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The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law

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The Hague Principles on Choice of Law in International Commercial Contracts are "soft" private international law rules. They empower parties to choose either state law or soft "rules of law" to govern their contract, regardless of whether they litigate or arbitrate. This Article investigates the relationship between the Hague Principles and two sets of rules of law that parties may choose: the UNIDROIT Principles of International Commercial Contracts (PICC) and the United Nations Convention on Contracts for the International Sale of Goods (CISG). It makes three principal claims. First, the nature of the Hague Principles and their relationship with the PICC or the CISG give rise to several normative ambiguities which need clarification. Second, since the Hague Principles do not limit the parties' ability to divide their contract at a choice of law level (horizontal dépeçage), parties can influence not only which rules of law govern the contract but also their content. This is undesirable as a matter of principle. It may also facilitate results which the PICC and the CISG do not intend. Third, the Hague Principles provide that the law that the parties purportedly chose determines whether the parties agreed on a choice of law. They also provide a mechanism which designates the law that the parties purportedly chose in standard contract terms. Applied to rules of law, the suitability of these provisions is questionable: alternatives should be explored.

Keywords: ***Soft law; Hague Principles on Choice of Law in International Contracts; UNIDROIT Principles of International Commercial Contracts; United Nations Convention on Contracts for the International Sale of Goods; choice of law agreements; rules of law; dépeçage; the battle of forms***

A. Introduction

Parties have the freedom to agree on the law applicable to an international contract under the principle of party autonomy.[1] Most

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1 For recent critiques, see SYMEON C. SYMEONIDES, CHOICE OF LAW 361–433 (2016); Hélène Gaudemet-Tallon, *L'autonomie de la volonté: Jusqu'où*?, in MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER 255 (Vincent Heuzé et al. eds., 2015); JÜRGEN BASEDOW, THE LAW OF OPEN SOCIETIES—PRIVATE ORDERING AND PUBLIC REGULATION IN THE CONFLICT OF LAWS (2015); Horatia Muir Watt, "*Party Autonomy*" *in International Contracts: From the Makings of a Myth to the Requirements of Global*

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176 legal systems accept this principle, which is reflected in their conflict of laws rules applicable to contractual obligations. The general acceptance of party autonomy should mean that parties can choose the law of any state to govern their contract, safe in the knowledge that any court or arbitral tribunal seized of a dispute will uphold that choice. Some Latin American and Middle Eastern legal systems have not adopted the principle[2] or have adopted it only where parties arbitrate rather than litigate their dispute.[3] Instead, these systems prefer traditional private international law rules that designate the applicable law by reference to its territorial connection to the contract.[4]

Even in legal systems that do allow for choice of law in both arbitration and litigation, the object of that choice differs. In the overwhelming majority,[5] if parties litigate their contractual dispute in a

Governance, 6 EUR. REV. CONT. L. 250 (2010); Yuko Nishitani, *Party Autonomy in Contemporary Private International Law—The Hague Principles on Choice of Law and East Asia*, 59 JAPANESE Y.B. INT'L L. 300, 307–16 (2016).

2 For example, Uruguay. *See* María Mercedes Albornoz, *Choice of Law in International Contracts in Latin American Legal Systems*, 6 J. PRIV. INT'L L. 23, 47–48 (2010). Draft legislation allowing for choice of law is again before its Parliament. *See* Jürgen Samtleben, *Neukodifikation des Internationalen Privatrechts in Argentinien*, 36 PRAXIS DES INTERNATIONALEN PRIVAT- UND VERFAHRENSRECHTS [IPRAX] 289, 289–90 (2016).

3 For example, Bolivia, Brazil, and Colombia. *See* Albornoz, *supra* note 2, at 43–48. Draft legislation before the Brazilian Senate that would have allowed choice of law where parties litigate their dispute was archived at the end of 2010. Jürgen Samtleben, *Die Entwicklung des Internationalen Privat- und Verfahrensrechts in Brasilien—Ein historischer Rückblick*, *in* SCHRIFTEN ZUM PORTUGIESISCHEN UND LUSOPHONEN RECHT 207, 223 (Stefan Grundmann et al. eds., 2014).

4 *See* BASEDOW, *supra* note 1, ¶ 187–91; Jürgen Basedow, *Theorie der Rechtswahl oder Parteiautonomie als Grundlage des Internationalen Privatrechts*, 75 RABELSZ 33, 34–37 (2011).

5 The exceptions may be the Oregon, Louisianan, Venezuelan, and Vietnamese codifications, together with the Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, 33 I.L.M.732 [hereinafter Mexico City Convention]. For Oregon, see OR. REV. STAT. § 15.300(1) (formerly § 81.100(1)), § 15.350 (formerly § 81.120) (2013); Comment 3 to § 81.120 extracted in James A.R. Nafziger, *Oregon's Conflicts Law Applicable to Contracts*, 38 WILLAMETTE L. REV. 397, 421 (2002); Symeon C. Symeonides, *Oregon's Choice of Law Codification for Contract Conflict: An Exegis*, 44 WILLIAMETTE L. REV. 205, 228 (2007); SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW AROUND THE WORLD 142 (2014) [hereinafter SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW]. For Louisiana, see LA. CIV. CODE art. 3540 (2016); Symeon C. Symeonides, *Contracts Subject to Non-state Norms*, 54 AM. J. COMP. L. 209, 221–22 (2006). For Venezuela and the Mexico City Convention, see EUGENIO HERNÁNDEZ-BRETON, VENEZUELAN REPORT ON PIL TO THE 18TH INTERNATIONAL CONGRESS OF COMPARATIVE LAW ¶¶ 16–17 (2010) (which the author kindly provided to me). For Vietnam, see Nguyen Thi Hong Trinh, *Vietnam*, *in* 3 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW 2658, 2660 (Jürgen Basedow et al. eds., 2017) (discussing the relationship between article 769(1) of the former Vietnamese Civil Code (2005) and article 5(2) of the Vietnamese Commercial Law (2005)).

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177 court, they must choose the law of a country (state law)[6] to govern their contract. If instead parties resolve their dispute by arbitration, parties may choose "rules of law"[7] (soft law norms[8]) as the governing law, and this choice is typically respected.[9]

With a view to promoting the adoption and refinement of the principle of party autonomy,[10] the Hague Conference on Private International Law (the Hague Conference), an intergovernmental organization,[11] has developed the first nonbinding, "soft" choice of law instrument: the Principles on Choice of Law in International Commercial Contracts (the Hague Principles).[12] The Hague Conference has taken the view that states which have not embraced party autonomy for choice of law in litigation should take it up. This is reflected in the Hague Principle's core rule that the law that the parties have chosen governs their contract.[13] The Hague Principles have already been influential in Paraguay, a state whose private international law rules had not recognized party autonomy. Paraguay passed legislation implementing the Hague Principles in their entirety, with some additions,[14] before the Hague Conference's member states approved them in March 2015.

6 In this Article, state law refers to laws of both unitary and non-unitary legal systems.

7 *See* SYMEON C. SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 141–42 (critically analyzing the term).

8 *See generally* Henry D. Gabriel, *The Advantages of Soft Law in International Commercial Law: The Role of UNIDROIT, UNCITRAL, and the Hague Conference*, 34 BROOK. J. INT'L L. 655 (2009); Jürgen Basedow, *The Hague Principles on Choice of Law: Their Addressees and Impact*, 22 UNIFORM L. REV. 304, 306–07 (2017); Bénédicte Fauvarque-Cosson, *Entre droit souple et droit dur: Les "Principes" en droit des contrats internationaux*, *in* ÉTUDE ANNUELLE 2013—LE DROIT SOUPLE: RAPPORT ADOPTÉ PAR L'ASSEMBLÉ GÉNÉRALE DU CONSEIL D'ÉTAT 255 (Conseil d'État ed., 2013).

9 BASEDOW, *supra* note 1, ¶ 195; Stefan Vogenauer, *Interpretation of the UNIDROIT Principles of International Commercial Contracts by National Courts*, *in* CONTENT AND MEANING OF NATIONAL LAW IN THE CONTEXT OF TRANSNATIONAL LAW 157, 162 (Henk Snijders & Stefan Vogenauer eds., 2009).

10 HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PRINCIPLES ON CHOICE OF LAW IN INTERNATIONAL COMMERCIAL CONTRACTS, at cmt. 1.4 (2015) [hereinafter HAGUE PRINCIPLES]. Hague Conference documents referred to in this Article are available on the Hague Conference website at http://www.hcch.net (last visited Jan. 18, 2018).

11 Statute of the Hague Conference on Private International Law art. 1, July 15, 1955, 220 U.N.T.S. 121, provides: "The purpose of the Hague Conference is to work for the progressive unification of the rules of private international law . . . ." The Hague Conference became a permanent organization in 1955.

12 HAGUE PRINCIPLES, *supra* note 10.

13 *Id.* art. 2(1).

14 Ley No. 5393 sobre el derecho aplicable a los contratos internacionales, enero 20, 2015, GACETA OFICIAL DE LA REPÚBLICA DEL PARAGUAY [G.O.] 13 (2015). The Paraguayan law also contains provisions not found in the Hague Principles including those that determine the law applicable in the absence of party choice (art. 11) and on the "[e]quitative [sic] harmonization of interests" in the particular case (art. 12). *Paraguay*, *Law Regarding the Applicable Law to International Contracts*, *in* 4 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, *supra* note 5, at 3611 (containing an English translation by José Antonio Moreno Rodríguez). *See generally* José Antonio Moreno Rodríguez, *The New Paraguayan Law on International Contracts: Back to the Past?*, *in* 2 *EPPUR SI MUOVE*: THE AGE OF UNIFORM LAW, ESSAYS IN HONOUR OF MICHAEL JOACHIM BONELL TO CELEBRATE HIS 70TH BIRTHDAY 1146 (UNIDROIT ed., 2016). The Paraguayan law also excludes franchise, agency, and distribution contracts from the scope of the instrument (art. 1). The *Exposición de Motivos* ("explanatory memorandum") to the originating bill states that a number of these provisions were introduced to bring the text into line with the Mexico City Convention: Hugo Esteban Estigarribia Gutiérrez Asunción, Senador de la Nación, Congreso Nacional Honorable Cámara de Senadores, 7 de mayo de 2013 (on file with author). The provision on rules of law (art. 5) also differs from the final version of Article 3 of the Hague Principles, reflecting instead the language used in the November 2012 draft. Special Comm'n on Choice of Law in Int'l Contracts, Hague Conference on Private Int'l Law, *Draft Hague Principles as Approved by the November 2012 Special Commission Meeting on Choice of Law in International Contracts and Recommendations for the Commentary*, HCCH.NET 2

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178 The Hague Conference has also taken the more controversial view that those states that have accepted the principle of party autonomy should develop and refine it.[15] The Hague Principles reflect this aim by allowing parties to choose "tacitly" the applicable law[16] and to choose several applicable laws which apply partially to different parts of the contract.[17] Although these provisions are not new,[18] their legitimacy has been questioned.[19] It is also reflected in the unprecedented provision allowing parties to choose nonstate rules of law, regardless of whether they litigate[20] or arbitrate[21] their

(2012), http://www.hcch.net/upload/wop/contracts2012principles_e.pdf [hereinafter *Draft Hague Principles*].

15 HAGUE PRINCIPLES, *supra* note 10, cmt. 1.4.

16 *Id.* art. 4.

17 *See infra* Part III.

18 A tacit choice of state law and a partial or multiple choice of state law (horizontal *dépeçage*) are permissible under a number of private international law regimes, including: RESTATEMENT (SECOND) OF CONFLICT OF LAWS (AM. LAW INST. 1971); Regulation (EC) 593/2008 of the European Parliament and of the Council of 4 July 2008 on the Law Applicable to Contractual Obligations, 2008 O.J. (L 177/6) [hereinafter Rome I Regulation]. *See infra* text accompanying note 61; SYMEONIDES, *supra* note 1, at 386 n.259.

19 Gaudemet-Tallon, *supra* note 1, at 263; Tristian Azzi, *La volonté tacite en droit international privé*, *in* TRAVAUX DU COMITÉ FRANÇAIS DE DROIT INTERNATIONAL PRIVÉ 147 *passim* (Comité français de droit int'l privé ed., 2010–2012); Pascal de Vareilles-Sommières, *Autonomie substantielle et autonomie conflictuelle en droit international privé des contrats*, *in* MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER, *supra* note 1, at 869, 881.

20 Lauro Gama Jr. & Geneviève Saumier, *Non-state Law in the (Proposed) Hague Principles on Choice of Law in International Contracts, in* EI DERECHO INTERNACIONAL PRIVADO EN LOS PROCESOS DE INTEGRACION REGIONAL 41, 50 (D.P. Fernandez Arroyo & J.J. Obando Peralta eds., 2011); Michael Joachim Bonell, S*oft Law and Party Autonomy: The Case of the UNIDROIT Principles*, 51 LOy. L. REv. 229, 240 (2005); Marta Pertegás & Brooke Adele Marshall, *Party Autonomy and Its Limits: Convergence Through the New Hague Principles on Choice of Law in International Commercial Contracts*, 39 BROOK. J. INT'L L. 975, 995–96 (2014). See Geneviève Saumier, *Designating the UNIDROIT Principles in International Dispute Resolution*, 17 UNIFORM L. REV. 533, 545 (2012), who favors "decoupling" dispute resolution methods from choice of rules of law. Discussion of the ability of parties to choose rules of law as the applicable law in litigation in some jurisdictions by appointing the judge as *amiable compositeur* is outside the scope of this Article. As to arbitrators acting *ex aequo et bono*, in amiable composition or in equity, see Matthias Scherer, *Preamble II: The Use of the PICC in Arbitration*, *in* COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 110, 141–42 (Stefan Vogenauer ed., 2d ed. 2015) [hereinafter COMMENTARY ON THE PICC].

21 This provision is outmoded in the context of arbitration. Procedural rules as the *lex arbitri* often empower arbitrators to apply nonstate rules of law chosen by the parties directly without choice of law rules. Dieter Martiny, *Die Haager Principles on Choice of Law in International Commercial Contracts*, 79 RABELSZ 625, 630 2015). *See, e.g.*, INT'L CHAMBER OF COMMERCE (ICC), ICC ARBITRATION RULES art. 21(1) (2013); UNITED NATIONS COMM'N ON INT'L TRADE LAW, UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION, art. 28(1), U.N. Doc. A/40/17, U.N. Sales No. E.08.V.4 (2006); LONDON COURT OF INT'L ARBITRATION, ARBITRATION RULES art. 22.3 (2014). *See generally* Scherer, *supra* note 20, at 113–15.

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179 dispute. A similar provision appeared in the draft[22] of the European Union's Rome I Regulation,[23] but it was not included in the final instrument.[24] Australia and the United States may be examples of states where there is a desire to refine the principle of party autonomy. Australia's federal government is considering whether the Hague Principles should be adopted as the private international law rules of the forum.[25] The American Law Institute, for its part,

180 is currently developing a Restatement (Third) of Conflict of Laws.[26] One U.S. commentator has observed that "recent developments in the law of party autonomy in the USA, along with the Hague Principles, may be sufficient incentive and justification for a revised section [in the Restatement] on party autonomy."[27]

The Hague Principles allow parties to choose, as the law governing their contract, a "neutral and balanced" "set of rules" which are "generally accepted on an international level."[28] One set of rules of law which parties can choose is the United Nations Convention on Contracts for the International Sale of Goods

22 The draft Article 3(2) permitted the parties to "choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community." *See Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I),* at 14, COM (2005) 650 final (Oct. 15, 2005). The Max Planck Institute for Comparative and International Private Law envisaged a provision in the following terms: "The parties may choose as the applicable law: (a) the law of any country, (b) an international convention or (c) general principles of law such as the UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract law." Max Planck Institute Working Group on Rome I, Comments on the European Commission's Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Obligations into a Community Instrument and Its Modernization (Max Planck Institute for Foreign Private and Private International Law Proposal) 106, http://ec.europa.eu/justice/news/consulting_public/rome_i/contributions/max_planck_institute_foreign_private_international_law_en.pdf (last visited June 2, 2016).

23 The Rome I Regulation supplies the private international law rules of European Union member states that determine the law applicable to contractual obligations in most civil and commercial matters. It applies both to litigation and, in a limited fashion, to arbitration. *See* Burcu Yüksel, *The Relevance of the Rome I Regulation to International Commercial Arbitration in the European Union*, 7 J. PRIV. INT'L L. 149, 154–55 (2011). Like the Rome I Regulation (art. 1(2)(e)), the Hague Principles do not apply to the arbitration agreement itself (art. 1(3)(b)). For criticism, see Basedow, *supra* note 8, at 313.

24 Rome I Regulation, *supra* note 18, art. 3. As distinct from a choice of nonstate rules of law or an international convention as the applicable law, Recital 13 notes that the regulation does not prevent parties from incorporating nonstate rules of law or an international convention into their contract by reference.

25 The federal government proposed that Australia should accede to the Hague Convention of June 30, 2005 on Choice of Court Agreements and implement it in an International Civil Law Act. The Joint Standing Committee on Treaties subsequently recommended that binding treaty action be taken to accede to that Convention. It is envisaged that a later iteration of the same piece of legislation may give effect to the Hague Principles. *See* National Interest Analysis, Australia's Accession to the Convention on Choice of Court Agreements, [2016] ATNIA 7, ATNIF 23, ¶ 21 (Mar. 15, 2016); Joint Standing Committee on Treaties, Parliament of Australia, *Implementation Procedures for Airworthiness—USA; Convention on Choice of Courts—Accession; GATT Schedule of Concessions—Amendment; Radio Regulations—Practical Revision*, Report No. 166, at xvii, 19–21 (Nov. 2016). On an early draft of the Hague Principles and their compatibility with Australian law, see Brooke Adele Marshall, *Reconsidering the Proper Law of the Contract*, 13 MELB. J. INT'L L. 505 (2012).

26 *Restatement of the Law Third of Conflict of Laws: Projected Table of Contents*, AM. LAW INST. (2016), https://www.ali.org/media/filer_public/62/26/62269cac-1b96-4b11-9c75-8f9f43d2be39/pages_from_conflict_of_laws_pd_2_online.pdf.

27 Linda J. Silberman, *Lessons for the USA from the Hague Principles*, 22 UNIFORM L. REV. 422, 423 (2017).

28 HAGUE PRINCIPLES, *supra* note 10, art. 3.

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(CISG).[29] The CISG is an international convention providing substantive uniform rules applicable to the formation and performance of international sales contracts. The Hague Principles allow parties to choose the CISG in the increasingly rare circumstance when the CISG would not apply on its own terms.[30] A second candidate, according to the Hague Principles, is the UNIDROIT Principles of International Commercial Contracts (PICC).[31] The PICC are a nonbinding set of substantive legal rules designed to regulate the general contractual aspects of international commercial contracts.

Recent literature on a choice of nonstate law[32] focuses on whether legal systems could be construed as allowing,[33] or should

181 allow, parties to choose rules of law when their dispute is subject to litigation. Some authors have analyzed and expressed doubt about the extent to which a choice of rules of law in arbitration or litigation meets an existing commercial need.[34] Others

29 United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, 1489 U.N.T.S. 3 [hereinafter CISG]; HAGUE PRINCIPLES, *supra* note 10, cmt. 3.5.

30 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.5. The CISG has been very successful in its own right, with eighty-nine contracting states at the time of writing: *Status: United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980)*, UNITED NATIONS COMM'N ON INT'L TRADE LAW, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status. html (last visited Jan. 24, 2018). *But see* Peter Mankowski, *Article 3 of the Hague Principles: The Final Breakthrough for the Choice of Non-state Law?*, 22 UNIFORM L. REV. 369, 380 (2017) (aptly pointing out that the CISG's success must necessarily be tempered by the fact that contracting parties in CISG contracting states regularly exclude application of the Convention entirely, reflecting a low level of general "market acceptance and . . . [a] distrust in the CISG . . . however unjustified such distrust may be").

31 INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2016) [hereinafter PICC]. HAGUE PRINCIPLES, *supra* note 10, cmt. 3.6.

32 On nonstate law generally, see Florian Rödl, *Private International Law Beyond the Democratic Order? On the Legitimatory Problem of Private International Law Beyond the State*, 56 AM. J. COMP. L. 743 (2008). On the implications of non-state law for law as a discipline, see Helge Dedek, *Stating Boundaries: The Law, Disciplined*, *in* STATELESS LAW: EVOLVING BOUNDARIES OF A DISCIPLINE 9 (Helge Dedek & Shauna Van Praagh eds., 2015).

33 For an analysis of whether parties can choose nonstate rules of law under American laws, see Symeon C. Symeonides, *Party Autonomy and Private Law Making in Private International Law: The* Lex Mercatoria *that Isn't*, *in* FESTSCHRIFT FÜR KONSTANTINOS D. KERAMEUS 1397 (Nat'l & Kapodistrian Univ. of Athens, Faculty of Law, Research Inst. of Procedural Studies ed., 2009); under the Rome I Regulation and Turkish law, see Ceyda Sural, *Respecting the Rules of Law: The UNIDROIT Principles in National Courts and International Arbitration*, 14 VINDOBONA J. INT'L COM. L. & ARB. 249 (2010); under Chinese law, see Weidi Long, *The Feasibility of Parties' Choice of the PICC in Sino-European Commercial Contracts*, 18 UNIFORM L. REV. 163 (2013); under Omani law, see Yehya Badr, Can It Be Done? Adopting the UNIDROIT Principles Through Party Autonomy Under Omani Choice of Law Rules (2014), http://ssrn.com/abstract=2419258. For an overview of many of the objections raised to the application of the PICC as the governing law, see Luca Radicati di Brozolo, *Non-national Rules and Conflicts of Laws: Reflections in Light of the UNIDROIT and Hague Principles*, 48 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO E PRO-CESSUALE 841, 850–60 (2012).

34 Bonell, *supra* note 20, at 234–35. For empirical analyses suggesting that parties to arbitration seldom choose nonstate law, see Christopher R. Drahozal, *Contracting out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523, 536–49 (2005); Gilles Cuniberti, *Three Theories of* Lex Mercatoria, 52 COLUM. J. TRANSNAT'L L. 369, 396–403 (2014), but see *id*. at 401 n.108, 402, where he observes that the CISG is the nonstate law most frequently chosen; Ralf Michaels, *The UNIDROIT Principles as Global Background Law*, 19 UNIFORM L. REV. 643, 646–47 (2014) (referring specifically to a choice of the PICC in arbitration).

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have broached the problem of a democratic deficit in sources of law beyond the state.[35] Critics of the Hague Principles' nonstate law solution have argued that it is uncertain,[36] unnecessary,[37] and didactic.[38]

This Article does not revisit those issues. Nor does it call into question the fundamental value of the Hague Principles as a whole. Rather, it proceeds from the premise that parties *can* choose certain rules of law where the Hague Principles apply. It tests this premise by investigating the relationship between the Hague Principles and the PICC or the CISG as rules of law that parties can choose. These are all instruments of a different nature, and of different origin, content, and structure. The PICC and the CISG have been developed against the background of traditional private international law rules which differ from the Hague Principles. The combination of these elements gives rise to normative ambiguities and may produce undesirable results when the PICC or the CISG are applied via the Hague
182 Principles. It also requires the PICC or the CISG to be applied in ways that they may not intend.

Part I introduces the Hague Principles conceptually. In Part II, I analyze three key normative ambiguities that arise out of the soft Hague Principles and their relationship with the PICC and the CISG. Part III shows that the Hague Principles' provision on *dépeçage* at a choice of law level and its interaction with the PICC and the CISG may lead to undesirable results. In Part IV, I examine whether the Hague Principles' test for determining whether the parties agreed on a choice of law is suitable when applied to rules of law.

B. Preliminary Remarks on the Hague Principles

The origins of the Hague Principles can be traced back to a 1972 proposal of the United States' government,[39] although the project for their development only began to gain traction in 2006.[40] From 2009 to 2014, a specialist working group[41] was responsible for the Hague Principles' development and drafting. In 2012, a Special Commission of Hague Conference member states[42] unanimously endorsed the

35 Rödl, *supra* note 32; Muir Watt, *supra* note 1; SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 141–42.

36 *See* Andrew Dickinson, *A Principled Interpretation to Choice of Law in Contract?*, 18 BUTTERWORTHS J. INT'L BANKING & FIN. L. 151, 152 (2013); Ralf Michaels, *Non-state Law in the Hague Principles on Choice of Law in International Contracts*, *in* VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION: LIBER AMICORUM FOR HANS MICKLITZ 43, 56–60 (Kai Purnhagen & Peter Rott eds., 2014); Mankowski, supra note 30, *passim*.

37 *See* Michaels, *supra* note 34, at 65–66.

38 *Id.* at 64–66.

39 Hague Conference on Private Int'l Law, *Document de travail no 2—Proposal of the United States Delegation*, *in* ACTES ET DOCUMENTS DE LA DOUZIÈME SESSION, at I-86 (Bureau Permanent de la Conference ed., 1974).

40 The Permanent Bureau conducted a series of feasibility studies in 2006. *See* Pertegás & Marshall, *supra* note 20, at 980.

41 *List of Working Group Members and Observers*, HAGUE CONFERENCE ON PRIVATE INT'L LAW (Oct. 2013), https://assets.hcch.net/docs/7d1e8619-6569-4b88-8033-77f41382aa99.pdf.

42 Under Article 8(1) of the Statute of the Hague Conference on Private International Law, in 2012 the Council established a special commission to discuss, *inter alia*, the working group's proposals. *See* Permanent Bureau, Hague Conference on Private Int'l Law, *Report of the November 2012 Special Commission Meeting on the Choice of Law in International Contracts*, HCCH.NET 5–6 (Feb. 2013), https://assets. hcch.net/docs/735cb368-c681-4338-ae8c-8c911ba7ad0c.pdf.

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Hague Principles,[43] subject to amendments, particularly with respect to a choice of rules of law.[44] The Permanent Bureau of the Hague Conference released the final draft of the Hague Principles in January 2015 seeking member-state approval through a nonobjection procedure. The member states approved the Hague Principles on March 19, 2015.

In a similar fashion to the American Law Institute's Restatements, the Hague Principles are accompanied by an explanatory

183 commentary, which contains useful and well-considered illustrations demonstrating how each provision should operate, and often, how each provision interacts with other provisions. The commentary to the provision on a choice of rules of law specifically explains the required criteria, namely, a "neutral and balanced" "set of rules" which are "generally accepted on an international level."[45] It gives examples of the types of rules of law that parties may choose, and refers specifically to the PICC[46] and CISG.[47] But it falls short of describing how any of the other provisions apply to a choice of rules of law. The only reference merely repeats one of the Hague Conference's policy decisions.[48] Few of the commentaries on the other provisions offer significant insight as to how they apply to a choice of rules of law.[49]

The Hague Principles comprise twelve articles and a preamble.[50] They can be understood conceptually as rules as to the scope of application of the Hague Principles; the choice of law rule and rules as to the content, mode, and existence of the choice; and rules as to the scope of application of the chosen law or rules of law.

1. Scope of Application of the Hague Principles

Article 1(1) prescribes the scope of the Principles as applying to international commercial contracts where parties make a choice of law. "Commercial"[51] excludes employment

43 *Id.* at 15.

44 Article 2(1) of the *Draft Hague Principles*, *supra* note 14, at 1–2, which had provided that "[a] contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law . . ." was split into two provisions. The first sentence of Article 2(1) remained and the new provision, Article 3, on rules of law was added. It provided that "in these Principles, a reference to law includes 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." *See* Permanent Bureau, *supra* note 42, at 5–6; Pertegás & Marshall, *supra* note 20, at 996–98.

45 Several authors have strongly criticized these criteria. *See* Dickinson, *supra* note 36, at 152; Michaels, *supra* note 34, at 56–60. For a full account of the evolution of this provision, see Genevieve Saumier, *The Hague Principles and the Choice of Non-state "Rules of Law" to Govern an International Commercial Contract*, 40 BROOK. J. INT'L L. 1, 5–18 (2014).

46 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.6. The introduction to the 1994 edition of the PICC states that "[t]he objective of the UNIDROIT Principles is to establish a balanced set of rules . . . . This goal is reflected . . . in the general policy underlying them." INT'L INST. FOR THE UNIFICATION OF PRIVATE INT'L LAW (UNIDROIT), UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, at viii (1994), https:// www.unidroit.org/instruments/commercial-contracts/unidroit-principles-1994.

47 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.5.

48 Article 3 broadens the scope of party autonomy in Article 2(1) by providing that the parties may designate not only state law but also 'rules of law' to govern their contract, regardless of the mode of dispute resolution chosen." *Id.* cmt. 3.1.

49 *See id.* cmts. 2.1, 2.5, 2.16, 4.2, 8.7, 8.8, illus. 4-2, 8-2.

50 On the Preamble, see Jan L. Neels, *The Nature, Objective and Purposes of the Hague Principles on Choice of Law in International Contracts*, 15 Y.B. PRIV. INT'L L. 45 (2013).

51 HAGUE PRINCIPLES, *supra* note 10, art. 1(1).

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contracts and most types of consumer contracts (Articles 1(1)).[52] "International" excludes wholly domestic contracts, even if the chosen law is foreign (Articles
184 1(2), 12).[53] Article 1(3) excludes certain extracontractual issues from the scope of the Principles.

Unlike traditional private international law rules, the Hague Principles do not provide rules for determining the law applicable to the contract where parties have not made a choice of law. The Hague Conference did not make provision for these rules on the basis that the aim of the Hague Principles is to further party autonomy in choice of law rather than to provide a comprehensive regime for determining the law applicable to international commercial contracts.[54]

2. Choice of Law Rule and "Modal Choice of Law Rules"[55]

Article 2(1) contains the choice of law rule: the law applicable to the contract is the law chosen by the parties. This reflects the classical conception of party autonomy in choice of law.[56] Article 2(1) is supplemented by a number of "modal" rules that relate broadly to the content, mode, or existence of the choice.

(a) Content

Instead of a choice of state law (which is implicit in Article 2(1)), parties can choose a state law expressly including that state's rules of private international law (*renvoi*, Article 8), or rules of law (Article 3). Article 3 reflects a liberalization of the classical conception of party autonomy in choice of law. It provides 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."[57] Neutrality under the Hague Principles is a quality of the source of
185 the rules, meaning the institution that drafted them must be one "that represents diverse legal, political and economic perspectives," while balance refers to rules that do not "benefit one side of transactions in a particular regional or global

52 Some consumer contracts may nonetheless fall within their scope including "dual-purpose contracts" concluded both for person and professional purposes and undisclosed consumer contracts in which the professional was not aware that the contract was for consumer purposes. *Id.* cmt. 1.12.

53 *Id.* art. 1(2), cmt. 1.21.

54 *Id.* cmt. 1.14. *Compare* Ole Lando, *The Draft Hague Principles on the Choice of Law in International Contracts and Rome I*, *in* A COMMITMENT TO PRIVATE INTERNATIONAL LAW—ESSAYS IN HONOUR OF HANS VAN LOON 299, 302–03, 310 (Permanent Bureau of the Hague Conference on Private Int'l Law ed., 2013) (lamenting the fact that the Hague Principles do not contain rules for determining the law applicable in the absence of choice and suggesting that there is a clear international convergence on the interpretation of these rules which the Hague Conference claims to be lacking), *with* Symeon C. Symeonides, *Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 877 (2013) (observing that convergence exists among states influenced by the predecessor to the Rome I Regulation but does not extend to other states).

55 *See* Maria Hook, *The Concept of Modal Choice of Law Rules*, 11 J. PRIV. INT'L L. 185, 189 (2015) [hereinafter Hook, *The Concept of Modal Choice of Law Rules*]; Maria Hook, THE CHOICE OF LAW CONTRACT 11 (2016) [hereinafter Hook, THE CHOICE OF LAW CONTRACT].

56 Pascal de Vareilles-Sommières, *Autonomie et ordre public dans les Principes de La Haye sur le choix de la loi applicable aux contrats commerciaux internationaux*, 143 J. DU DROIT INT'L 409, 434 (2016).

57 HAGUE PRINCIPLES, *supra* note 10, art. 3.

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industry."[58] It is the "set" that must be "balanced" and not the content of the individual rules themselves.[59] Article 2(2) allows parties to choose one law applicable to one part of the contract and either to not make a choice or to choose another law with respect to the other part or parts (horizontal *dépeçage*). Article 2(2)'s application to rules of law will be scrutinized in Part III of this Article. Article 2(4) provides a rule separating the chosen state law from objective connecting factors: parties may choose a neutral law, unconnected to the parties or their transaction.[60]

(b) Mode

Article 2(3) provides rules as to timing and modification of the choice, while Article 4 allows parties either to express that choice or not to express it (a tacit choice).[61] Article 5 is what the commentary to the Hague Principles terms a "substantive rule of private
186 international law"[62] according to which a choice of law is not subject to any formal requirement.

(c) Existence

Article 6(1)(a) provides a rule for determining whether the parties have made a choice of law.[63] Article 6(1)(b) implements the rule in Article 6(1)(a) where parties have used standard contract terms.[64] Whether Article 6 is suitable to be applied to a choice of rules of law will be examined in Part IV. Article 7 provides

58 *Id.* cmts. 3.11, 3.12. This differs from earlier drafts and explanatory materials. *See* Permanent Bureau, Hague Conference on Private Int'l Law, *The Draft Hague Principles on Choice of Law in International Commercial Contracts*, Prel. Doc. No. 6, cmts. 3.9–3.12 (Mar. 2014), https://assets.hcch.net/upload/wop/gap2014pd06_en.pdf; Permanent Bureau, *supra* note 42, at 6 (stating that "'neutral and balanced' relates to the *obligations in the rules of law* and their source, for example, whether they are one sided, or imposed by an imbalance in market power" (emphasis added)).

59 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.9, states that "there must be *a set of rules*" and "the set must be . . . *balanced*."

60 *See generally* Neil B. Cohen, *The Proposed Hague Principles on Choice of Law in International Commercial Contracts*, *in* THE EVOLUTION OF GLOBAL TRADE OVER THE LAST THIRTY YEARS 161–62 (Elvia Arcelia Quintana Adriano ed., 2014) (suggesting that Article 2(4) is less dissimilar than it might appear to the Restatement (Second) of Conflict of Laws under which a reasonable basis for the parties' choice will displace the substantial relationship requirement).

61 HAGUE PRINCIPLES, *supra* note 10, cmt. 4.2. A tacit choice of state law is permissible under a number of private international law regimes, including the Rome I Regulation, *supra* note 18, art. 3(1); Civil Code of Québec, S.Q. 1991, c 64, art. 3111 (Can.); Inter-American Convention on the Law Applicable to International Contracts art. 7, Mar. 17, 1994, O.A.S.T.S. No. 78; the Australian common law, *Akai Pty., Ltd. v. The People's Ins., Co.* (1996) 188 CLR 418, 442; and the law of those states of the United States that follow the Restatement (Second) of Conflict of Laws. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2) cmt. a (AM. LAW INST. 1971). *See also* Sonat Exploration, Co. v. Cudd Pressure Control, Inc., 271 S.W.3d 228 (Tex. 2008); Jan L. Neels & Eesa A. Fredericks, *Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts*, 44 DE JURE L.J. 101 (2011). *But cf.* Azzi, *supra* note 19, *passim*; Gaudemet-Tallon, *supra* note 1, at 263 (describing the admission of a tacit choice of law as dangerous).

62 HAGUE PRINCIPLES, *supra* note 10, cmt. 5.3. *Cf.* Rome I Regulation, *supra* note 18, art. 11 (subjecting the formal validity of a choice of law (via Article 3(5)), to a separate choice of law rule, which SYMEONIDES, *supra* note 1, at 384, usefully classifies as an "alternative-validation-reference rule").

63 *See infra* text accompanying notes 166–167, 172.

64 *See infra* Part IV.C.

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that the parties' choice of law is an agreement severable from and independent of the main contract.

3. Scope of Application of the Chosen Law or Rules of Law

Article 9 lists matters to which the chosen law applies and Article 10 refers specifically to issues in assignment transactions. Article 11 limits the application of the chosen law to the extent required by internationally imperative norms. These "fundamental norms"[65] are of two types. The first are overriding mandatory or "super-mandatory"[66] laws, which are provisions that a country regards as crucial for safeguarding its public interests.[67] An example is a legislative provision designed to protect insureds which provides for forum law to apply notwithstanding any choice of law agreement.[68] The second type allows for the intervention of public policy (*ordre public international*) when application of the chosen law "would violate some fundamental principle of justice, some
187 deep-rooted tradition of the common weal."[69] An example is a policy, common among countries with a civil law heritage, which prevents an award of punitive damages under the chosen law in respect of a contractual claim.[70] Article 11 limits the application of the chosen law only to the extent required by the overriding mandatory laws and *ordre public international* of the forum. If required or permitted by the forum's private international law rules, Article 11 also limits the chosen law to the extent required by the imperative norms of a third state: the overriding mandatory laws of another state (Article 11(2)) or the *ordre public international*[71] of the state whose law would be applicable in the absence of a choice of law (Article 11(4)).[72] It is by reference to the law of the forum or third state that a court will characterize a provision of that law as an overriding mandatory rule or determine that a policy is of sufficient importance such that it should override the law chosen by the parties to the extent necessary to give effect

65 HAGUE PRINCIPLES, *supra* note 10, cmt. 11.2.

66 ERIN A. O'HARA & LARRY E. RIBSTEIN, THE LAW MARKET 15 (2009).

67 The Hague Principles do not contain a definition but the commentary to the Hague Principles, *supra* note 10, cmt. 11.16, refers approvingly to the definition under Article 9(1) of the Rome I Regulation, according to which a state's "political, social or economic organization" is an example of its "public interests." The Hague Principles do not appear to draw a distinction such as that drawn by some authors between "laws that serve the public interest" and laws that "serve private interests by functioning redistributively": MICHAEL J. WHINCOP & MARY KEYES, POLICY AND PRAGMATISM IN THE CONFLICT OF LAWS 4 (2001). The Rome I Regulation appears to limit overriding mandatory laws to the first category, although it is at least arguable that some laws which function redistributively may also serve public interests, especially a state's social organization.

68 *Compare Insurance Contracts Act 1984* (Cth) s 8 (Austl.) (applying to insurance contracts whose objective proper law is the law of an Australian state or territory, applied in *Akai Pty., Ltd. v. The People's Ins., Co.* (1996) 188 CLR 418, 442–43 (Austl.)), *and* HAGUE PRINCIPLES, *supra* note 10, illus. 11-1, *with* Rome I Regulation, *supra* note 18, recital 37, which casts some doubt on whether such a provision would qualify as an overriding mandatory provision under that instrument.

69 Loucks v. Standard Oil Co. of N.Y., 120 N.E. 198, 202 (N.Y. 1918) (Cardozo, J.).

70 HAGUE PRINCIPLES, *supra* note 10, illus. 11-5. *See generally* SYMEONIDES, *supra* note 1, at 84 (comparing the approach to punitive damages taken by U.S. courts and civil law countries).

71 *But see infra* text in note 75.

72 *Compare* Andrew Dickinson, *Oiling the Machine: Overriding Mandatory Provisions and Public Policy in the Hague Principles on Choice of Law in International Commercial Contracts*, 22 UNIFORM L. REV. 402, 406–07, 409 (2017) (arguing that Article 11(4) is justified, assuming it is confined to the fundamental notions of public policy (*ordre public international*) of the law which would, absent a choice of law, govern the contract), *with* Martiny, *supra* note 21, at 649–50.

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to that provision or policy.[73] Internationally imperative norms from which parties cannot derogate by agreement must be distinguished from simple mandatory norms[74] which Article 11 does not address[75] and from which parties generally can derogate by agreement.

C. Normative Ambiguities

The Hague Principles are soft private international law rules which empower parties to choose the law or rules of law applicable to their contract and which govern the situation where parties

188 do so by agreement. As explained in Part I, the Hague Principles can be divided into rules as to the scope of application of the Hague Principles; the choice of law rule and rules as to the content, mode, and existence of the choice; and rules as to the scope of application of the chosen law or rules of law. They are designed to serve as a guide for parties and their lawyers, and as a model for legislatures, courts, and arbitral tribunals.[76] When adopted by a national or regional legislature, the Hague Principles become the forum's private international law rules.[77] In that case, the Hague Principles become positive law and are normatively superior to at least some of the rules of law that they allow parties to choose. Beyond that situation, exactly whether or how the Hague Principles apply and their relationship to the rules of law that they allow parties to choose is somewhat opaque. The Hague Principles do not contain interpretative principles, so the relative weight to be accorded to the commentary to and drafting history of the Hague Principles is unclear.[78]

1. A Choice of Private International Law Rules

The Preamble to the Hague Principles states that "[t]hey may be used to interpret, supplement and develop rules of private international law."[79] The question is, "by whom?" Can parties "supplement" the forum's private international law with the Hague Principles? Although the Hague Principles and the commentary do not

73 HAGUE PRINCIPLES, *supra* note 10, cmt. 11.5.

74 *See generally* Bernard Audit, *Du bon usage des lois de police*, *in* MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER, *supra* note 1, at 25, 25, 41 (perceptively criticizing the focus in theory and in practice on the qualification of a norm as imperative or simple rather than on the grounds which justify the application of the norm, in light of its aims, to a given case); Symeonides, *supra* note 54, at 886–88.

75 *See* HAGUE PRINCIPLES, *supra* note 10, cmt. 11.14. It has, however, been argued that Article 11(4), because it refers to "public policy" (*ordre public*) rather than "*fundamental notions of* public policy" (*ordre public*) (emphasis added), which is employed in Article 11(3), encompasses the simple mandatory norms of the law which would otherwise apply to the contract, absent a choice of law: *see* de Vareilles-Sommières, *supra* note 56, at 439–40, 450 (arguing that Article 11(4) directly contradicts the Hague Principles' core rule on freedom of choice in Article 2(1), meaning that, in some fora, the parties' choice of law is effectively an incorporation through the law that would otherwise apply to the contract).

76 HAGUE PRINCIPLES, *supra* note 10, pmbls. 2, 4.

77 For example, Paraguay: *see supra* note 14 and accompanying text.

78 *See also* de Vareilles-Sommières, *supra* note 56, at 414–15.

79 HAGUE PRINCIPLES, *supra* note 10, pmbl. 3.

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expressly refer to parties "opting in" to the instrument,[80] they do not expressly foreclose it either. As Ole Lando has observed, this would result in a "double choice"[81]: a choice of the Hague Principles and a choice of law or rules of law. The forum's private international law rules are clearly state law and the Hague Principles are clearly soft law, so normatively speaking, it is hard to see how soft law could allow for something that state law does not.[82] And if state law were to allow parties to opt into private international law rules, then the faculty to do so via soft law would be redundant, although a choice of the
189 Hague Principles could supplement permissive but incomplete state private international law rules.[83]

An alternative possibility is that the Hague Principles allow for the selection of soft private international law rules[84] in the form of rules of law via Article 3. An earlier version of the commentary explicitly stated that "parties may also designate non-state private international law rules (Article 3)."[85] This would allow for two possibilities. The first would allow for parties to choose soft private international law rules other than the Hague Principles. The fact that the Hague Principles are the first set of soft private international law rules does not mean that they will be the last. This possibility encounters the normative difficulty of one soft law instrument purporting to empower the application of another soft law instrument. The second possibility would allow for parties—in states that have adopted only some of the Hague Principles' articles, including Article 3, as the private international law rules of the forum—to choose those articles of the Hague Principles which the legislature excluded. This possibility would mean that parties could effectively circumvent the private international law rules of the forum. The reference to a choice of soft private international law rules via Article 3 does not appear in the final version of the commentary. The fact that the working group removed this reference should be read as foreclosing the possibility of a choice of soft private international law rules, including a choice of some of the Hague Principles themselves, via Article 3.

2. Soft Private International Law Rules Selecting Soft Law

80 *Cf.* Bénédicte Fauvarque-Cosson, *Règles impératives et instruments de droit souple: Quelle articulation? Réflexions à partir des Principes d'UNIDROIT relatifs aux contrats du commerce international*, *in* MÉLANGES EN L'HONNEUR DU PROFESSEUR PIERRE MAYER, *supra* note 1, at 195, 205 (arguing that the objective of the Hague Principles "is less about being chosen by the parties and more about influencing national legislatures" (translated by author)).

81 Lando, *supra* note 54, at 299, 304.

82 *See also* Harry M. Flechtner & Ronald A. Brand, *Opting in to the CISG: Avoiding the Redline Products Problems*, *in* A TRIBUTE TO JOSEPH M. LOOKOFSKY 95, 119 (Mads Bryde Andersen & René Franz Henschel eds., 2015); Basedow, *supra* note 8, at 309–10.

83 *See* Basedow, *supra* note 8, at 311 (proposing a standard choice of law clause selecting a permissive state law as supplemented by the Hague Principles).

84 It is clear that parties can choose state private international law rules but only in connection with a choice of the substantive law of that state: HAGUE PRINCIPLES, *supra* note 10, art. 8.

85 Permanent Bureau, Hague Conference on Private Int'l Law, *Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts*, HCCH.NET, at cmt. 8.13 (Nov. 2013), https://assets.hcch.net/upload/wop/ princ_com.pdf.

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Among the sets of nonstate rules of law that exist and might be eligible to be chosen,[86] the commentary to the Hague Principles specifically contemplates a choice of the PICC. The nature of this instrument as the chosen rules of law relative to the nature of the Hague Principles, as the instrument which "allows" for parties to choose them, may be normatively problematic.

190 The PICC is a soft law instrument developed by the international organization, UNIDROIT. It contains "general rules"[87] of substantive contract law which regulate the parties' rights and obligations under a contract. The PICC differ from the contract law of a state in that they are nonbinding, not comprehensive, and do not provide rules for specific types of contracts. Rather, they are "bright-line"[88] rules on formation including the battle of forms, interpretation, validity, performance, nonperformance, and remedies, among many others.[89] The PICC allow parties to exclude or derogate from any of its provisions except those which it declares to be mandatory.[90]

The PICC envisage themselves applying to an international commercial contract as the governing rules of law, when chosen by the parties, but require private international law rules to achieve this end.[91] The PICC therefore explicitly contemplate that parties might choose them, but the Hague Principles, unless adopted as the private international law of the forum, have no normative precedence over the PICC. If both the Hague Principles and the PICC have the same normative force as soft law instruments, it is unclear how one instrument can empower, direct, or control the application of the other.

3. Soft Private International Law Rules Selecting an International Convention

Unlike the PICC, which, as principles of soft law, are normatively equivalent to the Hague Principles, the CISG is an international convention and is, in CISG contracting states, normatively superior to the Hague Principles. The nature of the CISG as the chosen "rules of law" relative to the nature of the Hague Principles that "allow" for parties to choose them may again be normatively problematic, although it may be less so if the CISG is read as encouraging a choice of its rules where it would not otherwise apply.

The CISG is a substantive law convention developed by UNCITRAL, a branch of the United Nations Organization. It applies to sale of goods contracts that meet its internationality requirement and do not fall outside its substantive scope.[92] Consumer contracts

86 Litigation is likely to arise as to whether anything other than those sets of rules of law to which the commentary to the Hague Principles (*supra* note 10, cmts. 3.1–3.15) refers will satisfy the requisite criteria.

87 PICC, *supra* note 31, pmbl. ¶ 1; Sural, *supra* note 33, at 251; Jürgen Basedow, *Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts*, 5 UNIFORM L. REV. 129, 132 (2000); Ralf Michaels, *Preamble I*, in COMMENTARY ON THE PICC, *supra* note 20, at 31, 41–43.

88 *See* Michaels, *supra* note 87, at 43.

89 INT'L INST. FOR THE UNIFICATION OF PRIVATE LAW (UNIDROIT), MODEL CLAUSES FOR THE USE OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 4 (2012).

90 *See infra* notes 155–156 and accompanying text.

91 PICC, *supra* note 31, pmbl. ¶ 2; see Michaels, *supra* note 87, at 69–109, for a discussion of the PICC's other purposes.

92 CISG, *supra* note 29, arts. 1(2), 2. *See* Franco Ferrari, *PIL and CISG: Friends or Foes?*, 31 J.L. & COM. 45, 58–68 (2012).

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191 are one type falling outside the CISG's substantive scope.[93] If these requirements are satisfied, the CISG is directly applicable when the parties have their places of business in different contracting states (Article 1(1)(a)) or indirectly applicable when the private international law rules of the forum lead to the application of the national law of a contracting state (of which the CISG forms part (Article 1(1) (b))).[94] The latter includes the situation where parties choose the law of a contracting state. Nonetheless parties can, and often do, choose to exclude the application of the CISG entirely when choosing the law of a contracting state.[95]

The CISG contains rules of substantive contract law, but it also contains gap-filling provisions and provisions excluding certain matters to which the law designated by private international law rules must apply. Its rules of substantive contract law govern broadly the formation, performance, and remedies for breach of international sales contracts. Its gap-filling provision provides that the Convention's general principles, or in their absence the law designated by the applicable private international law rules, must be applied to resolve issues concerning matters governed but not expressly resolved by the convention.[96] Among the issues which the CISG does not govern, and which are therefore excluded, is the issue of whether a contract or any of its provisions are valid[97] and the assignment of rights or assignment of contracts.[98] The CISG allows parties to derogate from most of its provisions[99] within the limits of the mandatory rules of the governing law.[100]

The Hague Principles purport to allow parties to choose the CISG as a set of rules of law "where the CISG would not otherwise apply according to its own terms."[101] No private international law rules prior to the Hague Principles have allowed parties to choose an international convention outside its normal scope of application,[102]

192 which has given rise to problems in particular sectors.[103] A choice of the CISG through the Hague Principles may therefore respond to a clear commercial need.[104] Notwithstanding, empowering parties to choose the rules of an international convention where it would not otherwise apply gives rise to complex issues when they are incorporated as terms of the contract and that incorporation is controlled by the applicable

93 CISG, *supra* note 29, art. 2(a).

94 Ferrari, *supra* note 92, at 57, 69–70; Jürgen Basedow, *An EU Law for Cross-Border Sales Only—Its Meaning and Implications in Open Markets*, *in* LIBER AMICORUM OLE LANDO 27, 29–30 (Michael Joachim Bonell et al. eds., 2012) (describing these scope provisions as "conservative" and "innovative," respectively). Article 1(1)(b) of the CISG does not apply in multiple states, including the United States and Singapore, which made a declaration to this effect when ratifying the Convention.

95 CISG, *supra* note 29, art. 6, cl. 1: "The parties may exclude the application of this Convention . . . ."

96 *Id*. art. 7(2).

97 *Id*. art. 4(a). See *infra* text accompanying notes 193–97.

98 . *See generally* Ingeborg Schwenzer, *Regional and Global Unification of Contract Law*, *in* CODIFYING CONTRACT LAW: INTERNATIONAL AND CONSUMER LAW PERSPECTIVES 39, 45 (Mary Keyes & Therese Wilson eds., 2014).

99 CISG, *supra* note 29, art. 6, cl. 2: "The parties may . . . subject to article 12, derogate from or vary the effect of any of its [the Convention's] provisions."

100 *See infra* notes 163–64 and accompanying text.

101 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.5.

102 Michaels, *supra* note 87, at 56 n.162.

103 For example, multimodal transport which is governed by a single contract of carriage but involves sea and land legs subject to different regulatory regimes. *See generally* Sergio M. Carbone, *Multimodal Carriage Contracts*, *in* 2 ENCYCLOPEDIA OF PRIVATE INTERNATIONAL LAW, *supra* note 5, at 1262.

104 Though one might have good reason to be skeptical given the rate at which contracting parties exclude application of the CISG.

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law.[105] Those issues may be heightened when the international convention alone is the applicable law. A choice of the CISG through the Hague Principles may also be theoretically problematic. If the CISG loses its conventional character when chosen, such that it becomes soft law in contracting states, or if it is viewed from the perspective of noncontracting states for which it is soft law, a choice of the CISG through the Hague Principles raises the same normative concerns as a choice of the PICC: the instrument allowing for the choice and the chosen instrument are both soft law. If the CISG retains its conventional character when chosen, it is hard, conventional law in CISG contracting states: the Hague Principles as soft law are normatively subordinate to the instrument that they empower parties to choose. That the Hague Principles are normatively subordinate may be less problematic if the CISG is read as encouraging a choice of its rules where it would not otherwise apply.

The CISG does not expressly contemplate its selection independently from the law of a contracting state[106] owing to a resistance at the time of its drafting in the 1970s. Considering UNCITRAL's recent decision to commend the use of the Hague Principles as a means of facilitating the choice of UNCITRAL texts where they would not otherwise apply,[107] it appears that this resistance has largely dissipated. In the paragraphs that follow, I will set out the historical reservations to an independent choice of the CISG and analyze the extent to which the Hague Principles remedy the concerns that were motivating them, before considering the effect of UNCITRAL's decision commending the Hague Principles.

193 The 1964 Uniform Law on the International Sale of Goods (ULIS),[108] one of the two conventions forming the historical backbone of the CISG, allowed parties to independently choose the ULIS "to the extent that it does not affect the application of any mandatory provisions of law which would have been applicable if the parties had not chosen the Uniform Law."[109] The working group charged with drafting the CISG considered that the effect of national mandatory provisions on the CISG needed to be dealt with in a separate provision and not solely in connection with a choice of the CISG by the parties.[110] Accordingly, the working group's final text on an independent choice of the CISG simply provided: "This Convention also applies where it has been chosen as the law of the contract by the parties."[111] The intention behind the proposed provision was to allow parties to choose the CISG where both parties did not have their places of business in different contracting states or where the private international law rules of the forum did not lead to the application of the national law of a contracting state (of which

105 DOMINIQUE BUREAU & HORATIA MUIR WATT, DROIT INTERNATIONAL PRIVÉ 449–50 (3rd ed. 2014).

106 *See* United Nations Comm'n on Int'l Trade Law, UNCITRAL Digest of Case Law on the United Nations Convention on the International Sale of Goods, art. 6(12), U.N. Doc. A/CN.9/SER.C/DIGEST/CISG/6 (June 8, 2004); JOHN O. HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 79 (4th ed. 2009); Ingeborg Schwenzer & Pascal Hachem, *Article 6*, *in* SCHLECHTRIEM & SCHWENZER: COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS, at 101, 116–18 (Ingeborg Schwenzer ed., 4th ed. 2016) [hereinafter SCHLECHTRIEM & SCHWENZER].

107 Rep. of the United Nations Comm'n on Int'l Trade Law on the Work of Its Forty-Eighth Session, ¶ 240, U.N. Doc. A/70/17 (2015), http://undocs.org/A/70/17.

108 Convention Relating to a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 [hereinafter UNIFORM LAW ON THE INTERNATIONAL SALE OF GOODS].

109 *Id*. art. 4

110 Working Group on the Int'l Sale of Goods, Rep. on the Work of the Second Session, ¶¶ 39–40, 48, U.N. Doc. A/CN.9/52 (1970).

111 *Id*. ¶ 44.

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the CISG forms part).[112] What it did not contemplate was a choice of the CISG where the contract fell outside the CISG's substantive scope (especially where it involved a consumer)[113] or was wholly domestic.[114] The risk that the proposed provision could nonetheless be construed as allowing for those possibilities militated against its inclusion in the 1979 draft of the CISG.[115] During the diplomatic conference of 1980,[116] at which the 1979 draft was considered, Germany proposed that a provision be inserted allowing for a choice of the CISG in contracts falling outside the CISG's substantive scope.[117] The diplomatic

194 conference rejected the German proposal by twenty-one votes to nine.[118]

The previous historical excursion suggests that there were two key reservations in the 1970s weighing against a provision allowing parties independently to choose the CISG: First, there was a risk that such a provision would allow parties to reintroduce those categories of contract expressly excluded from the Convention, including domestic contracts. Second, the mandatory provisions of national law designed to protect parties to those categories of contract would be excluded. The commentary to the Hague Principles,[119] which refers to Article 1 of the CISG,[120] appears to contemplate a choice of the CISG where it does not form part of the law of a contracting state. It does appear to contemplate a choice of the CISG where the contract falls outside the CISG's substantive scope, as per Article 2 of the CISG.

Even if the Hague Principles do allow for the possibility of a choice of the CISG in contracts outside of the CISG's substantive scope, they eliminate several of the concerns which could have arisen under the proposed provision of the CISG: the Hague Principles do not, by their own terms, allow for a choice of the CISG if the contract is wholly domestic[121] and they do not apply to at least those types of consumer contracts excluded by the CISG.[122] What remains potentially problematic are those categories of contract that the CISG excludes but the Hague Principles do not, for example, those concerning sales of stocks, shares, and investment securities[123] which are governed by mandatory laws in some jurisdictions where a small business is a party.[124] Choice of the CISG via

112 *Id*. ¶ 45.
113 *Id*. ¶ 49.
114 *Id*. ¶ 46.
115 Text of Draft Convention on Contracts for the International Sale of Goods, U.N. Doc A/CONF.97/5 (Mar. 14, 1979), *extracted in* U.N. CONFERENCE ON CONTRACTS FOR THE INT'L SALE OF GOODS, at 5 U.N. Doc. A/CONF.97/19, http://www.uncitral.org/pdf/english/texts/sales/cisg/a-conf-97-19-ocred-e.pdf.
116 U.N. CONFERENCE ON CONTRACTS FOR THE INT'L SALE OF GOODS, *supra* note 115.
117 The proposal in U.N. Doc A/CONF.97/C.1/L.32 read: "Even if this Convention is not applicable in accordance with Articles 2 or 3, it shall apply if it has been validly chosen by the parties" (reprinted and discussed in *id*. at 86, 252–53). This was clearly much broader than article 4 of the Uniform Law on the International Sale of Goods, *supra* note 108, and the proposed provision mooted by the working group and rejected by the committee. Germany subsequently sought to narrow its proposal to exclude consumer contracts but encompass all other types of contracts outside the substantive scope of the instrument.
118 U.N. CONFERENCE ON CONTRACTS FOR THE INT'L SALE OF GOODS, *supra* note 115, at 86.
119 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.5.
120 *See supra* text accompanying note 94.
121 HAGUE PRINCIPLES, *supra* note 10, cmt. 1.18.
122 *Id*. cmt. 1.12.
123 CISG, *supra* note 29, art. 2(d).
124 See, e.g., *Australian Securities and Investments Commission Act 2001* (Cth) s 12BF(1), which protects small businesses from unfair terms in standard form contracts for a financial product (defined in section 12BAA). Section 12BF(1) does not appear to have overriding mandatory effect (*cf. Australian Securities and Investments Commission Act 2001* (Cth) s 12EA, which substitutes the parties' choice of law in a consumer contract for the supply of financial services with Australian law, if the proper law of the contract

the Hague Principles would allow parties to apply the CISG to those excluded categories of cases, the parties being free under Article 6 of the CISG as the applicable rules of law to derogate from the provision containing those exclusions.[125] Unlike the case where the CISG forms part of the law of a contracting

195 state, whether the parties are allowed to derogate those exclusions in that manner is not governed by the mandatory laws of the applicable law because the CISG is the applicable law. Accordingly, the concerns motivating a resistance at the time of the CISG's drafting to a choice of the CISG outside its normal scope of application are partially, but not fully, eliminated by the Hague Principles.

UNCITRAL's recent approval of the Hague Principles supports an independent choice of the CISG, such that it could be said that the CISG encourages such a choice. The UNCITRAL Report to the 2015 session of the UNCITRAL Commission,[126] states that the "Commission noted with approval that [Article 3 of the Hague Principles] might facilitate the choice of UNCITRAL texts, such as the [CISG], where they would not otherwise apply, thus enhancing the harmonizing impact of those texts."[127] This wording does not clarify whether what is contemplated is a choice of the CISG where it does not form part of the law of a contracting state or where the contract falls outside the CISG's substantive scope, or both. An appropriate reading of UNCITRAL's endorsement would be to confine it to the first situation: that is consistent with the commentary to the Hague Principles, which only expressly contemplates a choice of the CISG where it does not form part of the law of a contracting state. This reading is also consistent with the drafting history of the CISG: to endorse a choice of the CISG outside its substantive scope of application would leave some of the concerns that originally militated against an independent choice of the CISG unresolved.

4. Conclusion

would otherwise be Australian law). Assuming section 12BF(1) does not have overriding mandatory effect, Article 11 of the Hague Principles would not apply. The result is that a choice of the CISG as the applicable rules of law would prevent *Australian Securities and Investments Commission Act 2001* (Cth) s 12BF(1) from applying.

125 *But cf*. Honnold, *supra* note 106, at 79, 81, who states that "the Convention does not govern the effect of contracts extending its scope." This may be the case where the parties merely incorporate the CISG through a governing national law (*id*. at 84, suggests that this is the situation with which Honnold was concerned). But where the CISG *is* the governing rules of law, Honnold's view is difficult to reconcile with the freedom of the parties under Article 6 of the CISG simply to derogate from the provision containing the Convention's exclusions.

126 The forty-eighth session of the Commission comprised sixty states, forty-four of which were represented. See Rep. of the United Nations Comm'n on Int'l Trade Law on the Work of Its Forty-Eighth Session, *supra* note 107, ¶¶ 4–5.

127 *Id*. ¶ 239. The relevant aspects of actual decision of the Commission quoted in that report are as follows:

> The United Nations Commission on International Trade Law . . .
>
> Taking note that the Hague Principles complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods, and the UNCITRAL Model Law on International Commercial Arbitration (1985) . . . Commends the use of the Hague Principles, as appropriate, by courts and by arbitral tribunals; as a model for national, regional, supranational or international instruments; and to interpret, supplement and develop rules of private international law.

Id. ¶ 240.

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The legal basis for application of the Hague Principles and their relationship with the rules of law that they allow parties to choose gives rise to several issues. Some of those issues are eliminated if a

196 state adopts the Hague Principles as the private international law rules of the forum: parties no longer need to opt in to the Hague Principles, so the question explored in Part II.A of whether they can falls away. That question lingers, however, if a state adopts only some of the Hague Principles, including Article 3, as the private international law rules of the forum. The problem of the soft Hague Principles having no normative force over the soft PICC, raised in Part II.B, is also remedied: once the Hague Principles become forum law, they are normatively superior to the rules of law that they allow parties to choose. The relationship between the Hague Principles and the CISG analyzed in Part II.C is more complex, even if the Hague Principles become forum law. If the CISG retains its conventional character when chosen, it is hard, conventional law in CISG contracting states. The result is that the Hague Principles are normatively subordinate to the instrument that they empower parties to choose. That the Hague Principles are normatively subordinate may be less problematic if the CISG is read as encouraging a choice of its rules where it would not otherwise apply. This reading is open but should be confined to the situation where the CISG does not form part of the law of a contracting state. A narrow reading finds support in both the drafting history of the CISG and in the commentary to the Hague Principles.

D. Horizontal and Vertical *Dépeçage*

The previous Part showed that some, but not all, issues relating to the legal basis for the Hague Principles' application and the relationship between the Hague Principles and the chosen rules of law are necessarily eliminated where a state adopts the Hague Principles as the private international law rules of the forum. Even where the Hague Principles are the private international law rules of the forum, the interaction between various provisions of the Hague Principles and of the PICC or the CISG, as the chosen rules of law, may lead to undesirable results. This Part explores the undesirable results which may arise out of the interaction between the instruments' provisions on *dépeçage*.

Voluntary *dépeçage*,[128] loosely described, is a legal tool that enables parties to choose several laws to govern discrete parts of their contract or phases of their contractual relationship. This type of dépeçage operates at a choice of law level, so it can be conceptualized as a horizontal "splitting" of the contract and a correlative splitting

197 of the chosen laws (horizontal *dépeçage*). Article 2(2) of the Hague Principles empowers parties to use this technique without limitation. How horizontal *dépeçage* would operate where parties choose a set of rules of law rather than state law is not specifically considered in the commentary to the Hague Principles.[129] Horizontal *dépeçage* is conceptually different from vertical *dépeçage*. Vertical *dépeçage* is where parties pick and choose from among the applicable rules of law. It operates at a substantive law level and so can be conceptualized as a vertical splitting of the chosen rules of law (vertical *dépeçage*). The PICC and CISG allow parties to use this technique. Vertical *dépeçage* is

128 *See generally* SYMEONIDES, CODIFYING CHOICE OF LAW, *supra* note 5, at 224, 232–34, 240–43 (distinguishing voluntary *dépeçage* from statutory *dépeçage* and judicial *dépeçage*); Cyril Nourissat, *Le dépeçage*, in LE RÈGLEMENT COMMUNAUTAIRE "ROME I" ET LE CHOIX DE LOI DANS LES CONTRATS INTERNATIONAUX: ACTES DU COLLOQUE DES 9 ET 10 SEPTEMBRE 2010, DIJON 205 (Sabine Corneloup & Natalie Joubert eds., 2011).

129 *See infra* notes 144–152 and accompanying text.

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limited, at least in the PICC, by various mandatory provisions without which the PICC do not intend to apply.[130]

Horizontal *dépeçage* and vertical *dépeçage* are both distinguishable from "gap-filling."[131] The type of gap filling which the Hague Principles encourage but do not govern[132] is where parties choose rules of law, such as the PICC or the CISG, to apply to the whole of their contract and the law of a state or another set of rules to govern matters not dealt with by the rules of law. Parties would be wise to choose a gap-filling law and to articulate expressly the hierarchy which they intend between the chosen law and gap-filling law(s).[133] This would help to avoid clashes between possibly contradictory[134] provisions of the PICC and CISG and to avoid a conclusion that a contract which provides for both a governing state law and set of rules of law is pathological[135] or merely incorporates the rules of law within the limits of the governing state law.[136]

198 Where parties make a choice of law including a gap-filling law, the whole of the set of rules of law, including its mandatory provisions, applies to the contract; the gap-filling law performs only a supplementary function. The designated gap-filling law naturally only governs matters within the scope of the Hague Principles. This form of gap filling operates at a choice of law level. An example is where the parties choose the PICC to govern their contract and, with respect to issues not covered by the PICC, the law of state *X*.[137] Pursuant to that clause, the PICC, including its mandatory rules,[138] would govern the contract and to the extent that the contract deals with the internal aspects of a relationship between principal and agent (a matter outside the scope of the PICC[139] but within the scope of the Hague Principles[140]) the law of state *X* would govern. Where the parties do not designate a gap-filling law and for matters outside the scope of the Hague Principles, recourse to another law is needed. The PICC and the CISG themselves address gap filling,

130 *See infra* notes 155–157 and accompanying text.

131 *But cf*. Michaels, *supra* note 87, at 55 (who envisages the horizontal and vertical relationships among these concepts differently).

132 HAGUE PRINCIPLES, *supra* note 10, cmt. 3.15, states that "Parties designating 'rules of law' to govern their contract should therefore be mindful of the potential need for gap-filling and may wish to address it in their choice of law." *Id*. illus. 3-1, 3-2, refer to a choice of rules of law accompanied by a choice of state law as a gap-filling law

133 Article 14 of the 1999 International Trade Center Model Contract for the International Sale of Perishable Goods (extracted in Michaels, *supra* note 87, at 57), provides a useful example of a certain and comprehensive approach to gap filling where a choice of the CISG and PICC is concerned.

134 Schwenzer, *supra* note 98, at 47.

135 See FPM Fin. Serv., L.L.C v. Redline Products, Ltd., No. 10-6118, 2013 WL 5288005 (D.N.J. Sept. 17, 2013), which provided for the contract to be governed by the law of South Africa and in a separate clause by the CISG, *supra* note 29, ¶¶ 5–6. For an analysis of the case, see Flechtner & Brand, *supra* note 82.

136 The International Chamber of Commerce Commission on Commercial Law and Practice recently observed in relation to Model Clause 1.1(a) (UNIDROIT, *supra* note 89), which provides: "This contract shall be governed by the UNIDROIT Principles of International Commercial Contracts (2010)," that

> [t]he clause does not expressly answer the question whether the principles should apply as the applicable law (instead of the otherwise applicable domestic law), or if they should apply together with the applicable national law; and, in the second case, if they should be considered as rules of law or as contractual provisions.

INTERNATIONAL CHAMBER OF COMMERCE, DEVELOPING NEUTRAL LEGAL STANDARDS FOR INTERNATIONAL CONTRACTS: A-NATIONAL RULES AS THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL CONTRACTS WITH PARTICULAR REFERENCE TO THE ICC MODEL CONTRACTS ¶ 6.5 (2015).

137 UNIDROIT, *supra* note 89, model cl. 1.2(a).

138 *See infra* notes 155–156 and accompanying text.

139 PICC, *supra* note 31, at 75 (art. 2.2.1(2) cmt. 1).

140 HAGUE PRINCIPLES, *supra* note 10, cmt. 1.32.

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but they do so at a substantive rather than choice of law level and naturally only do so for issues within their scope[141] or matters that they govern.[142] For issues outside their scope or matters that they do not govern, recourse to another law is needed.[143]

The potential problems associated with horizontal and vertical *dépeçage* are at least threefold. First, if horizontal *dépeçage* is intended to apply to rules of law, there is a risk that parties may misuse horizontal *dépeçage* to circumvent the PICC's limitations on vertical *dépeçage*. Second, vertical *dépeçage* itself may be problematic where the CISG is the chosen rules of law, because the CISG contemplates the use of vertical *dépeçage* being controlled by the law of a state. Third, horizontal *dépeçage* and vertical *dépeçage*, when used creatively in combination, may lead to curious results.

1. Horizontal *Dépeçage* and the PICC's Limitations on Vertical *Dépeçage*

Whether horizontal *dépeçage* should apply to rules of law or only state law is not addressed in the commentary to the Hague
199 Principles. It is clear that Article 2(2) of the Hague Principles empowers parties to use horizontal *dépeçage* to make a partial choice of state law, subjecting part of their contract to one system of law, or multiple choices of state law, subjecting several parts of their contract to different systems of law. Multiple choices of law allow parties to engineer their choices so as to exclude the otherwise applicable simple mandatory norms, because the scope of the chosen law "is also the scope of its mandatory provisions."[144] The Hague Principles impose no express limitation on the use of horizontal *dépeçage*.[145] Horizontal *dépeçage* is indirectly or directly limited in other legal systems that permit it. For example, the Rome I Regulation has the effect of prohibiting horizontal *dépeçage* where it ousts simple mandatory provisions of the law of a member state forum that gives effect to European Union law, where all relevant elements are located in one or more member states;[146] the Louisiana Civil Code has the effect of limiting *dépeçage* by the public policy of a state whose law would be applicable in the absence of a choice;[147] and Anglo-Australian common law, in principle, rejects the "general obligation" of a contract being governed by more than one law.[148] The commentary to the Hague Principles cautions against the "risk of contradiction or inconsistency in the determination of the parties' rights and obligations."[149] Even if, at its highest, this warning could be

141 PICC, *supra* note 31, art. 1.6(2).
142 CISG, *supra* note 29, art. 7(2).
143 The explanatory comments to the PICC envisage a choice of the PICC and a gap-filling law (PICC, *supra* note 31, at 2–3, pmbl., cmt. 4(a); UNIDROIT, *supra* note 89, model cl. 1.2(a)).
144 Gilles Cuniberti, *Articles 1.5*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 175, 177.
145 The fact that Article 2(1) states that a contract is governed by the *law* chosen by the parties is little to the point because Article 2(2) expands Article 2(1) such that the contract is governed by the *laws* chosen by the parties. *Contra* de Vareilles-Sommières, *supra* note 56, at 438.
146 Rome I Regulation, *supra* note 18, art. 3(4); ANDREA AUBART, DIE BEHANDLUNG DER DÉPEÇAGE IM EUROPÄISCHEN INTERNATIONALEN PRIVATRECHT 71 (2013).
147 LA. CIV. CODE ANN. art. 3540. Granted, this is a limit on the principle of party autonomy as a whole.
148 *Wanganui-Rangitikei Electric Power Board v. Austl. Mutual Provident Soc'y* (1933) 50 CLR 581, 604 (Austl.); *Centrax, Ltd. v. Citibank NA* [1999] EWCA (Civ) 892 (Ward, L.J.) (Eng.) (applying this principle to the identical provision of the predecessor to Article 3(1) of the Rome I Regulation); DICEY, MORRIS & COLLINS ¶ 32-026 (Lord Collins of Mapesbury ed., 15th ed. 2012).
149 HAGUE PRINCIPLES, *supra* note 10, cmt. 2.6. *See generally* Paul Lagarde, *Le* "*dépeçage*" *dans le droit international privé des contrats*, 4 RIVISTA DI DIRITTO INTERNAZI-ONALE PRIVATO E PROCESSUALE 649, 668–69 (1975).

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construed as a limitation on the use of horizontal *dépeçage*, it is not clear by reference to which law, if any, this limitation is to be applied. An implied limitation of cohesion cannot be derived from a higher order source such as the law of the European Union, which one author suggests controls the parties' use of horizontal *dépeçage* in partial choices of state law under the Rome I Regulation.[150] Because there is no law which controls the way the parties choose to
200 divide up their agreement,[151] parties are able to influence not only *which* law governs their contract but also the *content* of the law governing their contract. The risks of uncontrolled horizontal *dépeçage* are evident.[152]

The risks of horizontal *dépeçage* are equally acute when parties choose rules of law, because parties may use it to circumvent the limitations of vertical *dépeçage* under the chosen rules of law.[153] Numerous sets of rules of law allow parties to use vertical *dépeçage* to pick and choose from among them so as to exclude any rules that are unsuited to the parties' commercial arrangement.[154] The PICC allow parties to use vertical *dépeçage* to exclude or derogate from any of its provisions[155] except those which it declares to be mandatory.[156] As the comment to Article 1.5 of the PICC makes clear, those provisions that are mandatory are of such "importance in the system of the [PICC] . . . that parties should not be permitted to exclude or to derogate from them as they wish."[157] Because vertical *dépeçage* is controlled by the PICC's simple mandatory norms, it
201 is, in and of itself, unproblematic. For example, parties may wish to use vertical *dépeçage* in order to avoid the remedies for a failure to make payment when it

150 Nourissat, *supra* note 128, at 216, 218.

151 With the exception of any overriding mandatory laws or provisions of the *ordre public* of, or dictated by, the law of the forum. *See supra* text accompanying notes 66–73.

152 *See* de Vareilles-Sommières, *supra* note 56, at 431–32; Gaudemet-Tallon, *supra* note 1, at 268 (suggesting that allowing for *dépeçage* comes dangerously close to allowing for a *contrat sans loi*).

153 This argument is more persuasive if the Hague Principles are adopted as the private international law rules of the forum, which affords them a status that is normatively superior to the PICC. If the PICC and the Hague Principles have the same normative status as soft law instruments, there is no reason why the PICC would allow its limitations on vertical *dépeçage* to be circumvented by the Hague Principles. As to the normative relationship between the PICC and the Hague Principles, see *supra* Part II.B.

154 *See generally* Stefan Vogenauer, *Appendix I: Synopsis of Instruments*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 1267, 1270.

155 PICC, *supra* note 31, art. 1.5.

156 These include: the obligation of both parties to *act* in good faith and fair dealing (Article 1.7); possibly, the obligation to *negotiate* in good faith (Article 2.1.15, but this would require a preliminary agreement under which parties exclude the obligation to negotiate in good faith); the right of a party to avoid the contract if fraudulent representations or nondisclosure (Article 3.2.5) or unjustified threat (Article 3.2.6) by its counterparty led the party to conclude the contract, or if a term contained in the contract unjustifiably gave the counterparty an excessive advantage (Article 3.2.7). Others include Article 5.1.7(2), which provides for the substitution of a manifestly unreasonable price—the determination of which has been delegated to one of the parties—with a reasonable price; Article 7.4.13(2), which provides for the reduction of a grossly excessive sum payable by the nonperforming party in the event of nonperformance; and Article 10.3, which limits the parties' ability to extend or reduce limitation periods. *See generally* Cuniberti, *supra* note 144, at 178–79; Stefan Vogenauer, *Article 1.7*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 205, 209; Stefan Vogenauer, *Article 5.1.7*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 635, 639–40; Zuloaga Rios, *Article 2.1.15*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 344, 347–48, 363. *See also* UNIDROIT, *supra* note 89, at 15.

157 PICC, *supra* note 31, at 14 (art. 1.5 cmt. 3). Fauvarque-Cosson, *supra* note 80, at 198, refers to the role that these rules playing in preserving the "internal coherence" of the PICC (translated by author).

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falls due being governed by the PICC. Parties could also permissibly exclude Articles 3.2.4 and 7.4.9–7.4.10 of the PICC. Article 3.2.4 prevents a party from avoiding the contract on the ground of mistake if remedies for nonperformance are equally available. Articles 7.4.9–7.4.10 provide for the payment of interest on unpaid monies and may be incompatible with the Shari'a ban on the charging of interest (*riba al-nasi'a*).[158] Parties could not use vertical *dépeçage* to exclude Article 7.4.13(2), which is a mandatory provision of the PICC that allows for the reduction of a grossly excessive agreed payment for nonperformance[159] to a reasonable amount. But parties could use horizontal *dépeçage* under the Hague Principles to achieve this result: a choice of law clause providing that the "PICC govern all aspects of this contract except remedies for non-performance" would have the result under the Hague Principles of excluding not only Articles 3.2.4 and 7.4.9–7.4.10 of the PICC but also the mandatory Article 7.4.13(2).[160] Where the chosen rules of law are the PICC and the parties' horizontal *dépeçage* has the effect of excluding one or more of the PICC's mandatory norms without which the PICC "refuse to apply,"[161] the Hague Principles facilitate a result not intended by the PICC. The previous example shows that the risks associated with horizontal *dépeçage* in state law are just as evident when the chosen law is a set of rules of law.

2. Vertical *Dépeçage* and a Choice of the CISG

Vertical *dépeçage* under the CISG, in contrast to the PICC, is uncontrolled and may be in itself problematic when the CISG is chosen through the Hague Principles. The CISG does not contain simple mandatory norms because at the time it was drafted, it was not

202 intended to apply *as* the governing law. The CISG does not expressly contemplate its selection independently from the law of a contracting state and therefore does not contain mandatory rules of its own.[162] The CISG allows parties to exclude any of its provisions, except one,[163] within the limits of the mandatory rules of the

158 Ewan McKendrick, *Article 7.4.9*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 1012, 1013; Michaels, *supra* note 87, at 42.

159 The PICC do not distinguish between penalties and liquidated damages clauses.

160 *See* Stefan Vogenauer, *Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?*, 6 EUR. REV. CONT. L. 143, 155–56 (2010) (arguing that the idea that a drafting party would divide up the contract so as to exclude the PICC's mandatory rules may be "more or less an academic problem," because the counterparty would be unlikely to agree to those terms and because the excluded mandatory provision of the PICC is likely to have an equivalent under the otherwise applicable law, but contending that this problem will not always be merely academic, especially if the effect of the *dépeçage* is to exclude the obligation to negotiate in good faith).

161 Jan Kleinheisterkamp, *Article 1.5*, *in* UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (PICC) 136, 137 (Stefan Vogenauer & Jan Kleinheisterkamp eds., 2009). But see Gilles Cuniberti, *Article 1.5*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 178, who is less unequivocal. *See also supra* note 157 and accompanying text.

162 *See supra* text accompanying note 106. That the CISG may now be read as not impliedly precluding its independent selection does not affect this conclusion.

163 CISG, *supra* note 29, arts. 6, 12. Article 12 states that the parties cannot derogate from the requirement that a contract be concluded in or evidenced by writing where at least one party has its place of business in a contracting state whose legislation requires writing and which has made an Article 96 declaration to this effect.

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governing law,[164] which the CISG conceives to be the law of a contracting state. The commentary to the Hague Principles explains that the Hague Principles themselves do not allow parties to pick and choose from within the applicable law, because parties must choose the whole of the chosen law including its simple mandatory norms (or where parties use horizontal *dépeçage*, they must choose the whole of the part of the chosen law including the simple mandatory norms falling into that part). This exhortation appears to be concerned with parties not being able to exclude the simple mandatory norms of the applicable law.[165] It follows that where the CISG is the chosen rules of law the Hague Principles may facilitate a form of vertical *dépeçage* not intended by the CISG. Because the CISG expressly contemplates its selection only as part of the law of a state, it envisages vertical *dépeçage* being controlled by the simple mandatory provisions of the law of a state. It may also facilitate a result not contemplated by the Hague Principles, if the Hague Principles assume that the chosen rules of law will, like state law, themselves contain at least some simple mandatory provisions.

3. Conclusion

The Hague Principles do not impose any limitation on the use of horizontal *dépeçage*, such that parties are able to influence not only *which* law governs their contract but also the *content* of the law governing their contract. The risk of misuse is just as clear when applied to rules of law, because parties may use horizontal *dépeçage* to circumvent the rules of law's limitations on the use of vertical *dépeçage*. Vertical *dépeçage* under the CISG may be itself problematic when parties choose the CISG through the Hague Principles. Because the CISG expressly contemplates that parties will choose it only as part of the law of a state, the CISG envisages that the simple mandatory provisions of that state's law will control vertical *dépeçage*.

203 When parties choose the CISG through the Hague Principles, vertical *dépeçage* is not controlled by any simple mandatory laws. The implications of parties using double *dépeçage*—horizontal *dépeçage* and vertical *dépeçage* in combination—appear also not to have been considered in the drafting of the Hague Principles and their commentary. If party autonomy is used creatively at a choice of law level and used creatively at a substantive law level, it may lead to curious results. The latter combination may be a new risk which merits further exploration.

E. Agreement on a Choice of Rules of Law

Article 6 of the Hague Principles addresses the problem of whether parties have effectively agreed on the applicable law. Article 6(1)(a) resolves that question using a "bootstrap principle."[166] The bootstrap principle operates by using provisions of the purportedly chosen law to resolve the anterior private international law question of whether the parties in fact chose it. Article 6(1)(b) identifies the purportedly chosen law for the purposes of Article 6(1)(a) where parties have used standard contract terms containing conflicting choice of law

164 Ferrari, *supra* note 92, at 103.

165 HAGUE PRINCIPLES, *supra* note 10, cmt. 11.14. (The irony, of course, is that this is what horizontal *dépeçage* in effect, although not in form, allows.)

166 *See generally* Stuart Minor Benjamin, *Bootstrapping,* 74 LAW & CONTEMP. PROBS. 115, 118–19, 143 (2012).

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clauses.[167] The Article 6(1)(b) mechanism determines which choice of law clause prevails (if any) by comparing the solutions to the problem of conflicting substantive contract clauses supplied by the rules of law or law designated in each choice of law clause. A limited exception clause, mostly applicable to Article 6(1)(a), is provided in Article 6(2). The exception allows for the law of the state in which the party that seeks to impugn the agreement has its establishment to determine whether that party agreed to the choice of law clause, if it would not be reasonable to apply the purportedly chosen law to that question. It is clear that Article 6 is intended to apply to a choice of a state law including a choice of the law of a CISG contracting state.[168] Whether Article 6 should apply to a choice of rules of law is not specifically addressed in the commentary to the Hague Principles.

Article 6's suitability for rules of law is questionable, largely because it causes the governing rules of law to be applied in a way that they do not necessarily intend. This applies if the Hague Principles are adopted as forum law and are, therefore, normatively superior[169] to the rules of law that they "allow" parties to choose. Equally, Article 6 may be unsuitable where the Hague Principles

204 have the same[170] or an inferior[171] normative character to the rules of law that they "allow" parties to choose. Article 6(1)(a) of the Hague Principles, considered in Part IV.A below, requires recourse to provisions of the CISG that the CISG does not contain and which the PICC may not contain as a result of horizontal or vertical *dépeçage*. It also causes the CISG and possibly, the PICC to be applied in ways that they may not intend. This problem is heightened in the case of Article 6(1)(b) of the Hague Principles, which is addressed in Part IV.C. It causes provisions of the PICC and the CISG, designed to regulate issues of substantive contract, to be applied to the private international law problem of conflicting choice of law clauses. In the case of the CISG, Article 6(1)(b) requires recourse to a provision of the CISG which is in itself uncertain and unsettled. Although the exception contained in Article 6(2) of the CISG, discussed in Part IV.B, is not designed to remedy these problems, it may provide a sensible solution, particularly in the case of Article 6(1)(a).

1. Rules of Law Applied to the Existence and Material Validity of the Parties' Choice

Article 6(1)(a) of the Hague Principles provides that the question of whether the parties have effectively agreed on the applicable law is to be resolved by the law

167 HAGUE PRINCIPLES, *supra* note 10, cmt. 6.3.

168 *Id.* cmts. 6.23–6.27.

169 I.e., when the Hague Principles are adopted as the private international law rules of the forum and are therefore transformed from soft law into positive law.

170 If the Hague Principles as soft law have a normative status that is equal to the rules of law that they "allow" parties to choose, the problem of the Hague Principles overreaching their faculty is not merely objectionable as a matter of principle but is problematic from a normative perspective: it is unclear how the Hague Principles can *require* provisions of the PICC or the CISG, designed to regulate substantive contractual clauses as sales contracts to be applied to choice of law agreements if those are not issues to which the PICC or the CISG intend to apply. *See supra* Part II.B.

171 The point made above, in note 170, applies equally here except only insofar as it concerns the CISG—the Hague Principles as soft law are normatively inferior to the CISG from the perspective of CISG contracting states, if the CISG retains its conventional character when chosen.

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purportedly chosen.[172] Accordingly, where one party seeks to show that there is no choice of law agreement between the parties, either because it never came into existence or because it is defective for want of consent, the absence of the agreement and "the existence and effect of these defects of consent" is determined by the law purportedly agreed upon.[173] Any grounds for avoidance must relate to the choice of law agreement itself, which is considered separately from the main contract.[174] Article 6(1)(a) encompasses all issues relevant to whether parties have reached an agreement on choice of law[175] which it assumes the chosen law will
205 be capable of resolving. Those include issues going to the existence of the choice of law agreement (formation of the choice of law agreement), such as silence following the receipt of an offer. They also include the issue of whether the choice of law agreement is materially valid (i.e., that the parties' consent was not defective because of duress, misrepresentation, and mistake, for example).[176]

If the purportedly chosen rules of law are the PICC, and the *whole* of the PICC, Article 6(1)(a) of the Hague Principles can operate effectively. Chapters Two and Three of the PICC contain both simple mandatory and derogable rules of substantive law governing the formation and validity of a contract.[177] Those substantive rules, pursuant to Article 6(1)(a), will be applied to dispose of the private international law question of whether the parties chose the PICC. It is arguable that the parties intended the PICC, as the rules of law they purportedly chose, to determine the question of whether they chose them, though it is less certain whether the PICC intend its substantive contract law provisions to be applied to that private international law question.

If the purportedly chosen law is only part of the PICC, applying that partial choice of rules of law to the question of whether the parties agreed on them[178] would be problematic. The same problems could arise where parties make a partial choice of state law. If parties are allowed to use horizontal *dépeçage*[179] so as to exclude the PICC's non-mandatory provisions on validity, such as mistake,[180] or they have excluded it via vertical *dépeçage* under the PICC,[181] then the purportedly chosen rules of law no longer contain rules capable of determining whether the parties chose the PICC. Similarly, if parties are allowed to use horizontal *dépeçage* so as to exclude even the PICC's mandatory provisions[182] relating to "serious" grounds of defective consent,[183] then the PICC no longer contain rules capable of determining whether the parties chose them.

Determining the question of whether the parties reached an agreement on choice of law by reference to the rules of law purportedly chosen is more tenuous when the CISG is the purportedly chosen rules of law. The issue of the existence

172 HAGUE PRINCIPLES, *supra* note 10, art. 6(1)(a). *See also* Rome I Regulation, *supra* note 18, arts. 3(5), 10(1).
173 HAGUE PRINCIPLES, *supra* note 10, cmt. 6.7. *See generally* Franco Ferrari & Jan A. Bischoff, *Article 10*, *in* ROME I REGULATION 355, art. 10 (¶ 5) (Franco Ferrari ed., 2014).
174 HAGUE PRINCIPLES, *supra* note 10, art. 7.
175 *Id.* cmt. 6.6.
176 *Id.* cmt. 6.7.
177 *See supra* note 156.
178 HAGUE PRINCIPLES, *supra* note 10, art. 6(1)(a).
179 *Id.* art. 2(2). *See supra* Part III.
180 *See* Jacques du Plessis, *Article 3.1.4*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 472, 473.
181 PICC, *supra* note 31, art. 1.5. *See supra* Part III.
182 *See supra* Part III.A.
183 *See* du Plessis, *supra* note 180, at 472.

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of a choice of the CISG raises distinct problems from the issue of its material validity, so I will consider these in turn. The CISG plainly governs the question of whether a sales contract has come into existence.[184] It follows

206 that on application of the Hague solution,[185] the CISG's provisions on whether a sales contract has come into existence must logically apply to the question of whether the choice of law agreement, designating the CISG as rules of law, has similarly come into existence. The fact that the choice of law agreement is separable from the sales contract (Article 7 of the Hague Principles) does not affect that conclusion,[186] because Article 6(1)(a) requires the CISG's rules on the existence of the sales contract to be applied to the separable choice of law agreement designating the CISG.

The legitimate criticism can nevertheless be made that the CISG does not intend its provisions, which exclusively govern sales contracts,[187] to be applied to choice of law agreements, which are clearly not sales contracts.[188] It is difficult to cogently reason that the existence of a choice of law agreement is an issue governed by the CISG or governed by the CISG but not expressly resolved by it such that it should be resolved by the general principles on which the CISG is based.[189] It may be that where the CISG applies as part of the law of a contracting state, the CISG governs or its general principles govern the question of whether the parties have reached an agreement to exclude the CISG.[190] But from this one should be slow to infer that where the CISG does not apply on its own terms, the CISG governs the question of whether the parties have reached an agreement on a choice of the CISG as rules of law. This criticism is supported by the fact that the CISG leaves issues concerning matters which it does not govern to private international law rules.[191] The CISG presumably does so on the basis that those rules will not then require the CISG to apply to those matters. In requiring the CISG's provisions on the existence of a sales contract to be applied to a choice of law agreement, the Hague Principles appear to do just that.[192]

184 CISG, *supra* note 29, pt. II.

185 HAGUE PRINCIPLES, *supra* note 10, art. 6(1)(a).

186 *Contra* Thomas Kadner Graziano, *Solving the Riddle of Conflicting Choice of Law Clauses in Battle of Forms Situations: The Hague Solution*, 14 Y.B. PRIV. INT'L L. 71, 96–97 (2012) (citing Article 7 of the Hague Principles as a reason not to apply the CISG to the existence of the choice of law agreement when the parties choose the law of a CISG contracting state).

187 CISG, *supra* note 29, art 4.

188 *Cf.* Kadner Graziano, *supra* note 186, at 96–97 (suggesting that where parties have chosen the law of a CISG contracting state, the law of that state, excluding the CISG, should apply to the existence and material validity of the parties' choice of law because the CISG only applies to contracts of sale).

189 CISG, *supra* note 29, art. 7(2).

190 Peter Winship, *The Hague Principles, the CISG, and the* "*Battle of Forms,*" 4 PENN ST. J.L. & INT'L AFF. 151, 159–60 (2015). Winship and Kadner Graziano, *supra* note 186, are both concerned with the situation where the CISG applies on its own terms as the law of a contracting state and not where the CISG applies a set of rules of law chosen by the parties. Their analyses therefore operate within a different normative framework.

191 *See generally* Ferrari, *supra* note 92, at 87–90.

192 This is not the only issue that the Hague Principles refer to the governing rules of law, and which the governing rules of law refer back to the Hague Principles as the applicable private international law rules. Article 9(1)(e) of the Hague Principles refers the validity of the main contract to the governing law or the governing rules of law. Where the CISG is the governing rules of law, Article 4(a) of the CISG expressly excludes the issue of the validity, leaving this to be determined by the law designated by the applicable private international law rules. Where the Hague Principles are the applicable private international law rules, they unhelpfully refer back to the CISG. Similar problems,

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207 The CISG does not intend to apply to issues of material validity where they affect the parties' contract let alone where they affect a choice of law agreement. The application of the CISG to the "validity of the contract or of any of its provisions" is excluded under Article 4(a).[193] This exclusion dates back to the ULIS, which preceded the CISG.[194] The commentary to Article 6 of the Hague Principles cites duress and, more significantly for sales contracts, [195] misrepresentation and mistake as relevant to the question of whether the parties have reached an agreement on the choice of law. These issues fall squarely within the Article 4(a) CISG exclusion[196] and are therefore not matters governed by the Convention.[197] The CISG leaves those issues to the Hague Principles, as the applicable private international law rules, which the Hague Principles refer back to the CISG.

2. Relevance of the Exception

If the purportedly chosen rules of law do not intend to apply to the question of whether the parties chose them, or do not contain rules capable of determining that question, does the exception in Article 6(2) of Hague Principles allowing recourse to the law of a

208 parties' place of establishment apply? The exception does not appear a priori to apply in these circumstances, although it could provide a sensible solution. Article 6(2) provides that if it would not be reasonable in the circumstances to apply the purportedly chosen law to determine whether a party agreed to it, the law of the state in which the party that seeks to impugn the agreement has its establishment applies.[198] The commentary to the Hague Principles suggests a condition: the exception can be invoked to displace the purportedly applicable law only where the conduct of the party that seeks to impugn the agreement has no effect under the law of the state in which that party has its establishment.[199] The exception

which will not be considered here, may arise with respect to Article 10 of the Hague Principles on assignment where the CISG is the governing set of rules of law.

193 Article 4 of the CISG provides that:

> This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with: (a) the validity of the contract or of any of its provisions or of any usage. . . .

Secretariat, United Nations Comm'n on Int'l Trade Law, *Explanatory Note by the UNCITRAL Secretariat on the United Nations Convention on Contracts for the International Sale of Goods*, ¶ 11, U.N. Doc. V.89-53886 (June 1989). At least one validity issue is expressly dealt with by another provision of the CISG under a different label, namely, the lack of a requirement of formal validity, to which the CISG applies. Helen E. Hartnell, *Rousing the Sleeping Dog: The Validity Exception to the Convention on Contracts for the International Sale of Goods*, 18 YALE J. INT'L L. 1, 52 (1993), but this is not an issue with which Article 6(1)(a) of the Hague Principles is concerned, formal validity being dealt with separately under Article 5 of the Hague Principles.

194 Uniform Law on the International Sale of Goods, *supra* note 108, annex; ANDRÉ TUNC, COMMENTARY TO THE HAGUE CONVENTIONS OF 1ST JULY 1964, at 20 (1964).

195 Hartnell, *supra* note 193, at 72.

196 *Id.* at 69–78.

197 Matters outside the Convention are not governed by Article 7(2), which requires a court first to have recourse to the general principles on which the Convention is based before having recourse to the law designated by the rules of private international law.

198 HAGUE PRINCIPLES, *supra* note 10, art. 6(2). *Cf.* Rome I Regulation, *supra* note 18, arts. 3(5), 10(2).

199 HAGUE PRINCIPLES, *supra* note 10, cmt. 6.28. See, by way of analogy, Ferrari & Bischoff, *supra* note 173, art. 10 ¶ 18.

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apparently cannot be invoked to displace the purportedly applicable rules of law where the purportedly applicable rules of law do not intend to apply to that question or are not capable of determining whether a party chose them. Accordingly, although a partial choice of the PICC may constitute circumstances in which it would not be "reasonable" to determine a party's consent to the choice of law agreement by reference to the purportedly chosen rules of law, the condition imposed by the commentary appears to be an obstacle to the application of the exception in those circumstances. Equally, although a choice of the CISG[200] or a choice of the CISG in conflicting standard terms[201] may constitute circumstances in which it would not be "reasonable" to determine a party's consent to the choice of law agreement by reference to the purportedly chosen rules of law, the exception cannot be used because it is not only unreasonable but impossible to determine that party's consent under the purportedly chosen rules of law. Whether the condition suggested by the commentary is necessary and whether the exception could be expanded to encompass situations in which it would be impossible to determine the parties' consent under the purportedly chosen law should be considered.

3. The Battle of Forms

The battle of forms refers to the situation where parties contract by exchange of standard terms and each set of terms contains one or several clauses that conflict with the other. Article 6(1)(b) of the Hague Principles provides a novel mechanism for determining the purportedly applicable law where parties exchange standard

209 contract terms, and each contains a choice of law clause.[202] For example, party *A* makes an offer on its standard terms which choose the law of state *X* and party *B* accepts using its standard terms which choose the law of state *Y*. The Hague Principles' mechanism operates by comparing the solutions that each law provides to the problem of conflicting *substantive* contract clauses. The following discussion assesses the extent to which this mechanism is suitable to be applied to choice of law agreements designating rules of law.

Traditionally, the problem of conflicting substantive contractual clauses is dealt with as a matter of substantive law, whereas the problem of conflicting choice of law agreements is dealt with as a matter of private international law. The solutions in each of these areas reflect different objectives. One substantive law solution is a first shot rule, according to which the standard terms used first prevail over the standard terms used last. Another is a last shot rule, which some authorities and authors suggest is employed by the CISG,[203] according to which

200 *See supra* text accompanying notes 184–197.

201 *See infra* text accompanying notes 218–228. The Article 6(2) exception could not apply where one set of standard terms nominates the PICC because the PICC applies a knockout rule with the result that there will never be a chosen law: HAGUE PRINCIPLES, *supra* note 10, cmt. 6.29.

202 HAGUE PRINCIPLES, *supra* note 10, art. 6(1)(b); Kadner Graziano, *supra* note 186. *Cf.* Jan von Hein, *Art. 3 Rome I-VO*, *in* THOMAS RAUSCHER, EUROPÄISCHES ZIVILPROZESS- UND KOLLISIONSRECHT EUZPR/EUIPR, BAND III, at 94, 135–36 (2016). *See generally* Thomas 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?*, 22 UNIFORM L. REV. 351 *passim* (2017).

203 CISG, *supra* note 29, art. 19; Norfolk S. Railway, Co. v. Power Source Supply, Inc., No. 3:06-58, 2007 U.S. Dist. LEXIS 24352 (W.D. Pa. July 25, 2008); Ulrich Magnus, *Last Shot v. Knock Out—Still Battle*

the standard terms used last constitute the contract if performance has commenced *provided* those terms do not contain material terms which differ. A knockout solution, which other authorities and authors suggest is employed by the CISG,[204] and which the PICC adopt, requires the parties to have reached an agreement, except on the standard terms, and any conflicting terms that are not common in substance are to be disregarded.[205] Hybrid rules that contain various combinations of these rules also exist.[206] These rules are all intended to give effect to the gist of the parties'

210 bargain even though some of the terms they have used are incompatible.[207] Private international law approaches to the problem of conflicting choice of law agreements include the application of forum law, the law determined by objective factors, or the law applicable in the absence of choice.[208] The latter approaches are intended to designate the applicable law where the parties have not agreed on one, by localizing the parties' transaction.

How the Hague Principles' battle of forms mechanism would apply where one set of standard terms designates the PICC as the governing rules of law can be illustrated with the following example. Imagine a situation in which party *A* makes an offer on its standard terms, which choose the law of state *X*, and party *B* accepts using its standard terms, which choose the PICC. Assume that the law of state *X*'s substantive solution to conflicting contractual clauses is the application of a last shot rule. Under Article 2.1.22, the PICC's substantive solution to conflicting contractual clauses is the application of a knockout rule.[209] Recall that the knockout rule means that conflicting contractual clauses are disregarded in each set of standard terms. Because one of the designated laws applies a knockout rule,[210] no

of Forms Under the CISG, *in* COMMERCIAL LAW CHALLENGES IN THE 21ST CENTURY 185, 191 (Ross Cranston et al. eds., 2007) (referring to a "literal and strict application" of Article 19).

204 CISG, *supra* note 29, art. 19; Bundesgerichtshof [BGH] [Federal Court of Justice] Jan. 9, 2002, Case No. VIII ZR 304/00 (The Powdered Milk Case) (CISG Pace Database), *translation at* http://www.cisg.law.pace.edu/cisg/wais/db/cases2/020109g1. html (although the Court noted that the result would be no different if the last shot rule were followed); Sieg Eiselen, Rapporteur, CISG Advisory Council, CISG-AC Opinion No. 13, Inclusion of Standard Terms Under the CISG, r. 10 (Jan. 20, 2013). Rule 10 is materially the same as Article 2.1.22 of the PICC. The CISG Advisory Council is a private initiative of expert scholars which seeks to promote the uniform interpretation of the CISG. *See About Us*, CISG ADVISORY COUNCIL, http://www.cisgac. com/about-us/ (last visited Jan. 22, 2018).

205 PICC, *supra* note 31, art. 2.1.22.

206 For a comprehensive discussion of the various approaches, see Kadner Graziano, *supra* note 186, at 75–80; Gerhard Dannemann, *The* "*Battle of the Forms*" *and the Conflict of Laws*, *in* LEX MERCATORIA: ESSAYS ON INTERNATIONAL COMMERCIAL LAW IN HONOUR OF FRANCIS REYNOLDS 199, 200–06 (Francis Rose ed., 2000); Omri Ben-Shahar, *An Ex-Ante View of the Battle of the Forms: Inducing Parties to Draft Reasonable Terms,* 25 INT'L REv. L. & ECoN. 350, 353–58 (2005) (advocating a "reasonable-shot" rule).

207 Hook, *The Concept of Modal Choice of Law Rules, supra* note 55, at 211.

208 For a discussion of these and other solutions, see Kadner Graziano, *supra* 186, at 82–87.

209 Article 2.1.22 of the PICC, *supra* note 31, provides:

> Where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance unless one party clearly indicates in advance, or later and without undue delay informs the other party, that it does not intend to be bound by such a contract.

210 The result would be the same if both of the designated laws applied a "knockout" rule.

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choice of law clause prevails, and both clauses must be disregarded. The outcome is that "there is no choice of law."[211]

As the example shows, the mechanism determines which choice of law clause prevails (if any) by comparing the solutions to the problem of conflicting clauses supplied by the rules of law or law designated in each choice of law clause.[212] To be clear, this is a comparison of the solutions that each law provides to the problem of conflicting substantive contractual clauses, not the solutions each law provides to the problem of conflicting choice of law agreements. The mechanism uses a substantive law solution to resolve a private international

211 law problem; it treats choice of law agreements as indistinguishable from ordinary contractual clauses. This is potentially problematic for a number of reasons, including where the chosen law is state law, but relevant to the present discussion, it may be problematic from the perspective of the PICC. Additional problems arise where the CISG is involved.

Do the PICC, as substantive rules of contract law, intend to apply to the resolution of a private international law problem of conflicting choice of law agreements? One commentator notes that the issue of conflicting choice of law clauses gives rise to "difficult problems" and expresses no view as to whether Article 2.1.22 of the PICC properly applies to it.[213] On the one hand, the issue of conflicting choice of law agreements appears not to be one within the scope of the PICC, which provide general, substantive rules on international contracts. Even if it were an issue within the scope of the PICC, it is clear that this issue is not expressly settled by the PICC, nor is it one that can be settled by recourse to the PICC's general principles,[214] such as private autonomy, given that the reality of the parties' choice is the very question to be decided. On the other hand, the issue of conflicting choice of law clauses is one which could be settled by applying Article 2.1.22 by analogy,[215] if the issue of conflicting choice of law agreements can be said to be "materially similar"[216] to the issue of conflicting substantive contractual clauses. How is the material similarity of these issues to be measured? They may be to a private international lawyer materially dissimilar, to a contract lawyer broadly equivalent, and to a commercial party indistinguishable. If material similarity is to be measured by the perspective (or presumed perspective) of a typical commercial party, the result produced by the Article 2.1.22 knockout rule of the PICC via Article 6(1)(b) of the Hague Principles is likely to be consistent with the PICC's requirement that standard form contracts must be interpreted by

211 This situation falls within the scope of Article 6(1)(b). *See* HAGUE PRINCIPLES, *supra* note 10, at 35 (cmt. 6.19).

212 Article 6(1)(b) provides:

> 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.

Id. art. 6(1)(b).

213 Tjakie Naudé, *Article 2.1.22*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 408, 411.

214 Article 1.6(2) of the PICC, *supra* note 31, provides that "[i]ssues within the scope of these Principles but not expressly settled by them are as far as possible to be settled in accordance with their underlying general principles." UNIDROIT, *supra* note 89, at 7.

215 *See generally* PICC, *supra* note 31, at 17 (art. 1.6 cmt. 4).

216 Stefan Vogenauer, *Article 1.6*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 181, 202–03.

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reference to the reasonable expectations of their average users.[217] Even if the issues could be said to be materially similar, given that Article 2.1.22's objective is to uphold the common terms forming the parties' bargain, can it legitimately be applied analogously to two choices of law on which there is no bargain?

212 The Hague Principles' battle of forms mechanism is more problematic when one of the sets of standard terms designates the CISG. The CISG does not contain a specific provision addressing the battle of forms, and this issue was left open during its drafting,[218] although there is general agreement in the literature that this issue is governed by the CISG and should be resolved by its Article 19.[219] There is no consensus as to whether Article 19[220] of the CISG provides for a last shot rule or a knockout rule.[221] This uncertainty is of little importance where one set of standard terms designates the CISG and the other set of standard terms designates a law whose substantive law solution to the battle of forms is the knockout rule: even if a court were to conclude that the CISG provides for the last shot rule, whenever one set of standard terms brings the knockout rule into play, the result under the Hague Principles' solution is that there is no choice of law. But the uncertainty as to whether Article 19 provides for a last shot rule or a knockout rule is likely to be very significant where the set of standard terms that do not designate the CISG refers to a law which provides for the last shot rule. The commentary to the Hague Principles does not contemplate this scenario.

While it is clear that the Hague Principles cannot[222] and do not purport to[223] remedy the ambiguities of the CISG, designing a rule

217 PICC, *supra* note 31, at 138 (art. 4.1 cmt. 4). *See* Stefan Vogenauer, *Article 4.1*, *in* COMMENTARY ON THE PICC, *supra* note 20, at 575, 581.

218 Schwenzer, *supra* note 98, at 45.

219 Ulrich G. Schroeter, *Article 19*, *in* SCHLECHTRIEM & SCHWENZER, *supra* note 106, at 350, 364–65. Schroeter himself, however, argues that whenever parties contract by exchange of standard terms, they should be taken to have impliedly intended to derogate from Article 19 of the CISG, on the basis that Article 19 is ill-suited to the resolution of the problem of the battle of forms and is likely to "hinder the contract" from being concluded contrary to their interests. The bold justification for this argument is that the expression of the parties' common intention to derogate from Article 19 is the mere fact that they have used standard contract terms.

220 Article 19 of the CISG, *supra* note 29, provides:

> (1) A reply to an offer which purports to be an acceptance but contains additions, limitations or other modifications is a rejection of the offer and constitutes a counter-offer.
>
> (2) However, a reply to an offer which purports to be an acceptance but contains additional or different terms which do not materially alter the terms of the offer constitutes an acceptance, unless the offeror, without undue delay, objects orally to the discrepancy or dispatches a notice to that effect. If he [or she] does not so object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance.
>
> (3) Additional or different terms relating, among other things, to the price, payment, quality and quantity of the goods, place and time of delivery, extent of one party's liability to the other or the settlement of disputes are considered to alter the terms of the offer materially.

221 *See supra* notes 203–04 (for relevant case law); Schroeter, *supra* note 219, art. 19 ¶¶ 35–38 (favoring the knockout rule and proposing a way to attempt to reconcile it with the CISG's rules on formation); Magnus, *supra* note 203, *passim*.

222 Kadner Graziano, *supra* note 186, at 99.

223 *See generally* HAGUE PRINCIPLES, *supra* note 10, cmt. 6.23 (stating that the interpretations of the CISG in the commentary to the Hague Principles "do not purport to be exclusive or authoritative interpretations of the CISG …").

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213 that refers the very question of whether parties have chosen the CISG to those ambiguities does not lead to a simple or predictable solution.[224] Since there is no real uniform interpretation of the CISG, there is no certainty as to which approach a court will follow and if it will find there to be a choice of law or not. Far from being a noncomplex solution, the Hague Principles' solution is likely to encourage opportunistic litigation on this point whenever the CISG have been designated. A party is likely to argue that the CISG provides for either a last shot rule or a knockout rule in accordance with whichever rule leads to the application of the substantive law most favorable to its case at the time the litigation arises. A party will argue in favor of a last shot rule if the substantive law designated in the standard terms used last is more favorable; a party will argue in favor of the knockout rule if the substantive law designated by the forum's private international law rules applicable in the absence of choice is more favorable. One author suggests that in circumstances in which the substantive solution to the battle of forms given by a law (or in this case, rules of law) is unclear, "it will be impossible to establish that "under both of these [designated] laws the same standard terms prevail," meaning that there is no choice of law.[225] On this interpretation whenever the CISG is chosen in one set of standard terms, systematically there will be no choice of law.

Even if it were clear that the CISG provides for a last shot rule, the ambiguity raised in relation to the PICC arises: it is uncertain whether the CISG intends it to be applied to the question of conflicting choice of law clauses. Whether the last shot rule can be applied to that question turns on whether the clause used last materially alters the clause used first. Several authors state that differing choice of law clauses will regularly constitute a material change,[226] at least from the perspective of the parties assessed at the time a dispute arises.[227] Article 19 of the CISG allows the standard terms used last to prevail *provided* those terms do not contain material terms that differ: the last shot rule only applies where the latter used terms contain immaterial modifications. Under the Hague solution, Article 19 is to be applied only to the choice of law clause in isolation, it being a separable agreement.[228] If the choice of law clause used last materially alters the choice of law clause used first, then according to Article 19 there is no agreement and the last shot rule does not apply.

214 If the materiality of differing choice of law clauses is to be assessed at the time of contracting, rather than at the time of a dispute, it might be said that this change is immaterial, at least from the perspective of the parties.[229] If that were the case, the last shot rule in Article 19 of the CISG could apply: the choice of law clause in the terms referred to first is the offer and the choice of law clause in the terms referred to last is the acceptance with the modifications contained therein.[230] It is clear that this reasoning is strained: it is difficult to reason that

224 *See also* Martiny, *supra* note 21, at 643.
225 Kadner Graziano, *supra* note 186, at 94.
226 *Id.* at 76.
227 Magnus, *supra* note 203, at 187 (observing that at the time of contracting only "price, place and time of payment, kind, quality and quantity of the goods, place and time of their delivery" are material, whereas at the time a dispute arises, the parties, or their lawyers, are likely to attach importance to the choice-of-law clause).
228 HAGUE PRINCIPLES, *supra* note 10, art. 7.
229 *See* Magnus, *supra* note 203, at 187.
230 CISG, *supra* note 29, art. 19(2).

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the "acceptance," which nominates a different law to the original choice of law offer, is a mere modification of that offer.

A more principled and practical solution than Article 6(1)(b) of the Hague Principles may be the modal, knockout choice of law rule that Maria Hook proposes.[231] This rule would simply provide that where conflicting choice of law clauses are used in standard contract terms, and neither has been the subject of specific negotiation, there is no choice of law.[232] This solution usefully borrows from the substantive law knockout approach but is consistent with private international law objectives: giving effect to party autonomy where it is real and certain and not giving effect to it where it is not there.[233] To say, as Article 6(1)(b) does, that the parties in choosing the law of state *X* in one of their standard forms and choosing the CISG in the other have agreed on the CISG (because the substantive law solution of state *X* and the CISG is the last shot rule) is to give effect to a choice of law that is at best hypothetical, at worst illusory.

4. Conclusion

The suitability of the Hague Principles' mechanism for determining whether the parties have agreed on a choice of law is questionable. Article 6(1)(a) may require recourse to provisions of the CISG which it does not contain and which the PICC may not contain because of horizontal or vertical *dépeçage*. It also causes the CISG and, possibly, the PICC to be applied in ways that they may not intend. Although the exception contained in Article 6(2) is not designed for these problems, it may be a remedy. The exception would allow for the law of the state, where the party seeking to impugn the choice of law clause is established, to apply to the question of whether the parties have agreed on a choice of the CISG (Article 6(1)(a)). The law of the party's establishment could apply if the CISG does not intend to apply to that question or where it would be impossible to resolve the question under the CISG because
215 it involves issues of material validity. Article 6(1)(b) of the Hague Principles is a novel but unsuitable mechanism for determining the purportedly chosen law where parties exchange standard contract terms that contain conflicting choice of law clauses. It causes provisions of the PICC and the CISG, designed to save the parties' core agreement despite some irreconcilable terms, to be applied to the isolated problem of conflicting choice of law clauses where there is no agreement to save. In the case of the CISG, Article 6(1)(b) requires recourse to a provision of the CISG that is itself unsettled and uncertain. A more principled solution may be Hook's modal, knockout choice of law rule: where standard terms contain conflicting choice of law clauses, there is no choice of law agreement.

F. Conclusions and Outlook

Where the Hague Principles on Choice of Law in International Contracts apply, parties can choose nonstate rules of law, rather than state law, to govern their contract regardless of whether they litigate or arbitrate. This Article has investigated the Hague Principles' relationship with the PICC and with the CISG

231 Hook, *The Concept of Modal Choice of Law Rules, supra* note 55, at 211.
232 Hook, THE CHoICE oF LAw CoNTRACT, *supra* note 55, at 171.
233 *See* Lando, *supra* note 54, at 308–09.

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as sets of rules of law that parties can choose. The Hague Principles—as soft private international law rules—differ in nature, origin, content, and structure from the PICC and the CISG. Consequently, the Hague Principles' relationship with each of them gives rise to normative ambiguities and may lead to undesirable and unintended results on application. What follows are the Article's key conclusions in support of this claim. These should be the subject of further reflection in the explanatory document which the Hague Conference, uNIDRoIT, and UNCITRAL are developing on the interaction between their respective international contract law instruments.[234]

- The Hague Principles do not foreclose the possibility of parties opting in to the Hague Principles or choosing soft private international law rules via Article 3, whether they be those articles of the Hague Principles which a forum state has chosen not to adopt or other soft private international law rules. If parties can opt into the Hague Principles or choose other soft private international law rules, they have no normative force over the
216 rules of law that they "allow" parties to choose. It is unclear how the Hague Principles, as soft law, can empower, direct, or control the application of the PICC which is also soft law. These issues are resolved where a state adopts the Hague Principles as the forum's private international law rules, except where a state adopts the Hague Principles only in part, but adopts Article 3.
- Empowering parties to choose the rules of an international convention gives rise to novel issues that do not necessarily fall away where a state adopts the Hague Principles as the forum's private international law rules. No choice of law rules before the Hague Principles have allowed parties to choose an international convention outside its normal scope of application. Whether the CISG retains its character as a convention when chosen is unclear. It is therefore uncertain whether the CISG is normatively subordinate (as soft law) or superior (as conventional law) to the Hague Principles (which are hard but not conventional law when the forum adopts them). That the CISG may be normatively superior is less problematic if the CISG is read as encouraging a choice of its rules where it would not otherwise apply. UNCITRAL's recent endorsement of the Hague Principles supports that reading. The Hague Principles eliminate many concerns, which centered around mandatory laws, that motivated a resistance at the time of the CISG's drafting to a choice of the CISG outside its normal scope of application. But they do not remedy all of them, unless the Hague Principles are read narrowly. The narrow reading, supported in this Article, would prevent a choice of the CISG in contracts

234 Permanent Bureau, Hague Conference on Private Int'l Law, *The Development of a Guide to Uniform Legal Instruments in the Area of International Commercial Contracts (with a Focus on Sales)*, Prel. Doc. No. 6, HCCH.NET *passim* (Dec. 2017), https://www.hcch.net/en/governance/council-on-general-affairs; Rep. of the United Nations Comm'n on Int'l Trade Law on the Work of Its, Fiftieth Session ¶¶ 333–35, U.N. Doc. A/72/17 (2017); Secretariat, Int'l Inst. for the Unification of Private Law (UNIDROIT), Item No. 9 on the Agenda: Preparation of a Guidance Document on Existing Texts in the Area of International Sales Law in Cooperation with UNCITRAL and the Hague Conference on Private Int'l Law, Governing Council, 96th session UNIDROIT Doc. 2017 C.D. (96) 8, *passim* (Apr. 2017), https://www.unidroit. org/meetings/governing-council/2161-96th-session-rome-10-12-may-2017.

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outside the CISG's substantive scope but allow a choice where the CISG does not form part of the law of a contracting state.

- The Hague Principles impose no limitation on the use of horizontal *dépeçage* (Article 2(2)). Because there is no law that controls the way parties choose to divide their contract, they can influence not only *which* law governs their contract but also the *content* of that law. This is undesirable as a matter of principle.
- The risks of horizontal *dépeçage* are just as acute when applied to rules of law, because it may facilitate results that the rules of law do not intend. One result is the exclusion of one or more of the PICC's mandatory norms without which the PICC do not intend to apply.
- Determining the question of whether the parties agreed on a choice of law (Article 6 of the Hague Principles) by the law purportedly chosen may not be suitable for all sets of rules of

217 law. The CISG does not contain provisions on material validity, because it does not intend to apply to those issues. The CISG also may not intend its provisions on the formation of sales contracts to be applied to choice of law agreements, which are not sales contracts. While the Article 6(2) exception is not designed for these problems, it may be suitable as a workaround. Under Article 6(2), the law of the state where the party seeking to impugn the choice of law clause is established applies to the question of whether the parties have agreed on a choice of the CISG.

- The Hague Principles' solution to conflicting choice of law clauses in standard terms treats choice of law agreements as indistinguishable from ordinary contractual clauses. Although pragmatically enticing, one should be cautious about using substantive law solutions to resolve private international law problems. This is all the more so where the objectives of one do not correspond with the other. The solution loses even its practical appeal where the CISG is purportedly chosen. The CISG does not contain a specific provision addressing the battle of forms. There is no consensus on whether Article 19 (which case law and the literature suggest should govern the issue) provides for a last shot rule or a knockout rule. Even if it were clear that Article 19 provides for a last shot rule, the reasoning needed to apply it to conflicting choice of law clauses is strained. A more principled solution than Article 6(1)(b) may be Hook's modal choice of law rule: conflicting choice of law clauses in standard contract terms would be systematically "knocked out."