in the standard terms and the franchisee's knowledge may also be impaired. The other way to evade art. 4(1)(e) occurs when in case of absence of choice of law, the place of performance of the franchise contract is different from the place of residence of the franchisee, due to several factors[30]. First of all, norms on franchise contracts are not considered as overriding mandatory rules because, under the Rome I's interpretation, their nature is not essential to safeguard public interests, therefore art. 9 won't apply in order to protect the franchisee, however even if they were considered as overriding mandatory rules, Rome I gives effects only to the rules of the forum State and of the State where the obligations have to be performed *only as far as* they render the performance of the contract unlawful. Lastly, provisions of art. 3(3) and 3(4) have a very restricted scope, applying only when the contract is fully connected to a specific country except for the choice of law.

In the end, the first conclusion shows how Rome I and the American approaches on choice of law examined can be considered as the two patterns of, respectively, the principle of party autonomy and sovereignty. By the way, I believe that in order to promote international contracts, there is a true need to uniform rules of contractual choice of law and the approach which should be taken is necessarily a party autonomy one similar to that adopted by Rome I, even if the latter may be imperfect. To this aim, in the previous chapters these systems have been examined also under the perspective of a new international instrument, that is Hague

[29] Art. 4(1)(e):" a franchise contract shall be governed by the law of the country where the franchisee has his habitual residence;"
[30] *Id* note 28.

Principles on Choice of Law on International Contracts, which hopefully will develop and implement the issue of choice at international level.

3. *The potential impact of the Hague Principles on Choice of Law in International Commercial Contracts in the European and American contexts, proposals of implementation, hopes and expectations*

The Hague Conference of private international law opted to enact the Hague Principles as a soft law instrument, because during the drafting several difficulties emerged in order to produce a hard law instrument on choice of law in commercial contracts. Furthermore, many signatory States do already have supranational sources of law concerning the issue of choice of law in international contracts, as Rome I Regulation which applies to all member States of the E.U., thus there was no true effort for requiring a hard law instrument.[31] Therefore, the Hague Principles have been enacted as a soft law instrument potentially able to uniform the issue of choice of contractual law at a global level, because it pursues two functions specified in the preamble of the latter[32]. They can serve as a model for States that do not recognize party autonomy in their system of private international law or do recognize it in a very restrictive way.[33] On the other side, they may be

[31] M. MERCEDES ALBORNOZ, N. GONZALEZ MARTIN, *Towards the uniform application of party autonomy for choice of law in international commercial contracts,* page 454 ss ; S. C. SYMEONIDES., *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments* ; .L. NEELS, *The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts, Journal of South African Law*, 2015.

[32] *Preamble of the Hague Principles on Choice of Law on Commercial Contracts,* P.1-P.6; J.L. NEELS, *The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts*, 776 ss.

[33] Paraguay legislation modified its own domestic system in compliance with the provisions of the Hague Principles see Law 5393 on the Law Applicable to International Contracts of 15 January 2015 ; In India there has been a proposal to modify the Indian Limitation Act, in conformity with article 9(1)(d) of the principles.; In 2018, Australia has enacted an International Civil Law Act which gives effect to the Principles on Choice of Law in International Commercial Contracts.

used to to interpret, supplement and or develop rules of private international law in order to increasingly comply with the principle of party autonomy.

The European and the American systems, compared to other international private law legal orders, widely recognize party autonomy approach. For this reason, the support which can be provided by the Principles may be less significant than that put in place in favor of less developed Countries.

However, the Principles could still be helpful towards the European and the American legal orders in compliance with both the "model function" and the "interpretative and supplementary function". In fact, under a comparative perspective the Principles are closer to Rome I Regulation because both are in favor of a party autonomy approach, but from the point of view of the content of norms, the latter can be considered as a *commixtio* between the U.S. and the European legal order, because the Principle's provisions deal with issues that are treated in both systems, separately. Therefore, I strongly maintain that the adoption of the Hague Principles at domestic level may have beneficial effects in both legal orders, also considering the huge contribute that would result from the perspective of harmonization of private international law.

Current American system of choice of law is very distant from that provided by the Principles, especially because of the fact that the first is fragmented at inner-State level and not united from the Federal perspective. Thus, I believe that in the U.S. system the adoption of the Principles could first of all help to promote a uniform application throughout the Nation and second, I believe that the Hague Principles could play a "model role" in the American system of law and could be considered as a helpful guidance for a Third Restatement on Conflicts of Law, in accordance with many other commentators[34]. In fact, as it has been observed in the

[34] S. C. SYMEONIDES., *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 873 ss ; L.J. SILBERMAN, *Lessons for the USA from the Hague Principles*; M.PERTEGÁS B.A. MARSHALL, *Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts*; A. SCHWARTZE, *New Trends in Parties' Options to Select the Applicable Law? e Hague Principles on Choice of Law in International Contracts in a Comparative Perspective,*

previous chapters, even if in the U.S. party autonomy is generally recognized as an existent principle, the latter is too much unbalanced compared to the overwhelming prevalence of the principle of sovereignty and the Principles would improve this side in compliance to a liberal approach. First of all, the adoption of a specific instrument focused on international contracts[35] would set an end to the complex issue of convergence between international and interstate contracts established by the Second Restatements, 1-301 U.C.C. and other inner-national approaches. In so doing, certainty of law would be enhanced and parties could better foresee whether their will would be respected in compliance to a party autonomy approach favored in international contracts, or would be shut down by strict limitations in compliance with the sovereignty approach favored in domestic / interstate contracts.

Second, the principle of party autonomy would be strongly empowered because the adoption of the Principles would give preeminence to the freedom of contract, by applying the freedom to choose the applicable law in compliance with art. 2[36] and eliminating the "substantial relationship" and the "reasonable basis" requirement established by Section § 187, similarly as provided in the Louisiana and Oregon Codifications which foresee the lack of substantial connection with the chosen law. Furthermore, the adoption of the Principles would solve the issue of the battle of forms at private international law level, critical in the U.S. because of the coexistence of more material approaches concerning the issue of standard

University of St. Thomas Law Journal, 2015; T.FOLKMAN, J. LEVIN, *A Comparative Look At The New Hague Principles on Choice of Law & the Restatement (Second) of Conflict of Laws: Last Post, Letter Blogatory,* 2015.

[35] Specifically, adoption of art. 1 of the Hague Principles:" These Principles apply to choice of law in international contracts where each party is acting in the exercise of its trade or profession. They do not apply to consumer or employment contracts. For the purposes of these Principles, a contract is 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."

[36] Art. 2 of the Hague Principles:" A contract is governed by the law chosen by the parties. The parties may choose a) the law applicable to the whole contract or to only part of it; and b) different laws for different parts of the contract.

forms in contracts[37]. In fact, article 6[38] of the Principles is the first source of law which sets rules on international private law level dealing with battle of forms and would solve conflicts of law both at interstate and international level in contracts concluded by the exchange of non-identical forms containing different choice-of-law clauses[39] .

Lastly, concerning the aspect of limitations, the Hague Principles would reverse the U.S. mechanism of rule/exception, in compliance a party autonomy approach. Thus, the application of the fundamental policy of the State which has a materially greater interest wouldn't be considered anymore an ordinary rule, but rather an exception which could be applied only in extraordinary circumstances encompassed within art. 11[40] in order to enhance the predictability and certainty of the law chosen by the parties and in conformity with the aim of the Principles[41].

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[37] Coexistence of first shot rule, last shot rule and the knock out rule.

[38] Art. 6 of the Hague Principles: " Subject to paragraph 2 a) whether the parties have agreed to a choice of law is determined by the law that was purportedly agreed to; b) if the parties have used standard terms designating two different laws and under both of these laws the same standard terms prevail, the law designated in the prevailing terms applies; if under these laws different standard terms prevail, or if under one or both of these laws no standard terms prevail, there is no choice of law. The law of the State in which a party has its establishment determines whether that party has consented to the choice of law if, under the circumstances, it would not be reasonable to make that determination under the law specified in paragraph 1.

[39] T. KADNER GRAZIANO, *The Hague Solution on Choice-of-Law Clauses in Conflicting Standard Terms: Paving the Way to More Legal Certainty in International Commercial Transactions?, Uniform Law Review, 2017;* ID, T. MICHAEL, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution*; D. GIRSBERGER, N.B. COHENY, *Key Features of the Hague Principles on Choice of Law in International Commercial Contracts, Uniform law review,* 2017.

[40] Art.11(1-4) of the Hague Principles:" 1. These Principles shall not prevent a court from applying overriding mandatory provisions of the law of the forum which apply irrespective of the law chosen by the parties. 2. The law of the forum determines when a court may or must apply or take into account overriding mandatory provisions of another law. 3. A court may exclude application of a provision of the law chosen by the parties only if and to the extent that the result of such application would be manifestly incompatible with fundamental notions of public policy (ordre public) of the forum. 4. The law of the forum determines when a court may or must apply or take into account the public policy (ordre public) of a State the law of which would be applicable in the absence of a choice of law."

[41] *Comments on the Hague Principles,* 11.9: " In the present context, although the qualifications in Article 11 do restrict the application of the law chosen by the parties, they are intended to buttress the principle of party autonomy. By acknowledging and defining the *exceptional circumstances* in which a national court or arbitral tribunal may legitimately override the parties' choice in the exercise of the power conferred on them by Article 2(1)."

On the other side, the Hague Principles could express their interpretative and supplementary function towards the European system. In fact, whereas in the American system the Principles could play a "model role", in Rome I Regulation is not possible because the latter itself was taken as a model for the drafting of the Hague Principles. Thus, differently from the U.S. approach, even if the Principles have not formally been implemented in the European legal order, there is a kind of *de facto* application because Regulation 593/2008 is pervaded by many norms established by the Principles. Thus, the freedom to choose the law applicable to the contract without any connection to the chosen State is recognized in the same way both in art. 3 of Rome I Regulation and in art. 2 of the Principles, same for the modes of expression because both admit specifically the opportunity to put in place the expressed, tacit choice and the *depeçage.* Furthermore, the Principles and Rome I Regulation share the same *rationale* in considering limitations to freedom of contract and both adopt a party autonomy approach favoring international agreements, therefore the limits imposed to the latter shall be considered valid only under exceptional circumstances, as foreseen by Recital 37 of Rome I and by the Comments on the Hague Principles on art. 11.

By the way, concerning freedom of contract, I believe that from one perspective the Principles are less developed than Rome I, whereas from another side the first went further than the latter. Personally, I think that the approach taken by Regulation 593/2008 is more liberal from the point of view of the "internationality" requirement, because it ensures the opportunity to internationalize also objectively domestic contracts through the exercise of the power of will expressed by the choice of law, whereas the Principles restrict the scope of the latter, establishing a negative definition[42]. In my opinion, the method established by Rome I is more in compliance with the freedom of choice because

[42] Art. 1(2) of the Hague Principles:" For the purposes of these Principles, a contract is 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."

it attributes to parties themselves the liberty to choose or not whether applying Regulation 593/2008, whereas the Principles impose a stricter scope and do not allow subjects to fully express their will from this perspective because they do not have the opportunity to internationalize the contract if they are established in the same State and all the relevant elements, except for the choice of law, are connected with the same State. In addition, Rome I is also more developed and structured because it provides a system of protection composed by multiple layers of simple and overriding mandatory rules plus the public policy, whereas the Principles provide simpler and less complex limitations and restrict the scope to commercial contracts, excluding consumers and employees. Lastly, Regulation 593/2008 establishes criteria in order to identify the applicable law in case of absence of choice whereas the Principles do not cover this area.

By the way, I understand that the aim of the Principles is to uniform Private International law at global level, therefore I am aware of the fact that this source of law has been put in place in order to find an arrangement among States and it could not foresee a so complex system, at least because is the first source of international law on choice of law and it can be considered as the first step towards harmonization.

On the other side, keeping focused on a contractual freedom approach, I think that the Principles went further than Rome I concerning several sections and I strongly believe that the implementation of some of them would enhance the operation of Regulation 593/2008 empowering a party autonomy approach, already promoted by the latter. Especially, as provided in the Oregon Codification, art. 3[43] of the Hague Principles admits the possibility to refer to non-State law whereas Rome I does not allow this opportunity to parties to international agreements. In fact, art. 3 is limited by the law of the forum of the specific case, therefore nowadays at least in the European Union area under Regulation 593/2008, art. 3 does not find

[43] Art. 3 of the Hague Principles:" The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise."

application, by the way this norm is important because it extends at international level the relevancy of non-State law from the choice of law perspective and parties to a contract would be advantaged by this opportunity. Thus, the neutral principles would prevent discussion on which law apply in the specific case and would be taken into consideration a "neutral" set of rules which would balance the contractual bargaining power, without creating advantages on one side and handicaps on the other.

Furthermore, the adoption of this non-State norms as choice of law in the E.U. would enhance foreseeability of transactions between parties to a member State and others whose legal order is not as developed as ours, with the effect of strengthening commercial relationships on a transboundary level. Unfortunately, because of distrust felt by Regulation 593/2008 towards non-State laws, this result is unlikely that will be reached so easily, as it would be necessary to apply the same methodology for interpretation of foreign State law and non-State law, a step that may be too long perhaps.

The last aspect which, in my opinion, may deserve implementation deals with art. 11 of the Principles and the protection of the "other weak parties". Thus, it has been observed how Rome I Regulation is very protective towards special parties like consumers and employees, by selecting criteria to identify the applicable law in international contracts divergent from those established by the rest of the Regulation. However, differently from the American system, it has also been noted how the "other weak parties" in B2B contracts are not considered as worthy of protection. A solution to this problem may be found through the implementation of art. 11 of the Principles in the part in which foresees the opportunity to the forum law to "apply or take into account" overriding mandatory provisions of foreign law[44].

[44] This interpretation is based on the idea that every State has its own interpretation of mandatory rules. Thus, in order to enhance the protection of weaker parties in a B2B transaction it is necessary that there must at least one interested State that considers these norms protecting parties

By doing this, B2B contracts selecting a law foreign to both parties will be obliged to respect the limitation of the overriding mandatory provisions of the forum State and, if the latter believes in its reasonability and relevancy, also of the overriding mandatory norms of the State that demonstrates an interest in applying its law, whereas under Regulation 593/2008 the choice of law is dismissed only when is in contrast to the overriding mandatory rules of the forum or when the application of the overriding mandatory laws of the State of performance of the contract would render the agreement unlawful. On one hand I understand that the disadvantage of this incorporation would be that freedom of contract would be weakened because parties to a contract would be potentially subject to limitation of another interested State, if the forum believes so. By the way on the other hand in a complex and multi-layers system like Regulation 593/2008 which aims to a party autonomy approach and at the same time protects special subjects, I believe that should be found also a place for safeguarding these *tertium genus* parties[45] because they may be, more often than expected, in a similar position to those who already deserve protection under Rome I.

In conclusion, nowadays the nature of soft law instrument of the Hague Principles allows its application only when it emerges from the expressed or implied power of will exercised by the parties when drafting the international contract, therefore there is no mandatory domestic implementation in States' legal orders and it is not likely that the latter will immediately, if they will, adopt them at national level. However, I agree with the vast majority of authors in stating that the Principles will enrich the quality of international private law on choice of law at global level, improve the functioning of rules of private international law of developing and

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like franchisees, subsupplier, and every subject who may potentially be in a position of subjection of misuse of power by the counterpart, as overriding mandatory norms.

[45] M. TAMPONI, *Liberalizzazione, "terzo contratto" e tecnica legislativa, in Contr. E Impresa, 2013,* page 92 ss; E. NAVARRETTA, *Luci e ombre nell'immagine del terzo contratto*, *Il Terzo Contratto,* 2008 ; R. PARDOLESI, *Prefazione*, in G.COLANGELO, *L'abuso di dipendenza economica tra disciplina della concorrenza e diritto dei contratti*, Torino, 2004 ; A. CATRICALA', M.P. PIGNALOSA, *Abuso di dipendenza economica e tutela dell'imprenditore debole, in Manuale del dirito dei consumatori,* 2013*,* page 135-136.

already developed States, contribute to providing greater cohesion between approaches concerning choice of law rules among States and that they may be an appropriate instrument to support the harmonization of the principle of party autonomy in international contracts.[46]

[46] M.PERTEGÁS B.A. MARSHALL, *Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts*, page 1002; *Hague Principles on Choice of Law in International Contracts Essays in Honour of Michael Bogdan, P. Lindskoug et al. eds, Lund, Juristförlaget*, 2013; S. C. SYMEONIDES., *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments,* page 497 ss. ; M. MERCEDES ALBORNOZ, N. GONZALEZ MARTIN, *Towards the uniform application of party autonomy for choice of law in international commercial contracts,* page 461 ss.;. J.L. NEELS, *The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Commercial Contracts,* page 781 ss; *The Role of the Hague Principles on Choice of Law in International Commercial Contracts in Indian and South African private international law*, *Uniform law review*, 2017, page 451; *Choice of Law in the Revision of the Mexico City Convention - Inspirations from the Hague Principles and Beyond, Journal of Contemporary Roman-Dutch Law,* 2018, *, Journal of Contemporary Roman-Dutch Law*, 2018 ; *The Role of the Hague Principles on Choice of Law in International Commercial Contracts in the Revision of the Preliminary Draft Uniform Act on the Law of Obligations in the OHADA Region* J. LEVIN, *The Hague Principles on Choice of Law in International Commercial Contracts: Enhancing Party Autonomy in a Globalized Market, New York University Journal of Law & Business,* 2016*,* page 293 ss; P.MAKOWSKI, *Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law?, Uniform Law Review,* 2017 *;* D. GIRSBERGER, N.B., COHENY, *Key Features of the Hague Principles on Choice of Law in International Commercial Contracts,* page 335; J.A.M. RODRIGUEZ, *Beyond the Mexico Convention and the Hague Principles: what's Next for the Americas?, Uniform Law Review*, 2017, page 442; G. SAUMIER, *Article 3 of the Hague Principles: a response to Peter Mankowski*, *Uniform Law Review,* 2017, page 401; *Hague Principles and the Choice of Non-State "Rules of Law" to Govern an International Commercial Contract, Brooklyn Journal of International Law,* 2014, page 30 ; J.BASEDOW, *The Hague Principles on Choice of Law: Their Addressees and Impact*, *Uniform Law Review,* 2017; L. DE GAMA, SOUZA JR., *Tacit Choice of Law in the Hague Principles*, *Uniform Law Review*, 2017 ; F.RAGNO, *I Principi dell'Aja e il Regolamento Roma I: complementarietà o alternatività?, Vv.A.a. (eds), Studi in onore di Maurizio Pedrazza Gorlero: I diritti fondamentali fra concetti e tutele,* Napoli*,* 2014 ; A. DICKINSON, *Oiling the Machine: Overriding Mandatory Provisions and Public Policy in the Hague Principles on Choice of Law in International Commercial Contracts* ; *A principled approach to choice of law in contract?, Butterworths Journal of International Banking and Financial Law*, 2013 ; L.J., SILBERMAN, *Lessons for the USA from the Hague Principles* ; M. DOUGLAS, N. LOADSMAN, *The Impact of the Hague Principles on Choice of Law in International Commercial Contracts, Melbourne Journal of International Law,* 2018; O. LANDO, *The Draft Hague Principles on the Choice of Law in International Contracts and Rome I, A Commitment to Private International Law. Essays in honour of Hans van Loon,* 2013; L.G. RADICATI DI BROZOLO, *Non-national rules and conflicts of laws: Reflections in light of the UNIDROIT and Hague Principles, Rivista di diritto internazionale privato e processuale,* 2012 ; Z. AIBERGENOVA,, *Analysis of the Hague Principles on Choice of Law in International Contracts. Comparative analysis of the Hague Principles and Rome I Regulation, http://eilfe.com/?ddownload=392,* 2012 ; M. HOOK, *The Concept of Model Choice of Law Rules, Journal of Private International Law*, 2015; *The Choice of Law Contract, Hart Publishing,* 2016.

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