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APPLICABLE LAW PROVISIONS

IN INTERNATIONAL UNIFORM COMMERCIAL LAW CONVENTIONS

by

PAOLO EMILIO CONCI

(Under the direction of Professor Gabriel Wilner)

ABSTRACT

The development of international trade requires predictability and uniformity of the applicable legal framework. Such requirements can be satisfied by means of international uniform commercial law conventions, which try to set forth coherent and uniform bodies of substantial rules. A key role is also played by private international law, an instrument operating at a different level but often included in the uniform conventions themselves. This paper analyzes the relationship between international uniform commercial law conventions and private international law to investigate how it has developed over the last seventy years, and suggests a new approach to international commercial transactions in terms of coordination rather than alternativeness of the two different instruments.

INDEX WORDS: Private International Law, Applicable Law, Conflict of Laws, Uniform Law, Commercial Law, International Carriage of Goods, International Sale of Goods, International Leasing, International Factoring, International Assignment of Receivables.

APPLICABLE LAW PROVISIONS

IN INTERNATIONAL UNIFORM COMMERCIAL LAW CONVENTIONS

by

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JD, School of Law, University of Bologna, Italy, 1998

A Thesis Submitted to the Graduate Faculty of the University of Georgia in Partial Fulfilment of the Requirements for the Degree

MASTER OF LAWS

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2007

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IN INTERNATIONAL UNIFORM COMMERCIAL LAW CONVENTIONS

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August 2007

DEDICATION

My work is dedicated to my father, to my mother, to my brother, without whom everything would have no sense.

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TABLE OF CONTENTS

Page

ACKNOWLEDGEMENTS v

CHAPTER

1. INTRODUCTION 1

1.1. Historical Remarks 1

1.2. Private International Law 3

1.3. Uniform Commercial Law Conventions and Private International Law 4

1.4. Purpose and Structure of the Present Paper 7

2. CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR (THE WARSAW CONVENTION), 1929 10

2.1. Historical Remarks 10

2.2. Scope of Application 12

2.3. The Convention as the Only Applicable Law 13

2.4. Applicable Law Provisions 14

2.5. Private International Law and Gap-Filling 20

2.6. Warsaw Convention and Forum Shopping 22

2.7. Conclusion 23

3. UNITED NATIONS CONVENTIONS ON THE CARRIAGE OF GOODS BY SEA (HAMBURG RULES), 1978 24

3.1. Introduction 24

3.2. Historical Remarks 24

3.3. Legal Effect of the Rules: from The Hague to Visby (from The Vita Food Products Case to The Morviken Case 25

3.4. The Hamburg Rules 28

3.5. Scope of Application of the Hamburg Rules 29

3.6. The Hamburg Rules as the Only Applicable Law 30

3.7. Applicable Law Provisions 31

3.8. Carriage of Goods by Sea and Private International Law 33

3.9. Conclusion 35

4. CONVENTION ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD (CONVENTION DE MERCHANDISES PER ROUTE - CMR), 1956 36

4.1. Historical Remarks 36

4.2. Scope of Application 36

4.3. Legal Effect of the CMR 37

4.4. Applicable Law Provisions in the CMR 39

4.5. Gaps in the CMR 43

4.6. Conclusion 46

5. UNIFORM RULES CONCERNING THE CONTRACT FOR INTERNATIONAL CARRIAGE OF GOODS BY RAIL (CONVENTION INTERNATIONALE DE MERCHANDISE - CIM), 1980 47

5.1. Historical Remarks 47

5.2. Scope of Application.....48

5.3. Railway's Liability Regime.....49

5.4. CIM as a Mandatory Law.....50

5.5. The Gap-Filling Rule: "National Law" Defined.....51

5.6. Specific Applicable Law Provisions.....52

5.7. Conclusion.....54

6. UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), 1980.....55

6.1. Historical Remarks.....55

6.2. Scope of Application.....56

6.3. Party Autonomy (Article 6).....58

6.4. Applicable Law Provisions.....61

6.5. Gap Filling under the CISG.....67

6.6. Conclusion.....71

7. UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING AND UNIDROIT CONVENTION ON INTERNATIONAL FACTORING (OTTAWA CONVENTIONS), 1988.....72

7.1. Introduction.....72

7.2. Ottawa Conventions' Scope of Application.....73

7.3. Party Autonomy.....77

7.4. Private International Law and Gap-Filling.....78

7.5. Applicable Law Provisions.....80

7.6. Provisions Implying a Recourse to the Applicable Law.....81

7.7. Conclusion 83

8. UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, 2001 86

8.1. Introduction.....86

8.2. Scope of Application.....88

8.3. Party Autonomy.....89

8.4. Convention and Gap-Filling 89

8.5. A Specific Conflict Rule: Article 22 on "Competing Rights".....91

8.6. The Autonomous Conflict-of-Law Rules 92

8.7. Conclusion 96

9. CONCLUSIONS.....98

BIBLIOGRAPHY.....103

CHAPTER 1

INTRODUCTION

1.1 Historical Remarks

The statalization of the fountains of law, started in Europe in the nineteenth century through the enactment of national codes and statutes, caused the differentiation of private law on the basis of national states.[1] This evolution in the production of law was, on the other hand, in contrast with the international character of trade, which already covered areas larger than national borders and would have further developed in the future. There is no doubt that the nationality of private law - and especially of commercial law - constituted (and still constitutes) a serious obstacle for economic relationships involving persons and enterprises of different countries and therefore subject to different (and often conflicting) jurisdictions.[2] In fact, the flow of international trade is strictly connected with the need for certainty and predictability of applicable law: merchants, businessmen and professional carriers[3] need to organize in advance their economic and financial activities and thus want to previously know how risks, obligations

[1] Since the Middle Age, merchants could overcome local laws and regulations by means of the so called *lex mercatoria*, a body of rules created by the same merchants and their commercial courts and recognized throughout Europe. For a brief historic review, *see* FRANCO FERRARI, VENDITA INTERNAZIONALE DI BENI MOBILI 2 (1994).

[2] For this historic perspective *see* for instance FRANCESCO GALGANO, ATLANTE DI DIRITTO PRIVATO COMPARATO at 211 (1999); FRANCO FERRARI, LE CONVENZIONI DI DIRITTO DEL COMMERCIO INTERNAZIONALE XII (2002).

[3] For an extensive analysis of the relationship between multi-state commerce and need for predictability, with specific reference to international carriage of goods, *see* ANTONIO MALINTOPPI, DIRITTO UNIFORME E DIRITTO INTERNAZIONALE PRIVATO IN TEMA DI TRASPORTO 11-14 (1955).

and rights are allocated between the parties to an international transaction.[4] Such issues are clearly jeopardized by the plurality of national laws, while – as recognized by legal writers[5] and drafters of international conventions[6] – are promoted by the unification of the various rules governing transnational commerce.

It is then not surprising that, in order to deal with the diversity of national laws, the international community has long made efforts on the way to unify commercial law. Since the end of the nineteenth century, international organizations have drafted and adopted conventions containing uniform provisions in specific areas of trade, to be ratified by single states and received into their national legislations.[7] Can this be enough? If it is true that uniform commercial law conventions can overcome legal problems deriving from a conflict of different domestic rules (or at least reduce their impact) and promote certainty, predictability and uniformity in the international trade, it is on the other hand also true that they are not the ultimate answer.

Uniform commercial law conventions aim at regulating, in their relevant specific matters, the largest possible array of transactions, since it is believed that transnational legal problems can be better faced on an international level.[8] On the other hand, international conventions do not cover all legal issues possibly arising in the course of an international transaction. Several

---

[4] A brief example may give an idea of problems arising out from a multi-jurisdiction transaction. Part A resident in state X sends goods to part B resident in state Y through a carrier C resident in state Z; if a claim related to such fact pattern arises (non-conformity of the goods, delay in delivery or payment, defective carriage *etc.*), a national court may have to decide among three different and conflicting national laws in order to establish which is the law applicable to the dispute.

[5] *See* for a similar statement FRANCO FERRARI, INTERNATIONAL SALE OF GOODS 1 (1999).

[6] *See* for instance the Preamble of the UNIDROIT Convention on International Factoring ("*The States Parties to this Convention […], recognizing therefore the importance of adopting uniform rules to provide a legal framework that will facilitate international factoring […]*") and the UNIDROIT Convention on International Leasing ("*The States Parties to this Convention, recognizing the importance of removing certain legal impediments to the international financial leasing […], recognizing therefore the desiderability of formulating certain uniform rules relating primarily to civil and commercial law aspects of international financial leasing […]*").

[7] *See* FRANCO FERRARI, *supra* note 5, at 3.

[8] *See id*. at 4.

questions, relevant for the otherwise governed transactions, are often (explicitly or implicitly) excluded from the conventions' scope of application or simply not considered at all. This is not surprising if one considers that international conventions, in order to have a significant impact on international trade, are often the result of compromises among conflicting and sometimes opposite legal systems.[9] Thus, beside the basic uniform substantive rules established by international conventions, there are other legal issues that have to be dealt with by means of substantive rules external to the same conventions.[10] The instrument to determine such rules is traditionally private international law.[11]

1.2. Private International Law

Private international law [12] is actually an older way to deal with conflict of laws problems.[13] An history of the development of private international law would be here impossible[14] and also not necessary for the purposes of the present paper, which basically is to investigate the relationship between uniform commercial law conventions and private

[9] A typical example in this sense is offered by the United Nations Convention on Contracts for the International Sale of Goods, which under Article 4 expressly states that "*[…] it is not concerned with […] the effect which the contract* [of sale] *may have on the property in the goods sold.*". The reason of this exclusion is that it was not possible to find a common solution on the issue of the transfer of property, which is governed by completely different rules in the main national legal systems.

[10] *See* expressly ANTONIO MALINTOPPI, *supra* note 3, at 31.

[11] *See id.*

[12] "Private international law" is the traditional term used in civil law systems to indicate what in common law jurisdictions is known as "conflict of laws". More precisely, it refers to one of the three main areas covered by "conflict of laws": the "choice of law" (the other two areas are "jurisdiction" and "recognition and enforcement of judgments"). In this paper, we will use both terms to indicate those (mainly) national rules which determine the applicable law between two or more relevant jurisdictions involved in a specified transaction.

[13] *See* Arthur T. Von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347, 349-350 (1974), according to whom "the discipline of choice of law is concerned with the identification and systematic handling of situations in which the persons concerned and the interests and policies at stake have significant connections with more than one community".

[14] The origins of what has been later called "private international law" can be found in the "*theory of statutes*" by the Italian jurist and professor of law *Bartolo da Sassoferrato* in the XIV century. Basically, Bartolo established a set of rules governing the frequent conflicts among the numerous different statutes of the Italian municipalities in the

international law itself. It is here sufficient to make clear that when a conflict between two (or more) national laws arises (or, as sometimes the doctrine says, a case presents an element of "extraneousness") and no uniform law is available (because in the subject matter there is no uniform law at all or because an existing uniform law is in the specific case not applicable), the rules of private international law are applied to determine which national substantive law is to govern the case at hand.[15]

If private international law provides for a solution in case of conflict of law issues, it is on the other hand easy to understand that such solution may not be always a satisfactory one for the purposes of certainty and uniformity. The substantive law determined by private international law is going to be a domestic law (the national law of one of the parties, often to the displeasure of the other party) and not a uniform law; moreover, the conflict of law rules may strongly differ according to the *forum* deciding the dispute at hand and therefore are likely to lead to very different outcomes.[16] Of course, this seems to be opposite to the mentioned need for certainty, predictability and uniformity in international trade.

1.3. Uniform Commercial Law Conventions and Private International Law

Even though uniform commercial law conventions are probably the best way to promote the flow of international trade, we have also seen that the traditional and general instrument of private international law may be necessary to deal with legal issues connected to an international

---

Middle Ages. Thanks to the authority of Bartolo and to their large success, the rules of the theory of statutes continued playing a major role up to the end of the XVIII century.

[15] The rules of private international law to be applied to a case are those in force in the state of the court seized with the case (*i.e.* the "*forum*"). Such rules are usually of national origin but they may also derive from international conventions.

[16] In order to deal with the differences of national conflict of laws rules, international conventions of uniform private international law have been drafted. Famous examples are the *1955 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* or the *1980 Rome Convention on the Law Applicable to Contractual Obligations.*

commercial transaction but not governed by uniform provisions.[17] Thus, a lawyer or a court dealing for instance with an international sale of goods are forced to consider not only the existing international uniform law (specifically in this case, the *United Nations Conventions on Contracts for the International Sale of Goods*) but also the conflict of law rules leading to one or more domestic laws.

It should be quite manifest, at this point, the necessary co-existence of these two different tools in transnational business. What we think needs to be investigated, however, is how the relationship between private international law and international conventions has developed and could evolve to better serve the fundamental need for uniformity.[18] Just to anticipate some questions: do international conventions consider private international law or just ignore it? Do they recognize any role for it? Do they provide private international law as a general or specific instrument and, if yes, which techniques are used? What is the evolution in the connection between international uniform laws and private international law?

The above and other related questions will find an answer in this research. Nevertheless, it is important to point out from the beginning that the present paper is not a research on private international law and that therefore such instrument is studied only to the extent necessary to analyze the relationship with uniform laws. To that purpose, it is necessary to explain here some definitions referring to the role of private international law respect to uniform substantive laws that will be largely used in this paper:[19]

a) *supplementary function (external relevance)*: uniform laws are not exhaustive, therefore when they do not cover specific matters and do not provide for any specific rule (as in

[17] *See* ANTONIO MALINTOPPI, *supra* note 3, at 23, that emphasizes the connection between uniform substantive conventions and private international law.

[18] The need to study uniform conventions together with their impact on private international law was emphasized many years ago by *id*., at 27.

case of *external gaps*), private international law is the traditional way to determine the non-uniform substantive law to be applied to fill in the gaps;

b) s*ubstitutive function (external relevance)*: when uniform laws allow parties to the governed transaction to exclude the uniform rules or to derogate from them, private international law is the way to determine the national law (or other rules) substituting the uniform discipline;[20]

c) *subsidiary function (internal relevance)*: sometimes uniform laws do cover or at least include some matters but do not provide for any discipline (as in case of *internal gaps*); in these cases, if no internal solution can be found in conformity with the principles on which the uniform law is based, private international law remains the way to fill in the gap (as expressly stated, for example, by the *United Nations Convention on Contracts for the International Sale of Goods* and by the *Unidroit Ottawa Conventions of 1988*).

We will see that uniform conventions, even though with very different approaches, always contain provisions dealing with conflict of laws. In some cases, the non-uniform law to be applied is expressly determined (*direct application*). In other cases, reference is made only to conflict of laws rules and the national law to be applied has to be determined according to those rules (*indirect provisions*). In the course of the present paper, we will refer to both types of provisions as to "applicable law provisions" and they will be the main subject of our analysis.

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[19] *See* FRANCO FERRARI, IL FACTORING INTERNAZIONALE 13-14 (1999).

[20] This is true not only when parties do not state which is the national law to be applied but also when they explicitly or implicitly refer to a particular national law. Party autonomy is in fact one of the connecting factors (probably the main factor, as shown for example by the above cited *1980 Rome Convention on the Law Applicable to Contractual Obligations*) of private international law and therefore a provision recognizing it to determine the national substantive law is a conflict of laws provisions. There are states, on the contrary, that do not recognize party

1.4. Purpose and Structure of the Present Paper

The present research paper intends to investigate the relationship between some of the most important uniform commercial law conventions and private international law. More precisely, it wants to analyze how the particular instrument of the uniform conventions has used the general instrument of the conflict of laws rules.

In order to properly investigate the matter, this paper will analyze several commercial law conventions that cover formally the last seventy years, but are sometimes based on precedent body of uniform rules going back to the second half oh the nineteen century. The conventions analyzed in this paper have been chosen also because, thanks to their significant impact on the international trade (some of them are concerned with the international carriage of goods - by sea, by air, by road and by rail – , others with the most important "mercantile contracts"[21] like sale of goods, factoring, leasing and assignment of receivables), let us understand the evolution in the unification of substantive commercial law and in the techniques for the use of private international law.

For a better understanding, the conventions chosen in this paper can be virtually divided into two groups. The first group (Chapters II to V) includes four conventions regulating international carriage of goods, which has been always a typical multi-jurisdiction transaction. Such conventions cover a quite long period of time, since 1929 to 1980, but their purpose and structure is very similar.[22] They establish a uniform regime for (*i*) the carrier's monetary liability, and (*ii*) the requisites for the carriage documents. Thus, the carriage of goods

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autonomy as a connecting factor. Under the Brazilian private international law, for instance, a choice of law by the parties has no legal effect.

[21] *See* FRANCO FERRARI, *supra* note 5, at 2.

[22] The common origin, structure and purpose of the carriage of goods uniform conventions and their attitude to be analyzed as an autonomous system are expressly recognized, for instance, by ANGELO PESCE, IL TRASPORTO INTERNAZIONALE DI MERCI 16 (1995).

conventions are all characterized by a common element: they have been given a mandatory force and no room is left to party autonomy to alter the uniform discipline, with particular respect to the possibility of limiting the carrier's liability, due to the economic function of the international carriage that can be considered of "public interest".[23] Nevertheless, these conventions do contain some particular provisions that make applicable a different domestic law. We will see the problems deriving from such applicable law provisions and how the room for non-uniform laws has changed from one convention to another.

The second group of conventions (Chapters VI to VIII) considers a more limited period of time, since 1980 to 2001. It focuses on uniform laws regarding some very widespread international mercantile contracts: sale of goods, leasing, factoring and assignment of receivables. These conventions are particularly suitable to show a different and new approach to private international law, because they not only broadly recognize party autonomy and the possibility to derogate (partially or even totally) from the uniform disciplines but also expressly use conflict of laws rules as particular or general way to govern certain contractual issues.

Every convention in this paper has been analyzed according to a common scheme. After a brief historical introduction, attention is paid to the scope of application and to the provisions dealing with the mandatory or non-mandatory character of the law. The core of the analysis is in the paragraphs dedicated to provisions dealing with applicable law issues and the role of private international law. Even though sometimes the analysis will focus on specific issues governed (or not governed) by the conventions, it is to be borne in mind that – like it is not a work on private international law – this is not a paper on commercial law conventions. The subject matter of this paper is only the relationship between conventions and private international law and the analysis

[23] For a clear statement about the economical function of the carrier in the international trade and the consequent reason for uniformly limiting his monetary responsibility *see id.*, at 10, 14.

is aimed only at evaluating the evolution of such a relationship. Our final purpose is to suggest an answer to the key question: which is the type of relationship between private international law and international conventions that can serve uniformity in international trade at best?

CHAPTER 2

CONVENTION FOR THE UNIFICATION OF CERTAIN RULES RELATING TO INTERNATIONAL CARRIAGE BY AIR (THE WARSAW CONVENTION), 1929

2.1. Historical Remarks

The *Convention for the Unification of Certain Rules relating to International Carriage by Air* (commonly known as Warsaw Convention) was born to give an answer to the difficulties as to conflict of laws emerging in the 1920's, the era in which carriage of goods by air was growing in importance.[27] Since even the adoption of the standard conditions of carriage by air prepared by the International Air Traffic Association (IATA)[28] proved to be not sufficient to avoid significant differences in interpretation and application in different countries, the Warsaw Convention was signed in the year 1929. The underlying main purpose was to protect the then emerging air transportation industry from massive claims. This aim was dealt with by regulating two main issues: (i) the limitation of the international carrier's liability in case of damages to passengers and goods, and (ii) the setting of a uniform standard for the carriage's documentation.[29]

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[27] DAVID A. GLASS & CHRIS CASHMORE, INTRODUCTION TO THE LAW OF CARRIAGE OF GOODS 205 (1989).
[28] The International Air Transport Association is a private agency of international carriers.
[29] *See* Katherine A. Staton, *The Warsaw Convention's Facelift: Will it Meet the Needs of 21st Century Air Travel?*, 62 J. AIR L. & COM. 1083, 1085 (1997) according to whom two primary goals were "to obtain a certain degree of uniformity as to documentation, tickets, airways bills and liability rules which govern international aviation travel, and to limit the potential liability of the young air carrier industry in accidents that involve personal injury or death to passengers in exchange for limiting the carrier's defenses".

According to the Convention, the original carrier's damage liability was quite low in the amount, and this point was the main question under discussion and critics. Thus, after the year 1929 the Warsaw Convention has been amended and modified several times. The Hague Protocol in 1955, for example, doubled the carrier's liability for death or injury to passengers and the Convention was made applicable to the carrier's servants and agents.

In the year 1961, the Guadalajara Convention resolved another *vexata quaestio*: the definition of the "actual carrier". From the original text it was not clear whether the Convention was applicable both to the contracting carriers and to the actual carrier (meaning the one which "performs transportation on behalf or in place of the contracting carrier").[30] .Neither the original Warsaw Convention nor the Hague Protocol had dealt with the problem of the carriage completely subcontracted to another carrier or partially subcontracted without the agreement of the customer. It was then suggested that this "actual carriers" did not enjoy the protection of the Convention.[31] The Guadalajara Convention made clear that both the contracting carrier and the actual carrier have the same rights and are liable under the Convention, so that the plaintiff can sue either the former or the latter for damages. Accordingly, the Guadalajara Convention added a fifth *forum* to the four ones already established by Article 28 of the Warsaw Convention: the place where the actual carrier is ordinarily resident or has its principal place of business.

Even after all the above mentioned modifications and additions to the original text, the United States still considered the carrier's liability limit as too low and actually threatened to denounce (*i.e*. to withdraw from) the original Warsaw Convention. Through the efforts of IATA, an agreement was reached in the year 1966 (the Montreal Agreement), which set forth a higher

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[30] LAWRENCE B. GOLDHIRSCH, THE WARSAW CONVENTION ANNOTATED: A LEGAL HANDBOOK 7 (2000).
[31] GLASS & CASHMORE, *supra* note 27, at 206.
[33] *See* Article 1(1).

limit of liability (equivalent to 75.000 US dollars) in case of flights to, from or through the United States and made the recovery of damages more practicable.

Other modifications, directed to raise the monetary limitations, were made later by the Guatemala Protocol of 1971 and the Montreal Protocols of 1975, the last of which came into force in the year 1999.

The Warsaw Convention is currently administered by the International Civil Aviation Organization (ICAO), a specialized agency of the United Nations located in Montreal, Canada.

2.2. Scope of Application

The Warsaw Convention applies to international carriage of goods, persons or luggage performed by aircraft.[33] This is the carriage "in which the place of departure and the place of destination, as agreed in the contract, are within the territory of two different states, both of which are parties to the convention, whether or not there is an agreed stopping place in the territory of a third state",[34] or in which these places are within the territory of a single contracting State if there is an agreed stopping place in another State, whether contracting or whether not contracting.[35] Therefore, according to the Warsaw Convention, the contract of carriage is international when (i) at least two different states are involved in the transportation, and (ii) this is agreed upon by the parties in the contract. The nationality of the parties to the contract of carriage does not play here any role. In order for the Convention to be applicable, moreover, another element is necessary: (iii) at least one of the states involved in the carriage must be a contracting state.

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[34] JASPER RIDLEY, THE LAW OF THE CARRIAGE OF GOODS BY LAND, SEA AND AIR 41 (4th ed. 1975).
[35] *See* Article 1(2).

The Warsaw Convention defines itself as the only applicable law on international transportation by air as defined by Article 1(2). The definition of the Convention's – of any convention's – scope of application constitutes "a special conflict rule, prevailing over the general conflict rules of [any] national law which would otherwise apply".[36] Thus, when carriage is "international" in the sense of the Warsaw Convention, no other law may be applied by any *forum* wherever located, because the national conflict of laws rules are rendered irrelevant.[37] In sum, the Warsaw uniform provisions "constitute the mandatory law of the contract",[38] and any parties' agreement to the contrary is irrelevant.[39]

2.3. The Convention as the Only Applicable Law

The conclusion discussed above is consistent with the main purpose of the Warsaw Convention, that – as can be said, *mutatis mutandis*, about every international uniform law – is to create uniformity "with respect to air carriers and to supplant each member nation's domestic laws if they differed from the terms of the Convention".[40] This purpose cannot be frustrated by the parties by altering the regime of liability set forth by the Convention. Accordingly, Article 23, states that "any provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in this Convention *shall be null and void*". Therefore, "the Convention

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[36] Ludovico M. Bentivoglio, *Conflicts Problems in Air Law*, ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS, 69-182, 131 (1966 III), Tome 119.

[37] *See* the English decision in *Grein* v. *Imper. Airways LTD*., under rules "…in effect an international code declaring the rights and liabilities of the parties to contracts of international carriage by air; and when by the appropriate machinery they are given the force of law in the territory of a High Contracting Party they govern (so far as regards the courts of that party) the contractual relations of the parties to the contract of carriage of which (to use language appropriate to the legal system of the United Kingdom) they become statutory terms".

[38] Bentivoglio, *supra* note 36, at 132.

[39] See *Grey* v. *Amer. Airlines*: "…the terms of the convention apply by its own terms and not because the parties have so agreed".

[40] GOLDHIRSCH, *supra* note 30, at 5. *See* also the *Preamble* to the Convention, which declares that the purpose of the Warsaw Convention is to regulate "in a uniform manner the conditions of international transportation by air in respect of the documents used for such transportation and of the liability of the carrier".

itself becomes the law of the contract"[41] in a mandatory sense and, as stated by Article 32, "any clause contained in the contract and all special agreements between the parties purporting to infringe the rules laid down by the Convention, whether by deciding the law to be applied or by altering the rules as to jurisdiction, *shall be null and void*".

The scheme of the Warsaw Convention is actually clear: the uniform law establishes a general presumption of liability on the part of the carrier and a limitation of such liability to a maximum amount of money. The carrier may not alter this set of rules[42] either by excluding or lowering his liability (Article 23), or by choosing a different law or jurisdiction (Article 32). All questions regarding the carrier's liability are faced by the Convention: the events in which the liability arises, the events in which this liability becomes without limitation, the vicarious liability and the role of contributory negligence. No room seems to be left for private international law.

2.4. Applicable Law Provisions

We have seen that the parties (and especially the carrier) to an international contract of carriage by air may not choose any law different from the Convention or anyway exclude, change or limit the scope of the uniform discipline. On the other hand, although it does not contain any general rules on conflicts of laws,[43] the Convention sometimes "adopts a special conflicts rule"[44] regarding some specific questions.[45] More specifically, there are at least five

[41] Bentivoglio, *supra* note 36, at 127.
[42] A good list of examples of specific contractual provisions, both valid and invalid under the Convention, is offered by GOLDHIRSCH, *supra* note 30, at 139-142.
[43] *See* O. N. Sadikov, *Conflicts of Law in International Transport Law*, ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS, 189, 242 (1985 I), Tome 190, according to whom it was believed, at the time of the Diplomatic Conference in 1929, that references to national law would "undermine the role of unified rules on carriage included in the convention".
[44] Bentivoglio, *supra* note 36, at 128.
[45] Sadikov, *supra* note 43, at 241-242, defines this technique as "fragmental".

questions in the Warsaw Convention that are left to the national law of the *forum* (*lex fori* principle):[46] contributory negligence (Article 21); periodical payments of damages (Article 22, paragraph 1); fault equivalent to willful misconduct (Article 25, paragraph 1); procedural questions (Article 28, paragraph 2); method of calculating the period of limitation (Article 29, paragraph 2).

2.4.1. Article 21: Contributory Negligence

A particularly relevant conflict rule is provided for by Article 21, according to which "if the carrier proves that the damage was caused by or contributed to by the negligence of the injured person the Court may, *in accordance with the provisions of its own law*, exonerate the carrier wholly or partly from his liability".

Generally, this Article permits the carrier to reduce its liability because of the contributory negligence of the injured person. Thus, in case of damage, loss or delay in delivery of goods (but also of personal injury and death of passengers), the carrier's liability may be limited or excluded, provided that the carrier is not guilty of willful misconduct under Article 25.[47] What is relevant for our present analysis is the specific reference to the "provisions of its own law", meaning the law of the *forum*, in order to determine the extent of the contributory negligence. The Warsaw Convention merely states the general rule that contributory negligence of the plaintiff may limit or exclude carrier's liability, but leaves to national laws to determine in fact if and to what extent such limitation or exclusion will occur. The relevant law is the law of the forum, namely the law of the court seized of the suit. Therefore, as far as contributory

[46] It is believed that the reference to the law of the *forum* is generally limited to the substantive law and does not include the conflict of laws rules of the *forum*, even though some authors suggest that such question should be decided according to the text of the provisions and the circumstances. *See* Bentivoglio, *supra* note 12, at 128. For a careful analysis of the question with specific reference to the carriage conventions *see* ANTONIO MALINTOPPI, *supra* note 3, at 95, 202.
[47] GOLDHIRSCH, *supra* note 30, at 117.

negligence is concerned, "the court hearing a Warsaw case must apply its own law"[48] to decide *how* article 21 will be applied. Some authors, however, believe that the reference to the *lex fori* is comprehensive of the conflict of laws rules as well; if it were, the applicable law would be not necessarily the substantive law of the forum, but the law determined in accordance with conflict rules of the forum.[49]

A question that may arise in federal countries, such as the Unites States, is what law is to be applied: the national law or the law of a particular state? The need of uniformity and the necessity to avoid forum shopping support the conclusion that national law (federal law) is meant.[50] It is nevertheless to be born in mind that Article 21 does not mean an absolute right for the court to follow its own local law on the rules of contributory negligence when it contrasts to the rules of the Warsaw Convention. For instance, it would be against the spirit and the purpose of the Convention to completely exclude the carrier's liability; particularly, it would be contrary to the express provision of Article 23, according to which is prohibited to reduce the carrier's liability under the Convention.[51] For the same reason it is forbidden to modify by contract Article 21 "to absolve the carrier from all liability for the contributory negligence of the injured person"[52]; such an agreement would be violative of Article 23, which prohibits any modification of the provisions of the Convention. The carrier must prove the contributory negligence of the person injured; this is valid "even in jurisdictions where the plaintiff must plead and prove his freedom from contributory negligence in order to prevail"[53]. Thus, even if it is true that Article

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[48] *Id*.
[49] HERBERT KRONKE, in MÜNCHENER KOMMENTAR ZUM HANDELSGESETZBUCH 2069 (1997).
[50] GOLDHIRSCH, *supra* note 30, at 118.
[51] *Id*.
[52] *Id*.
[53] *Id*. at 119

21 refers to the forum's rules of contributory negligence, the Convention itself determines the central issue of the burden of proof.

2.4.2. Article 22: Periodical Payments of Damages

The *lex fori* principle is also applicable under Article 22, which determines the limits of carrier's monetary liability, both for passengers and for goods. Pursuant to paragraph 1, "where, in accordance with *the law of the Court to which the case is submitted*, damages may be awarded in the form of periodical payments…". The *lex fori* principle is therefore applicable in order to award the injured person periodical payments. However, such reference to local law is limited to damages to passengers and seems to be not applicable therefore to liability for goods.[54] Paragraph 4 of the same Article 22, then, refers to *lex fori* "for awarding the whole or part of the court costs and other expenses of the litigation incurred by the plaintiff".[55]

2.4.3. Article 25: Fault Equivalent to Willful Misconduct

The *lex fori* principle is taken into account then by Article 25(1). In drawing the discipline of the carrier's liability, this provision states that "the carrier shall not be entitled to avail himself of the provisions of this Convention which exclude or limit his liability, if the damage is caused by his willful misconduct or by such default on his part as, *in accordance with the law of the Court seised of the case*, is considered to be equivalent to willful misconduct". The provisions referred to by Article 25 are in particular Article 20 (carrier relieved from any liability if he proves he took all necessary measures to avoid the damage), Article 21 (carrier permitted to offset a judgment if the claimant was guilty of contributory negligence), Article22 (carrier's obligation to pay a judgment limited to the established values), Article 26 (carrier entitled to timely written notice of damage or delay of registered goods and baggage), and

[54] *See* Article 22(2).
[55] Sadikov, *supra* note 43, at 242.

Article 29 (a two-year statute of limitations applies to all actions not covered by Article 26). What prohibits the carrier from exercising these rights is, primarily in first place, his being guilty of willful misconduct. [56] The drafters of the Warsaw Convention were aware that several legal systems consider also other kinds of subjective conduct as amounting to "willful misconduct" and provide them with the same legal effects.[57] The international legislator has preferred to leave such evaluations to the national systems; thus, the Convention expressly states that the law of the *forum* may be applied to judge the carrier's conduct, which could be considered equivalent to willful misconduct even if it cannot under a different local law.[58]

2.4.4. Article 28: Procedural Questions

Article 28 deals with the jurisdiction issue. Pursuant to this provision, "an action for damages [under the Warsaw Convention] must be brought, at the option of the plaintiff, in the territory of one of the High Contracting Parties, either before the Court having jurisdiction where the carrier is ordinarily resident, or has his principal place of business, or has an establishment by which the contract has been made or before the Court having jurisdiction at the place of destination".

Over the years, two more *fora* have been added: the Guadalajara Convention of 1961 added a *forum* for suits against the actual carrier ("the court having jurisdiction at the place where the actual carrier is ordinarily resident or has its principal place of business"), and the Guatemala Protocol of 1971 added a sixth jurisdiction, namely "the court within the same jurisdiction of a carrier's establishment if the passenger has a domicile or permanent residence in

[56] "Willful misconduct" is defined in the Montreal Protocol No.4 as "an act or omission of the carrier, his servants or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result".
[57] For an analysis of different approaches both in common law and civil law jurisdictions *see* GOLDHIRSCH, *supra* note 30, at 152-154.
[58] This can be particularly relevant in the practice, as a court will have to determine under its own law questions such as whether an act can be considered "willful misconduct", whether there is a causal link between act and damage,

such jurisdiction". Thus, a plaintiff has nowadays the option to bring a suit among six different *forums*.

Of course such a choice is only a choice of *forum* and not a choice of the applicable law. But, under Article 28(2), "questions of procedure shall be governed by *the law of the Court seised of the case*". Thus, by choosing a particular *forum* rather than another equally available, the plaintiff chooses the procedural law of the suit as well. This means, for example, that the local *forum* may determine under its own law such matters as "whether there has been adequate service of papers, whether or not the claimant has properly invoked the subject matter jurisdiction of the court, whether the claimant has legal capacity or whether it will refuse to entertain the suit for other reasons"[59] or the burden of proof. The court could for example dismiss a suit on the grounds of *forum non conveniens*, but in this case it has to find another competent *forum* under Article 28, since Article 32 prohibits the parties from altering "the rules as to jurisdiction".[60] A question could arise for instance when a federal state is concerned. In this case, the question becomes whether a suit may be brought in any court of the competent country or whether it must be brought in a specific court within that country. The answer in the USA is that "the *forums* (*sic*) listed in Article 28 refer to the national territory of a High Contracting

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the degree of proof required to establish knowledge and the existence and extent of damages. *See* on this topic GOLDHIRSCH, *supra* note 30, at 155.

[59] *Id*. at 181

[60] *See* the case *Milor SRL* v. *British Airways Plc*, reported on Times, February 19, 1996 and analyzed by Indira Mahalingam Carr & Nicholas Grief, *Forum Non Conveniens and the Warsaw Convention*, J.B.L. 1996, Sep, 518-523. In this case, defendants in a suit under the Warsaw Convention involving carrier's liability for stolen goods alleged that, after plaintiff's choice of one of the possible *fora*, the competent court – in this case the High Court of Justice in London – had the discretion to grant a stay on the ground of the doctrine of *forum non conveniens* in favor of a different *forum*. The court ruled that the *forum non conveniens* doctrine was not applicable where the contract of carriage was governed by the Warsaw Convention, which expressly gives the plaintiff a right of option among several equally and available competent jurisdictions. Moreover, the court expressed the view that the Warsaw Convention creates a self-contained code of jurisdiction, the intention being to harmonize different national views on jurisdiction and it is implicit that the court of the chosen forum will remain seized of the matter and there is no scope for the imposition of a venue which conflicts with the plaintiff's choice. A different ruling would also favor forum shopping.

Party and not to political subdivisions within a particular High Contracting Party".[61] It therefore logically follows that the relevant procedural law is the federal law and not the law of the state where the suit is brought.

2.4.5. Article 29: Method of Calculating the Period of Limitation

The last specific applicable law provision to be addressed is Article 29, which sets forth a two-year statute of limitations period in order to bring a suit for damages under the Convention, either in contract or in tort.[62] According to paragraph (2), "the method of calculating the period of limitation shall be determined by *the law of the Court seised of the case*". Thus, local law will determine questions such as when an action can be considered "brought" in order to toll the statute of limitations.[63]

2.5. Private International Law and Gap-Filling

The above analysis should prove that even a uniform law convention considering itself as the only applicable discipline on a specific matter, as the Warsaw Convention, maintain a role for the private international law. This role is actually quite limited, because the Convention itself states not only the cases when a different law can be taken into account (internal gaps) but also directly states which is the specific national law to be applied. Such use of the private international law is the subsidiary function of the private international law.

Is the subsidiary function the only one for the private international law in the case of the Warsaw Convention? Of course there are issues related to international carriage by air that are not covered by the Convention. For example, negotiability of the air waybill, persons who have

[61] GOLDHIRSCH, *supra* note 30, at 178; *see* Mertens v. Flying Tiger Lines 9 Avi. 17187, 35 FRD 196 (D.C.N.Y. 1963) 352 F.2d 494 (9th Cir. 1965)
[62] *See* GOLDHIRSCH, *supra* note 30, at 189.
[63] *Id*. at 196.

the right to sue, extent and calculation of recoverable damages,[64] determination of all necessary measures to avoid the damage under Article 20,[65] or questions such as "overbooking, cancellation of the contract of carriage, liability of the passenger vis-à-vis the carrier".[66] All these external gaps are left to the otherwise applicable domestic law. This is the supplementary function of the private international law.

Our analysis could actually stop at this point but it may be interesting to briefly touch the question as to the proper domestic law to be applied. Following the solutions provided for by the Convention as to specific issues, one might think that the *lex fori* would be a good general approach. However, commentators have pointed out that the conflicts rules laid down in the Convention are "of special character" and that the *lex fori* "is applied in private international law as an exception only, for it allows the plaintiff to choose the substantive law and puts him in a privileged position".[67] The most appropriate solution seems to be that national courts should base their decision as to the applicable law on "the general principles of conflict of laws".[68] Therefore, the *forum* will apply its own conflict of laws rules and thus will determine the applicable substantive law. The result could be that "the carriage will be governed to some extent by the Warsaw provisions and, for the rest, by the law referred to by the usual rules of conflicts".[69] Briefly, the first criterion is likely to be the party autonomy.[70] In the absence of any parties' choice, it has been suggested that the law of the carrier (meaning the law of his principal

[64] The local law will therefore determine what kind of damages are recoverable, whether only monetary or also non-pecuniary loss. For an analysis of the US situation, particularly in relation to the Death on the High Seas Act (D.O.H.S.A.), *see* GOLDHIRSCH, *supra* note 30, at 76.
[65] Bentivoglio, *supra* note 36, at 129
[66] Sadikov, *supra* note 43, at 243.
[67] *Id.*
[68] *Id*. at 244.
[69] Bentivoglio, *supra* note 36, at 130.
[70] *Id*. at 134.

place of business) should apply;[71] other criteria are the law of the place where the contract was made (*lex loci contractus*), the law of the place of performance of the contract (*lex loci executionis*) and the law of the flag. A general and recognized need of predictability and uniformity seems to suggest that the law of the carrier should be "granted the governing role" in international carriage by air.[72] However, it is easy to understand how the need for uniformity in the carriage of goods by air is likely to be frustrated either by means of the subsidiary function of the private international law and even more by means of an uncontrolled supplementary function of the different conflict rules available to national courts.

2.6. Warsaw Convention and *Forum Shopping*

As already mentioned at the beginning of the present Chapter, the most violent critic to the Warsaw Convention is the low limit of carrier's liability. This is particularly true as far as personal injuries are concerned. For example, in the 1970's the maximum recoverable sum of money amounted to $20,000 per passenger, whereas some national laws, in particular in the United States, had already recognized much higher sums. The Warsaw Convention's limit seemed particularly inadequate in cases of large suits from plane disasters. The question arose in the *Parish air-crash case,* [73] when a Turkish plane crashed near Paris, causing the death of 330 passengers from five different continents and of the 13-member crew.[74] In order to avoid the unfavorable damage limit of the Warsaw Convention (and the jurisdictional problems, which under Article 28 of the Convention would have precluded a suit in the United States), some plaintiffs decided to shift the suits to a federal court in the United States, recasting the airplane

[71] *Id*. at 137.
[72] *See id.* at 140.
[73] *In Re* Paris Air Crash 339 F. Supp. 732 (D.C. Cal. 1975).

crash as a product liability suit against the American aircraft manufacturer. The suit resulted therefore in a tort action brought against the aircraft manufacturer and not against the carrier. This made the Convention (with its low limit) "not subject to the rules of the Convention".[75]

2.7. Conclusion

The Warsaw Convention is a typical model of international carriage of goods convention. It lays down a uniform standard of liability for the carrier that may not be altered or derogated by the parties: agreements made to modify the rules are "null and void" and automatically replaced by the rules. The application of the uniform law is mandatory, consistently with the purpose to internationally govern the carriage by air.[76] Private international law plays therefore a very limited role in the Warsaw Convention. There is no provision utilizing private international law as a general means to deal with matters related to the field of carriage by air. The Convention contained five provisions in which the substantive law of the *forum* governs specific issues. This use of a direct applicable law provision, as we will see, is the basic starting point for a more developed role of private international law in international substantive law conventions.

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[74] Case's analysis by Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553 (1989).
[75] GOLDHIRSCH, *supra* note 30, at 5.
[76] ANGELO PESCE, *supra* note 22, at 13.

CHAPTER 3

UNITED NATIONS CONVENTIONS ON THE CARRIAGE OF GOODS BY SEA (HAMBURG RULES), 1978

3.1. Introduction

The Hamburg Rules represent the most recent international discipline of the contract of carriage of goods by sea *par excellence*, *i.e*. the ocean bill of lading.[77] However, the history of the international harmonization of the carriage of goods by sea is much more ancient and the two preceding uniform sets of rules still constitute valid and applicable law in certain situations. It seems to be appropriate, therefore, to present a brief analysis of some aspects of such laws: the 1924 Hague Rules and the 1968 Hague/Visby Rules.

3.2. Historical Remarks

The bill of lading is the final result of a very ancient process in the development of contracts for transportation of goods by sea, which goes back to the fourteen century.[78] No surprise, therefore, that the first attempts to lay down an international uniform regime of the bill

[77] The ocean bill of lading has been recognized to have at least three function: it is (i) a document of title of the goods, (ii) a receipt of the cargo, (iii) the evidence of a contract of carriage; a general function is for the bill of lading to constitute a documentation of the contract of carriage. See WILLIAM TETLEY, BILLS OF LADING AND THE CONFLICT OF LAWS IN THE HAMBURG RULES: A CHOICE FOR THE E.E.C.?, at 51 (1994), and S. Braekus, *Choice of Law Problems in International Shipping,* ACADEMIE DE DROIT INTERNATIONAL, RECUEIL DES COURS, 251, 320 (1979 III), Tome 164. The bill of lading must be distinguished from another contract of transportation of goods by sea, the charterparty, a contract by which a person (the charterer) wants the employment of a ship for a voyage or for a specific duration of time.

[78] TETLEY, *supra* note 77, at 50.

of lading (as to form and content), especially in order to limit the risk for the carrier,[79] were made already in the nineteen century, precisely in the year 1864 with the York Rules, periodically revised until 1877, and then in the year 1890 with the York-Antwerp Rules. The uniformity in the carriage of goods by sea, however, was seriously threatened by the fact that the application of such sets of rules was not mandatory. The subsequent bodies of rules (the Hague Rules and the Hague/Visby Rules), on the contrary, were meant to be compulsory (at least to some extent), as their applicability was not connected with the contractual autonomy of the parties.

3.3. Legal Effect of the Rules: from The Hague to Visby (or from *The Vita Food Products Case* to *The Morviken Case*)

The Hague Rules (Brussels Convention for the Unification of Certain Rules Relating to Bills of Lading, 1924) established a "minimum obligation to exercise due diligence to make a ship seaworthy" on the part of the shipowners,[80] a duty of care in carrying the goods during the voyage and a limited liability regime for the carrier. These Rules were mandatory pursuant to Article 3(8) and Article 10.[81] For example, the English enactment of the Rules, the Carriage of Goods by Sea Act (U.K. C.O.G.S.A.) 1924,[82] provided that the Rules "shall have effect" in relation to certain types of contracts for the carriage of goods by sea. However, since a clear statement that the Rules had "force of law" was absent and since the bill of lading was required to contain a *paramount clause* (*i.e.* an express statement that the Rules are to be applied), their

[79] For a general statement on the importance to have uniform and certain rules on the limitation of carrier's risk as the main reason to have international conventions on carriage of goods, *see* ANGELO PESCE, *supra* note 22 at 4.
[80] *Id*. at 110.
[81] According to Article 10, "the provisions of this convention shall apply to all bills of lading issued in any of the contracting States".
[82] Even the Hamburg Rules, to be effective, have to be introduced in the domestic national legislation. Thus, the Rules become "domestic" law and their effectiveness will depend on how the national courts apply them

application has not always been considered as mandatory in the presence of a different choice of law by the parties.

The (English) Privy Council, in the famous *Vita Food Products* decision,[83] upheld a choice of law contained in the bill of lading where the parties had agreed on the applicability of English law. It was decided that the absence of a paramount clause invoking the compulsory application of the Rules rendered valid a different choice of law made by the parties to the transportation contract, with the consequence that the non-responsibility clauses contained in the bill of lading, and contrary to the Rules, were held to be valid.[84] In the *Vita Food Products* decision, the court applied the classic conflict of laws principle of express choice by the parties instead of recognizing the mandatory applicability of the Hague Rules, which were part to the English law by virtue of the U.K. Carriage of Goods by Sea Act 1924. According to the law, the parties would have been prohibited under Article 3(8) from relieving or lessening the carrier's responsibility. Clearly, the *Vita Food Products* decision was not in accord with the goal of international harmonization, which was the main purpose of the Rules.[85]

As a result of incongruity with the goal of harmonization, the new version of the Rules amended by the Brussels Protocol, the Hague/Visby Rules of 1968, took a different approach. No requirement of any paramount clause was included and it was expressly stated that the Rules shall have force of law.[86]

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[83] Vita Food Products Ltd. v. Unus Shipping Co. Ltd. [1939] A.C. 277.

[84] English courts had already ruled that a choice of law clause having the effect of striking out the system of the Convention was void as against the mandatory nature of the Rules. See *The Torni* case, [1932] P.78 (C.A.), which recognized the public policy character of the Rules and was overruled by *Vita Food Products*.

[85] See TETLEY, *supra* note 77 at 70-71; on this case and its impact on private international law *see* also GIUSEPPE SPERDUTI, EVOLUZIONE STORICA E DIRITTO INTERNAZIONALE PRIVATO 72 (1970).

[86] Article 3(8) and Article 10.

The *Vita Food Products* decision had been already opposed by some courts,[87] but a clear and firm position was taken only in the year 1983 in England by the House of Lords in the *Morviken* decision.[88] The *Morviken* court expressly rejected the *Vita Food Products* holding and did not give any primacy to the parties' choice of a national law (in the specific case, the Dutch law) contained in the bill of lading. Since the Rules were applicable under Article 10, a choice of law clause would result in a violation of Article 3(8), under which any attempt to lessen the carrier's liability as set out in the Rules is void. Therefore, the mandatory nature of the Rules could not be evaded by the parties through a choice of law clause because such a choice would have been contrary to public policy and mandatory provisions of law (specifically, the 1971 English Carriage of Goods by Sea Act).

There is no doubt that the *Morviken* decision expresses the correct and accepted approach to the Rules. As the *Morviken* court succinctly states, the Rules were "not conceived as a comprehensive and self-sufficient code regulating the carriage of goods by sea"[89] and were designed only "to unify certain rules relating to bills of lading"; but, within their scope of application, they were meant to be compulsory.[90] As another court, in applying the *Morviken* approach, has ruled, to give primacy to the intention of the parties "would enable the stated purpose of the International Convention, *viz.* the unification of domestic laws of the contracting states relating to bills of lading, to be evaded by the use of colourable devices that, not being expressly referred to in the rules, are not specifically prohibited".[91]

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[87] *See* Shackman v. Cunard White Star Ltd., 31 F.Supp. 948 (1940); Dominion Glass Co. v. The Ship Anglo Indian [1944] S.C.R. 409 (Canada Supreme Court); Ocean Steamship Co. v. Queensland State Wheat Board [1941] 1 K.B. 402; Boissevain v. Weil [1949] 1 K.B. 482.
[88] [1983] 1 A.C. 565
[89] UNCTAD Report on Bills of Lading p.15.
[90] JOHN F. WILSON, CARRIAGE OF GOODS BY SEA, at 185 (1988).
[91] *The Benarty,* [1983] 2 Lloyd's Rep. 50 at 56.

3.4. The Hamburg Rules

The standardization of the rules on bill of lading and liability of the parties purported and hoped by adopting the amended 1968 Hague Rules proved in the practice of business to be illusory, so that the international maritime commercial community considered as necessary a deep revision of the rules. Such efforts lead eventually to the UN Convention on the Carriage of Goods by Sea (the Hamburg Rules) of 1978, in force since 1992, and intended to replace the two precedent not satisfactory sets of rules.[92]

The Hamburg Rules are "not just an amendment" of the old rules, but "a totally new cargo convention",[93] because they cover a broad ocean of topics, virtually the whole of law concerning carriage of goods by sea, whereas the Hague Rules were limited only to rather narrow objectives.[94] What is important to notice is that, like the precedent Hague/Visby Rules, the Hamburg Rules impose a mandatory, and also heavier, level of liability on carriers,[95] and that they reject a total "freedom of contract in favour of imposing minimum standards of liability on shipowners".[96] In other words, the Hamburg Rules have been given force of law.

The enactment of the Hamburg Rules, however, canceled neither the Hague Rules nor the Hague/Visby Rules, with the very uncomfortable consequence that businessmen and lawyers have nowadays to deal with three different bodies of rules governing the international carriage of goods by sea, which also means, for instance, nine different package and kilo disciplines. Of

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[92] WILSON, *supra* note 90, at 209; PAYNE & IVAMY'S, CARRIAGE OF GOODS BY SEA, at 105 (13th ed. 1989).
[93] Anthony Diamond, *Responsibility for Loss of, or Damage to, Cargo on a Sea Transit: the Hague or Hamburg Conventions?*, in CARRIAGE OF GOODS BY SEA 117, 110 (Peter Koh Soon Kwang ed., 1986).
[94] According to WILSON, *supra* note 90, at 209, the purpose in drafting the new convention was "to produce a comprehensive code covering all aspects of the contract of carriage".
[95] Diamond, *supra* note 93, at 116.
[96] *Id*. at 110.

course, such stratification of conflicting uniform commercial law conventions is heavily contrary to the general need of international uniformity and standard harmonization.[97]

3.5. Scope of application of the Hamburg Rules

The Hamburg Rules apply to all contracts of carriage of goods by sea, which are defined in Article 1(6) as "any contract whereby the carrier undertakes against payment of freight to carry goods by sea from one port to another", regardless of whether a formal bill of lading is issued.[98] However, as the previous conventions provided, the Rules do not apply to charterparties.[99]

The Convention covers only contracts of carriage of goods by sea between ports located in two different States when one of the following five situations occurs: (a) the port of loading or (b) the port of discharge as provided for in the contract is located in a Contracting State; (c) one of the optional ports of discharge provided for in the contract is the actual port of discharge and such port is located in a Contracting State; (d) the bill of lading or other document evidencing the contract of carriage is issued in a Contracting States; (e) the bill of lading or other document evidencing the contract provides that the Convention or the legislation of any State giving effect to it is to govern the contract.

The above mentioned provision causes a significant enlargement of the scope of application of the Hamburg Rules. Basically, when a transportation of goods by sea can be defined as carriage according to Article 1(6) and at least one of the five objective elements of internationality occurs, the Rules shall always apply. It is actually interesting to notice that here

[97] For an extensive analysis of the different possible scenarios and the conflict among the three regimes see TETLEY, *supra* note 77, at 77-81.
[98] WILSON, *supra* note 90, at 209.
[99] Article 2(3).

the scope of application is even larger than in the case of the Warsaw Convention governing the carriage of goods by air. Under that convention, the applicability of the uniform law to the contract depends only on the circumstance that the places relevant to the transportation (place of departure, destination or stopping) are in different states and that at least one of them is a contracting state. The Rules take into consideration also the circumstance that none of the places involved in the transportation is located in a contracting state and consider as sufficient that (i) the contract is issued in a contracting state, or (ii) the contract expressly refers to the Rules or to the law of a contracting state. The final result is that any international carriage by sea anyway linked to a state recognizing the Rules falls within their regime.

3.6. The Hamburg Rules as the Only Applicable Law

Once the Rules are in force in a given situation, they are the only applicable law.[100] Articles 29 and 30 state that each of the Contracting States "shall apply the provisions of this Convention" and that no reservations are permitted. Being the Rules mandatory, any different choice of law by the parties is irrelevant. The Convention, in fact, allows no choice of law.[101] This is also made clear by Article 23, pursuant to which "any stipulation in a contract of carriage by sea, in a bill of loading, or in any other document evidencing the contract of carriage by sea is *null and void* to the extent that it derogates, directly or indirectly, from the provisions of this Convention".[102]

[100] TETLEY, *supra* note 77, at 55.
[101] SAMIR MANKABADY, THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA, at 225 (1978).

3.7. Applicable Law Provisions

The 1924 Hague Rules did not contain any conflict rules. That Convention was intended to be mandatory within its scope of application,[103] and the conflict of laws issue is not dealt with in it. The 1968 Hague/Visby Rules had the same general approach, but contained a conflict rule on a specific issue: they refer to the *lex fori* for the action for indemnity against a third person.[104]

The Hamburg Rules do not provide any general conflict of laws rule. As one author noted, "the efforts of the drafters of this important legal instrument were aimed at achieving unification of substantive law and not conflicts of laws".[105]

Nevertheless, the Rules contain a few provisions that refer to a particular domestic law in relation to specific issues.

3.7.1. Article 4

Article 4 defines the period of responsibility of the carrier for loss resulting from loss or damage to the goods and from delay in delivery, which extends from the time when the carrier is in charge of the goods at the port of lading until the time when he is in charge at the port of discharge. In order to explain the meaning of these two moments, paragraph (2) states that the carrier is deemed to be in charge of the goods (a) from the time he has taken over the goods from the shipper or an authority or other third party to whom, *pursuant to law or regulations applicable at the port of loading*, the goods must be handed over for shipment; (b) until the time he has delivered the goods by handing over the goods to the consignee or, in cases where the consignee does not receive the goods from the carrier, by placing them at the disposal of the consignee in accordance with the contract or with *the law or with the usage of the particular*

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[102] *Id.* at 24.
[103] *See* Article 10.
[104] Article 1(3).
[105] Sadikov, *supra* note 43, at 227.

trade, applicable at the port of discharge, or by handing over the goods to an authority or other third party to whom, *pursuant to law or regulations applicable at the port of discharge*, the goods must be handed over. The law of two different states, therefore, could be relevant to determine the exact and real extent of the carrier's liability.

3.7.2. Article 14

Article 14 specifies that the signature on the bill of lading, which must be issued by the carrier on demand of the shipper, may be in handwriting, printed or made by any other mechanical or electronic means, if not inconsistent *with the law of the country where the bill of lading is issued*. Mandatory provisions on the legal effects of a signature are rendered unavoidable by the Convention.

3.7.3. Article 20

Article 20 deals with the issue of the statute of limitations for actions relating to the carriage of goods under the Convention. The general period of limitation is two years. However, paragraph (5) considers a particular case: "an action for indemnity by a person held liable may be instituted even after the expiration of the limitation period provided for in the preceding paragraphs if instituted within the time allowed *by the law of the State where proceedings are instituted*".

3.7.4. Article 21

Article 21 deals with the important issue of jurisdiction. The Convention provides a choice of *forum* for the plaintiff to bring action among six different *fora* (the place of business of the carrier; the place where the contract was made; the port of loading; the port of discharge; the agreed place in the contract; the place where the vessel has been arrested). Paragraph (1), in

giving the plaintiff the option where to institute an action, specifies that the court chosen must be competent "according to *the law of the State where the court is situated*".

Of course, Article 21 does not deal directly with "the applicable law which governs the contract of carriage".[106] This determination is to be made by the court seised of the case according to Article 21, whether there is a choice of law by the parties or whether such a choice is absent.

3.8. Carriage of Goods by Sea and Private International Law

The Hamburg Rules do not constitute a comprehensive discipline of the carriage of goods by sea. Of course, when applicable, the Rules are the only governing law regarding the covered matters but they not govern all aspects of a contract of carriage by sea.

A court dealing with a dispute on a transportation of goods by sea, therefore, could have to adjudicate on some issues by applying the uniform rules and on other issues, not covered by the Convention, according to the domestic substantive applicable law, which can be the same law of the forum state (other than the statute in which the convention is enacted) or the domestic law of a different state.[107] The question, as always in similar cases, is how to determine the domestic substantive applicable law.

General conflict rules in the field of the carriage of goods by sea are to be found in national laws, judicial practice and regional international conventions. A brief overview on some of these conflict rules may be useful.

As far as American law is concerned, the Restatement, Second, Conflict of Laws, Chapter 8, provides a special rule on transportation contracts. Pursuant to paragraph 197, the validity of a

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[106] CHRISTOF LÜDDEKE & ANDREW JOHNSON, THE HAMBURG RULES FROM HAGUE TO HAMBURG VIA VISBY 36 (2nd ed. 1995).

contract of carriage of goods and the rights and obligations arising out of the resulting contractual relationship, in the absence of a choice of law by the parties, are governed by (i) the law of the State of dispatch of the goods or (ii) the law of any other State which has a more significant relationship to the contract. Thus, the USA follows the common law doctrine of the proper law of the contract, by giving priority to the intention of the parties and to the law most closely connected with the contract.[108]

When a European Union country is involved, the *1980 Rome Convention on the Law Applicable to Contractual Obligations* becomes relevant.[109]. Pursuant to Article 4(1) of the Convention, the contract shall be governed by the law of the country with which it is most closely connected; it is generally presumed by the Convention "that the contract is most closely connected with the country where the party who is to effect the performance which is characteristic of the contract has, at the time of conclusion of the contract, his habitual residence, or, in case of a body corporate or incorporate, its central administration".[110] In the case of contract of carriage of goods, however, Article 4(4) sets forth a different presumption: the applicable law shall be that of the country in which, at the time the contract is made, the carrier has his principal place of business, provided that it is also the country in which the place of loading, or the place of discharge, or the principal place of business of the consignor is situated. Where, from the circumstances of the case, it appears that the contract is more closely connected with another country, the specific presumption of paragraph 4 does not apply. However, as

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[107] MANKABADY, *supra* note 101, at 224.
[108] Sadikov, *supra* note 43, at 234.
[109] This international conflict of laws convention has been implemented in the various EU states by national laws, such as the UK Contracts (Applicable Law) Act 1990.
[110] Article 4(2).

noticed by the scholarship, the carriage-of-goods presumption should cover the larger part of the situations.[111]

3.9. Conclusion

The uniform rules on international carriage of goods by sea were always intended to be mandatory.[112] The apparent ambiguity of the 1924 Hague Rules, which caused the *Vita Food Products* decision and was remedied in the *Morviken* case (based however on the 1968 version of the Rules), is now resolved in the clear wording of the Hamburg Rules, under which every agreement of the parties to modify the mandatory regime of liability for the carrier is "null and void". Like the Warsaw Convention, the Rules do not contain any general provisions on private international law but only direct applicable law rules. However, the Rules use more than one connecting factor to determine the substantive domestic law to be applied: not only the law of the *forum*, but also the law of the port of loading, discharge and bill emission.

[111] WILSON, *supra* note 90, at 316.
[112] ANGELO PESCE, *supra* note 22, at 13.

CHAPTER 4

CONVENTION ON THE CONTRACT FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD,

(CONVENTION DE MERCHANDISES PER ROUTE - CMR), 1956

4.1. Historical Remarks

The Convention on Contract for the International Carriage of Goods by Road (CMR),[113] signed at Geneva on 19 May 1956, governs the international carriage by road in Europe. It was drafted by the Economic Commission for Europe, an ONU organization. Its content, as it will become clear in the following analysis, derives mainly from the CIM, the convention on international carriage of goods by rail.

4.2. Scope of Application

According to Article 1, paragraph 1, the CMR "shall apply to every contract for the carriage of goods by road in vehicles for reward, when the place of taking over of the goods and the place designated for delivery, as specified in the contract, are situated in two different countries, of which at least one is a contracting country, irrespective of the place of residence and the nationality of the parties".[114]

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[113] For an updated list of CMR contracting states, refer to http://www.jurisint.org.

[114] As an author summarized, "international carriage by road is defined as being carriage of goods by road from a place in one state to a place in another state, if either of these two states is a party to the Convention; and where part of the journey is by sea, the whole journey is deemed to be international carriage by road if the goods remain unloaded in the road vehicle while they are on the ship". *See* RIDLEY, *supra* note 34, at 57.

The criterion to determine the internationality of the contract is objective: relevant is only the fact that the places connected with the transportation (place of taking over and place of delivery) are located in different states. For the applicability of the Convention, moreover, is necessary but also sufficient that only one of these states has ratified the uniform law. The scope of application of the CMR is therefore particularly broad, since it is applicable even to the carriage by road with countries that are not parties to the Convention.[115]

The Convention also tries to extend its scope of application by requesting the parties to include in the consignment note a paramount clause. According to Article 6(1)(k), the note must contain a statement that the carriage is subject, notwithstanding any clause to the contrary, to the uniform provisions. The incorporation of the CMR in the contract is intended to render the Convention applicable even in a dispute before the courts of a non-contracting state.[116] [117]

4.3. Legal Effect of the CMR

The main purpose of the CMR, "like other international conventions which regulate contracts of carriage",[118] is to regulate uniformly the international carriage of goods by road, especially by setting a standardized regime of carrier's liability[119] and by determining the requisite of the carriage's main document, namely the consignment note.[120] An international

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[115] Sadikov, *supra* note 43, at 223.

[116] MALCOLM A. CLARKE, INTERNATIONAL CARRIAGE OF GOODS BY ROAD: CMR 21 (2nd ed. 1991); *see* also GLASS & CASHMORE, *supra* note 27, at 94, according to whom the paramount clause "will usually ensure that the convention is applied as a matter of contract even where the action is brought in a country which is not a party to the convention".

[117] HILL & MESSENT, CMR: CONTRACTS FOR THE INTERNATIONAL CARRIAGE OF GOODS BY ROAD, 72 (2nd ed. 1995).

[118] GLASS & CASHMORE, *supra* note 27, at 84.

[119] Article 17, which determines the central liability regime of the CMR," makes the carries liable for any loss or damage to the goods from the time when he takes over the goods until the time of delivery". The carrier is also liable for any delay in delivery.

[120] Pursuant to Article 4, "the contract of carriage shall be confirmed by the making out of a consignment note". The consignment note, among the many requirements specified by Article 6, must also contain "a statement that the carriage is subject, notwithstanding any clause to the contrary, to the provisions of this Convention" (Article

contract of carriage necessarily involves more than one subject (the carrier, the consignor, the consignee) and therefore more than one jurisdiction; an international uniform law has, or is supposed, to overcome conflict of laws problems arising out from such a contractual relationship.[121]

When the requirements of Article 1(1) are satisfied, the CMR is the only applicable law. The *forum* may not resort to the normal national rules on conflict of laws and parties to an international contract of carriage of goods by road may not exclude it or derogate from it. As correctly pointed out by the scholarship, Article 1 is indeed a "unilateral conflicts rule in the *lex fori* of a contracting state".[122]

The necessary application of the CMR extends also to arbitration clauses. Article 33 states that "the contract of carriage may contain a clause conferring competence on an arbitration tribunal if the clause conferring competence on the tribunal provides that the tribunal shall apply this Convention". On the one hand the parties are free to agree on an arbitration clause, on the other hand this clause must specify that the tribunal is bound to apply the CMR[123]; otherwise, "the clause will be of no effect" and the jurisdiction will be determined according to the rules set forth in Article 31 for normal state courts.[124]

6(1)(k)); in the absence of such a statement, the carrier is liable for all expenses, loss and damage sustained through such omission by the person entitled to dispose of the goods under Article 7(3). *See* on the issue RIDLEY, *supra* note 10, at 59.

[121] *See* the *Preamble*, which declares that the Contracting Parties have "recognized the desirability of standardizing the conditions governing the contract for the international carriage of goods by road, particularly with respect to the documents used for such carriage and to the carrier's liability".

[122] CLARKE, *supra* note 116, at 21; uses the same words Malcolm Clarke, *A Multimodal Mix-Up*, J. B. L. 2002, Mar, 210-217, 215.

[123] A general reference to the law of a Contracting State is deemed not sufficient, see HERBER & PIPER, CMR. INTERNATIONALES STRAßENTRANSPORTRECHT 501 (1996).

[124] HILL & MESSENT, *supra* note 117, at 257; HERBER & PIPER, *supra* note 123, at 501; *see* Arrond. Rotterdam, 10.11.1970 (1971) 6 E.T.L. 273; *see* also A.B. Bofors-UVA v. A.B. Skandia Transport [1982] 1 Lloyd's Rep. 410, holding invalid an arbitration clause which did not comply with Article 33 requisite as a derogation from the Convention against Article 41.

The Convention is clearly intended to be mandatory. According to Article 41, paragraph 1 (which clearly recalls Article 32 of the Warsaw Convention and Article 23 of the Hamburg Rules), "any stipulation which would directly or indirectly derogate from the provisions of this Convention shall be null and void". This means that, "once CMR applies, Article 41 prohibits the parties to a contract of carriage from writing into the contract any term which derogates from the Convention. Thus, they cannot alter the rights and responsibilities set out in it".[125] The obvious consequence is that "any contract purporting to do so is void to the extent, but only to the extent, that is repugnant to the terms of the Convention".[126] According to this approach, for example, Section 1 of the U.K. Carriage of Goods by Road Act of 1965 expressly states that the CMR has force of law between the parties.[127]

4.4. Applicable Law Provisions in the CMR

As previously mentioned, CMR provisions have been strongly influenced by the then in force text of CIM, namely the convention on carriage of goods by rail. However, differently from this, the CMR does not contain a general conflicts rule but it only provides specific conflict rules for specific issues which may arise in the event of an international carriage of goods by road.[128]

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[125] GLASS & CASHMORE, *supra* note 27, at 88; *see* HILL & MESSENT, *supra* note 117, at 72, according to whom Article 41 clearly prohibits any voluntary derogation from the Convention. In particular, parties may neither increase nor restrict nor exclude the carrier's liability as set forth in Article 17.

[126] RIDLEY, *supra* note 34, at 66; *see* also HILL & MESSENT, *supra* note 117, at 309: "Article 41 is of fundamental importance, since in effect it means that it is not possible for parties to either decrease or increase the rights and liabilities of parties under a contract for the international carriage of goods by road which is subject to CMR".

[127] The CMR "shall have the force of law so far as it relates to the rights and liabilities of persons concerned in the carriage of goods by road under a contract to which the Convention applies". Explaining the meaning of this provision, HILL & MESSENT, *supra* note 117, at 84 say that both the domestic substantial rules and the rules on conflict of laws do not apply on issues governed by the CMR.

[128] Sadikov, *supra* note 43, at 223.

4.4.1. *Lex Fori* as a Connecting Factor

Our analysis of the CMR conflict rules will start with a connecting factor quite common in international law conventions: the *lex fori*.[129]

According to Article 29, paragraph 1, the carrier's liability, limited as a general rule, is without limitations "if the damage was caused by his willful misconduct or by such default on his part as, in accordance with *the law of the court or tribunal seised of the case*, is considered as equivalent to willful misconduct". The determination on which kind of default can be considered amounting to a willful misconduct is left to the *lex fori*.[130] This reference to the national law could have as a consequence that in some countries, such as Italy, Germany and France, a particularly heavy fault ("*colpa grave*", "*große Fahrlässigkeit*", "*faute lourde*") will be considered equivalent to willful misconduct.[131]

Under Article 32 (dealing with the extension of the period of limitation), paragraph 3, "the extension of the period of limitation shall be governed by *the law of the court or tribunal seized of the case*. That law shall also govern the fresh accrual of rights of action". Article 32 states that the period of limitation for an action arising out of an international contract of carriage shall be normally of one year, in case of willful misconduct or equivalent default three years; paragraph 2 regulates some aspects of the suspension. Subject to these provisions of paragraph 2, the extension of the period of limitation will be governed by the law of the court seized of the case. This means that "any additional ground permitted by national law will also suspend the

[129] *See* for example the Warsaw Convention on international carriage of goods by air, Articles 21, 22, 25, 28, 29.
[130] The same solution is adopted in the Warsaw Convention, Article 25; *see* ANGELO PESCE, *supra* note 22, at 57.
[131] *See* the broad analysis by HERBER & PIPER, *supra* note 123, at 433-439. *See* also Barbara Sancisi, *Convenzione di Ginevra sul Trasporto Internazionale di Merci su Strada (1956)*, in LE CONVENZIONI DI DIRITTO DEL COMMERCIO INTERNAZIONALE 3, 16 (Ferrari ed., 2002), according to which "equivalent fault" should always be interpreted as an intentional conduct on the part of the carrier. This last position tries to favor the uniformity in the application of the provision, but it is difficult to discern this from the letter of the uniform text.

period of limitation".[132] For example, in England, when a period of limitation expires on Sunday or on other day on which the court offices are closed, the next available day will become the last valid day. This provision allows parties to extend by agreement the time limit when permitted under the applicable law, provided that such agreements are made after a claim arises; if made before, they would amount to derogations from the Convention, which are null and void under Article 41.[133] Paragraph 3 states also that the *lex fori* will govern the fresh accrual of rights of action. Under English law, for instance, a claim can revive, once expired because of the running out of the period of limitation, only by a "fresh contract to pay, which must be supported by its own consideration" to be enforceable.[134]

4.4.2. *Lex Loci Contractus* as a Connecting Factor

A different connecting factor is used in Article 5, paragraph 1, which refers to the *lex loci contractus* to regulate the signing of a consignment note, the crucial document of the carriage of goods by road. This provision states that "signatures may be printed or replaced by the stamps of the sender and the carrier if *the law of the country in which the consignment note has been made* out so permits".

4.4.3. *Lex Rei Sitae* as a Connecting Factor

Finally, the *lex rei sitae* is the connecting factor adopted by two other CMR provisions.

Article 16, paragraph 5, states that the procedure in the case of sale of the goods by the carrier because of circumstances preventing the delivery, "shall be determined by *the law or custom of the place where the goods are situated*".

Article 20, paragraph 4, states that when the carrier has to deal with the goods in the absence of instructions given by the owner of the goods, the carrier shall be entitled to deal with

[132] HILL & MESSENT, *supra* note 117, at 255.
[133] *Id*.

them in accordance with *the law of the place where the goods are situated*. Article 20 deals with the issue of the consequences of a definite delay in delivery. If the goods are not delivered within thirty days following the expiry of the agreed time-limit or within sixty days from the time the carrier accepts the goods for shipment, the person entitled to make a claim may consider the goods as lost (paragraph 1); the person entitled may also request the carrier in writing that he shall be notified if the goods are recovered within a year from the time when the compensation for the lost goods has been paid. Paragraph 4, relevant in our analysis, address the problem of how the carrier has to deal with the cargo if he recovers the lost goods after the time limit set forth in paragraph 1 has expired but does not receive any request or instruction from the person entitled. Thus, if the person entitled fails to send a written request under paragraph 2 or to give instruction within the time limit specified under paragraph 3 or if the goods are not recovered until more than one year after the payment of compensation, then the carrier can deal with the goods in any way in accordance with the *lex rei sitae*.

4.4.4. Generic Reference to the "*Law Applicable*"

A generic reference to the otherwise applicable law can be found in Article 28, pursuant to which "in cases where, *under the law applicable*, loss, damage or delay arising out of carriage under this Convention gives rise to an extra-contractual claim, the carrier may avail himself of the provisions of this Convention which exclude his liability or which fix or limit the compensation due". This provision is better understood by recovering Article 1, paragraph 1, which refers only to "contracts for the carriage of goods". A non-contractual claim would clearly be outside the scope of application *ratione materiae* of the CMR, so that this particular provision is intended to deal with the event that a certain applicable national law lays down a

[134] *Id*. at 256.

"non-contractual right of action".[135] The importance of the present provision is that, especially under common law, the framing of an action in contract or in tort will determine a different amount recoverable.[136] Article 28 influences the local law by making applicable for the carrier the uniform favorable provisions of the CMR. However, Article 28 is not an applicable law provision; no domestic law is made applicable through it, but it only considers the case in which a contractual claim under the Convention is also considered as extra-contractual by a particular domestic law. In such a case, the Convention extends its discipline on carrier's liability to this domestic tort law.

4.5. Gaps in the CMR

The CMR, like other international uniform laws, "is not a complete and self-contained code"[137] and "was never intended to contain an exhaustive system of regulations for the transport contracts coming within its scope and it was always presumed that national laws and regulations are to apply whenever there are no relevant provisions in the Convention".[138] It seems to be correct, therefore, that relevant provisions of national law should be used to fill the inevitable external gaps.[139]

For example, it has been written by English commentators that in case of gaps "a court will have to turn to English law to deal with the point provided that English law is the proper law of the contract. Thus if an issue is not governed by CMR an English court will normally apply

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[135] *Id.* at 205; for a detailed discussion of the English common law on this point *see* the same commentary at 206-207.
[136] *Id.* at 207.
[137] CLARKE, *supra* note 116, at 16; similarly, HILL & MESSENT, *supra* note 117, at 10 say that "CMR does not represent a comprehensive code on the international carriage of goods by road-it merely regulates certain aspects of the contractual relations between the various parties involved".
[138] CLARKE, *supra* note 116, at 328.

common law or the provisions of the contract".[140] Again, some leading authors affirm that when the Convention does not offer any guidance on matters related to contract of carriage, "the better view would seem to be that the answer can only be sought in the national law".[141]

As far as the case law is concerned, in the English decision *Eastern Kayam Carpets Ltd.* v. *Eastern United Freight Ltd.*,[142] the common law was applied to establish the carrier's liability as the judge found that CMR did not regulate the issue. In a widely cited German case,[143] national law was applied to decide on the failure of the carrier to collect the goods. Finally, as a Dutch court stated, with respect to the issue of the person responsible for loading goods, "if and to the extent that the CMR is silent and a reply must be given to questions about the liability of the carrier arising in such a case, one must apply the rules of national law applicable on the basis of private international law".[144] It can therefore be agreed on the statement that, below the uniform foundation set forth by the CMR, remains "the substratum of existing national law" to provide support.[145]

Among the notable issues to which courts have applied national law, it is also interesting to cite the following: 1) allocation of the duty of loading and unloading; 2) determination of the meaning of some key words, such as "goods", "reasonable time", "ordinary residence" in order

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[139] According to HERBER & PIPER, *supra* note 123, at 56, before resort to national law it is necessary to verify that the gap cannot by filled in by using the general principles or the analogy with other provisions of the Convention itself.
[140] GLASS & CASHMORE, *supra* note 27, at 84-85.
[141] HILL & MESSENT, *supra* note 117, at 10; *see* also HERBER & PIPER, *supra* note 123, at 52, according to whom when the Convention does not contain any provision, then it is to apply the national law as identified by the conflict of laws rules of the forum.
[142] Queen's Bench Division, 6.12.1983, unreported except on LEXIS; this seems to be the accepted approach in England after the doubts cast on the issue by the case *Buchanan & Co.* v. *Babco Forwarding & Shipping*, [1977] Q.B. 208, when Lord Denning, M.R., found a gap in the C.M.R. and ruled to fill in by reference to the intention of the Convention. This approach was rejected by the *House of Lords*, [1978] A.C. 141.
[143] LG Bremen, 6.5.1965 (1966) 1 E.T.L. 691.
[144] Rb Breda 16.12.1969, 1970 U.L.C. 298, 301; resort to national law to fill in gaps in the C.M.R. has been used also in Austria, OGH 18.12.1984, Stra GüV 1985/4, 34; in Germany, BGH 7.3.1985 (1985) E.T.L. 343; in Italy, Cass., 17.3.1992 (1992) B.T. 253.
[145] CLARKE, *supra* note 116, at 17.

to determine the jurisdiction; 3) liability for expenses in consequence of the breach of implied duties; 4) loss of or damage to goods which occurs outside of the time and space limits drawn by Article 17; and 5) fundamentals of the law of contracts, such as conclusion, misrepresentation, duress and non-enforceability.[146]

A subsequent question concerns which domestic law is to be applied in the absence of uniform provisions or of conflict rules contained in the Convention. For example, Article 13 of the CMR states that the consignee is entitled to damages for the loss of goods, but does not say anything about damage to the goods. How to fill in the gap? Of course, as we have already seen, an immediate answer is that national law is applicable. But which national law? How to identify the national law to be applied? First, a court seized of a case on international carriage of goods by road has to look for special conflict rules in the field concerned. In the absence of such rules, a court will look at its own general conflict of law rules, *i.e*. the conflict law of the *forum*. The connecting factor can be different from country to country: (i) the law of the carrier (*lex portitoris*); (ii) the law of the state where the contract of carriage (note of consignment) was made (*lex loci contractus*), as easy to identify and unique to the particular contract; or (iii) the *lex fori*, a common connecting factor especially when coinciding with the law of the place of performance or the law of the place of destination.[147] In addition, it is important not to forget about the law expressly or implicitly chosen by the parties, where the parties' autonomy is recognized as a connecting factor by the conflict rules of the *forum* (for example, in England).

Within the European Union, where is in force the text of the *Rome Convention of 1980 on the Law Applicable to Contractual Obligations*, a court – in the absence of a parties' choice of law –would apply the proper law of the contract (*lex causae*), meaning the law of the state with

[146] For a more complete list of matters *see id*. at 328-330.
[147] *Id*. at 21-22.

the closest connection with the contract of carriage.[148] Such law will be, very likely, the law of the carrier, who is the party to the contract of carriage that performs the characteristic service. More specifically, Article 4.4 of the Rome Convention states that "if the country in which, at the time the contract is concluded, the carrier has his principal place of business is also the country in which the place of loading or the place of discharge or the principal place of business of the sender is situated, it shall be presumed that the contract is most closely connected with that country".

4.6. Conclusion

The CMR is a mandatory body of rules that does not admit any derogation by the parties in the matters falling within its scope of application.[149] Like other previously analyzed uniform laws (Warsaw Convention and Hamburg Rules), it does not contain any general provision dealing with private international law. It contains, however, several applicable law provisions which directly lead to a particular national law. In the case of gaps, on the contrary, we have seen that there is no a clear answer on which law is to be applied. This is probably the reason why an author has said that development in the unification of conflict rules "could facilitate both the legal position of owners of the goods and the process of settling conflicts problems arising during the carriage of goods by road".[150]

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[148] Sadikov, *supra* note 43, at 225.
[149] ANGELO PESCE, *supra* note 22 at 13.
[150] *Id.* at 226.

CHAPTER 5

UNIFORM RULES CONCERNING THE CONTRACT FOR INTERNATIONAL CARRIAGE OF GOODS BY RAIL

(CONVENTION INTERNATIONALE DE MERCHANDISE - CIM), 1980

5.1. Historical Remarks

The international carriage of goods, passengers and luggage by rail is governed by the Convention Concerning International Carriage by Rail (COTIF). The uniform rules specifically concerning the contract for international carriage of goods by rail are contained in the CIM, the abbreviation for the part of the Convention exclusively dealing with the carriage of goods, which is the subject of the present chapter (the provisions dealing with the carriage of passengers and luggage are contained in another part of the COTIF, known as "CIV").

The version of the CIM currently in force is the most recent result of a series of conventions governing the field of the carriage by rail, which goes back to the first CIM Convention in the year 1890. The CIM rules, being the first uniform set of rules on international carriage of goods, served also as a model for other conventions, like the CMR Convention on the carriage of goods by road.[151]

The 1980 Convention concerning International Carriage by Rail entered into force on 1 May 1985.

5.2. Scope of Application

Under Article 1, the CIM applies to "all consignments of goods for carriage under a through consignment note made out for a route over the territories of at least two States and exclusively over lines or services included in the list provided for in Articles 3 and 10 of the Convention", which means the list maintained by the Central Office for International Carriage by Rail in Bern (Switzerland).

The carriage is, therefore, considered "international" and subject to the Convention when (i) the goods are being carried over the territories of at least two different states and (ii) such states are included in the list. However, Article 2 specifies that "consignment between sending and destination stations situated in the territory of the same State, which pass through the territory of another State only in transit, shall not be subject to the Uniform Rules". The carriage must be, therefore, a real international transportation from one (listed) state to another (listed) state.[152]

As far as the scope of application *ratione materiae* is concerned, Article 3 states the obligation for the railway to carry any goods presented to it when certain conditions are met. Some limitations are provided for by Article 4 and Article 5. The former identifies some articles as not acceptable for carriage: (*a*) articles the carriage of which is prohibited in any one of the territories in which the articles would be carried; (*b*) articles the carriage of which is a monopoly of postal authorities; (*c*) articles which are not suitable for carriage by reason of dimension, mass, weight *etc*.; (*d*) articles not acceptable under the Regulations concerning the international carriage of dangerous goods by rail. The latter identifies articles which are acceptable for

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[151] GLASS & CASHMORE, *supra* note 27, at 140.

[152] The CIM differs therefore from the Warsaw Convention on carriage of goods by air, which under Article 1(2) provides the case that the place of departure and the place of destination are located in the territory of the same contracting state but there is also an agreed stopping place in another different state.

carriage only subject to certain conditions. Basically, it is about dangerous goods, funeral consignments, railway rolling stock running on its own wheels, live animals, consignments the carriage of which presents special difficulties by reason of their dimension, their mass or their packaging.

5.3. Railway's Liability Regime

Like other international carriage of goods conventions, the most significant part of the CIM Rules contains a discipline for the documentation of the carriage (the consignment note) and for the carrier's liability.

According to Article 11, "the contract of carriage shall come into existence as soon as the forwarding railway has accepted the goods for carriage *together with the consignment note*". Therefore, the consignment note is fundamental for the formation, and as evidence of the validity, of an international contract under the CIM. The consignment note must be presented to the railway by the consignor and will travel with the goods (Article 12). Article 13 states then that the consignment note must contain certain information, such as the name of the destination station, the names and addresses of the consignor and consignee, the description of the goods, weight and number of packages, a list of documents, the number of wagons. Furthermore, pursuant to Article 11(3), the consignment note shall be evidence of the making and content of the contract.

An essential part of the CIM, like of any carriage-of-goods convention, is Title IV, dealing with the carrier's liability regime. The basic rule is set forth in Article 35, according to which: "the railway which has accepted goods for carriage with the consignment note shall be responsible for the carriage over the entire route up to delivery". Article 36 specifies the extent

of the liability, by stating that the railways is liable for loss or damage to the goods between the time of acceptance for carriage and the time of delivery and for the loss or damage resulting from the transit period being exceeded.

The CIM states two sets of defenses for the carrier. According to Article 36(2), the railway is relieved of liability if loss or damage are caused by (*i*) a fault on the part of the person entitled; (*ii*) by an order given by the person entitled otherwise than as a result of a fault on the part of the railway; (*iii*) by inherent vice of the goods (decay, wastage, *etc*.), or (*iv*) by circumstances which the railway could not avoid and the consequences of which it was unable to prevent. Then, Article 36(3) provides the railway with a defense against liability when loss or damage arises from the special risks inherent in certain circumstances, such as: (*i*) carriage in open wagon; (*ii*) absence or inadequacy of packing; (*iii*)loading operations carried out by the consignor or unloading operations carried out by the consignee; (*iv*) defective loading; (*v*) completion by the consignor, the consignee or an agent of either, of the formalities required by Customs or other administrative authorities; (*vi*) the nature of certain goods which renders them inherently liable to total or partial loss; (*vii*) or damage, irregular, incorrect or incomplete description of articles not acceptable for carriage or acceptable subject to conditions; (*viii*) carriage of live animals; (*ix*) carriage which must be accompanied by an attendant. The Title on liability is completed by Articles 37, dealing with the burden of proof, and Article 40, dealing with the compensation for loss.

5.4. CIM as a Mandatory Law

When a carriage of goods by rail is international in the meaning of Article 1(1), the CIM is the only applicable law and the parties may not derogate from it. This is made clear by Article

9(1), under which "two or more States or two or more railways may make supplementary provisions for the execution of the Uniform Rules. They may not derogate from the Uniform Rules unless the latter expressly so provide". The CIM only allows the making of "supplementary" provisions either by States or by railways, but it is forbidden any derogation that is not provided by the CIM itself. In other words, the uniform regime concerning formation, execution and modification of the contract of carriage, liability and of the assertion of rights set forth by the CIM may not be altered.

5.5. The Gap-Filling Rule: "National Law" Defined

The CIM is the first convention on international carriage that expressly takes into account the gap issue and provides for a general criterion to deal with it. Article 10(1) states that "in the absence of provisions in the Uniform Rules, supplementary provisions or international tariffs, *national law shall apply*".

Thus, the CIM makes clear that national law is the gap-filling rule to be followed and in Paragraph 2 also specifies that "national law" means the law of the State in which the person entitled asserts his rights, including the rules relating to conflict of laws. This last specification is important. After stating a special conflict of laws rule to be applied to fill in the gaps, Article 10 determines that "national law" includes, under this Convention, also the national rules on conflict of laws. This excludes, of course only with regard to the present Convention, every possible doctrinal or judicial dispute on what the reference to "national law" in uniform conventions means. A gap is therefore to be filled in not necessarily by the substantive law of the "State in which the person entitled asserts his rights", but by the law determined by the conflict of laws rules of this state, which could be the law of a third State.

5.6. Specific Applicable Law Provisions

After using the *lex fori* as a conflict rule "of a general character",[153] the CIM establishes special conflict rules for specific questions possibly arising in relation with contracts of carriage by rail.

5.6.1. *Lex Loci Contractus*

Some issues are dealt with by using the *lex loci contractus* as a connecting factor. The CIM language speaks of "laws and regulations in force at the forwarding station". For example, according to Article 13(1), "*the provisions in force at the forwarding station* shall determine the meanings of the terms "wagon load" and "less than wagon load" for the whole of the route", terms which are used in the wording of the consignment note. Similarly, Article 20 in paragraphs (1) and (2), states that "the handing over of goods for carriage shall be governed by *the provisions in force at the forwarding station*" and that "loading shall be the duty of the railway or the consignor according to *the provisions in force at the forwarding station*".

5.6.2. *Lex Loci Solutionis*

A different connecting factor (*lex loci solutionis*) is used by Article 28, paragraph 6, which states that "delivery of goods shall be carried out in accordance with *the provisions in force at the destination station*" in all other respects than those set forth in the previous five paragraphs.

5.6.3. *Lex Rei Sitae*

Then, Article 33, paragraph 6, refers to the *lex rei sitae*: "if the consignor, on being notified of circumstances preventing carriage, fails go give the necessary instructions, the

railway shall take action in accordance with *the provisions* relating to circumstances preventing delivery, *in force at the place where the goods have been held up*".

5.6.4. Other Specific Provisions

Again, under Article 39, paragraph 4, in the absence of a request or instructions from the person entitled, the railway that recovers goods supposedly lost "shall dispose of them in accordance with *the laws and regulations of the State having jurisdiction over the railway*".

The CIM refers to local law also in Article 52, dealing with "Ascertainment of partial loss or damage" to the goods. Paragraph (1) states that the railway must draw up a report containing all the possible information (condition, mass, extent of loss or damage, cause and time of occurrence) in case of partial loss of, or damage to goods. If the person entitled does not accept the findings contained in the report prepared by the railway, Paragraph (2) states that "he may request that the condition and mass of the goods and the cause and amount of the loss or damage be ascertained by an expert appointed either by the parties or by a court. The procedure to be followed shall be governed by *the laws and regulations of the State in which such ascertainment takes place*". In this particular case, the CIM refers only to the procedural local law and determines that the applicable law is that of the State where loss of or damage to the goods is to be ascertained. Since paragraph (1) of Article 52 says that the report must be drawn up when loss or damage "is discovered or presumed by the railway or alleged by the person entitled", the applicable law is very likely to be the law of the place of the final destination of the goods in the latter case (allegation by the person entitled), the same place or an intermediate place in the former (discovery or presumption by the railways).

[153] Sadikov, *supra* note 43, at 218. The provisions referring to the national *lex fori* (meaning the national law of the court which is to decide disputes regarding the issues mentioned in the provisions themselves) are specifically defined as "*renvoi*" provisions by ANTONIO MALINTOPPI, *supra* note 3, at 198.

Drawing the discipline of the "Limitation of action", Article 58 states that the general period of limitation for an action arising out from the contract of carriage by railway "shall be one year"; in specific situations, listed in the same paragraph (1)(a) to (e), two years. Paragraph (5), then, states that "the suspension and interruption of periods of limitation shall be governed *by national law*". Recalling Article 10(2)'s definition, "national law" is the law of the competent forum, including the rules relating to conflict of laws.

The system of conflict of laws rules for carriage of goods by rail is complex but also particularly accurate as takes into account "peculiarities of different transport operations performed during the carriage".[154]

5.7. Conclusion

The CIM is the most recent carriage-of-goods convention analyzed in this paper. Like the other uniform laws, it is meant to be mandatory.[155] It also provides several applicable law provisions which directly lead to the domestic law governing specific issues. Moreover, it is the first convention that expressly deals with the gap issue, by stating a general indirect conflict rule. Thus, issues not covered by the Convention itself are to be dealt with through the national law of the *forum,* including – quite unusually – its private international law provision. It means, therefore, that the substantive governing law can be either the law of the *forum* itself or the law of a third state; the CIM here merely states how to find the governing law, it does not directly states – like every convention before did – the applicable law.

[154] Sadikov, *supra* note 43, at 219.
[155] ANGELO PESCE, *supra* note 22, at 13.

CHAPTER 6

UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS (CISG), 1980

6.1. Historical Remarks

The United Nations Convention on Contracts for the International Sale of Goods (CISG)[156] has been drafted by the UNCITRAL and signed in Vienna in 1980.[157] The previous uniform regime for international sales was contained in the two Hague Conventions of 1964, the Uniform Law on International Sales of Goods (ULIS) and the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULF); however, the previous regime did not enjoy the anticipated success.[158] The purpose of the CISG is to set a uniform discipline for international contracts for sale of goods by providing rules on the formation of the contract and on the obligations of the parties. Unlike carriage of goods conventions, this discipline is not intended to be exclusive and mandatory, but only a common basis on which the parties can build their own statute by using their private autonomy. Therefore, the CISG has no force of law with respect to the parties, but only supports the parties in crafting contracts to meet their specific needs.

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[156] For an updated list of CISG contracting states, refer to http://www.uncitral.org.
[157] For an history of the CISG *see* FRANCO FERRARI, *supra* note 1, 8-22.
[158] Franco Ferrari, *Uniform Interpretation of the 1980 Uniform Sales Law*, 24 Ga. J. Int'l & Comp. L. 183, especially at 195-197.

6.2. Scope of Application

According to Article 1, the CISG applies to contracts of sale of goods between parties whose place of business are located in different states (international sales) when the States are Contracting States (Article 1(1)(a)) or when the rules of private international law of the *forum* lead to the application of the law of a Contracting State (Article 1(1)(b)).[159] This is the main provision dealing with the CISG sphere of application (applicability *rationae loci*). Others provisions deal with the applicability *rationae materiae*. Article 2 states that the CISG does not apply to certain kinds of sales (goods bought for personal use, consumer purchases, sales by auction *etc*.); Article 3 sets forth when a contract for the supply of goods to be manufactured or produced is to be considered a sale or a contract for services, which is outside the CISG's scope. Article 4 and Article 5, which will be further analyzed later, expressly state to which matters the CISG does not apply, leaving open the question on what law governs.

Some brief comments are necessary on Article 1's two criteria of application. Article 1(1)(a) does not present too many problems. When the parties to an international contract of sale have their place of business in two different contracting States, then the CISG does apply, unless there is an agreement to exclude it under Article 6. The mere fact that, for example, the contract has been signed in a non-contracting State and has to be performed in that State, does not undermine the applicability of the CISG under Article 1(1)(a) in any *forum* located in a contracting State: even if the rules of private international law would lead to the law of the non-contracting State, the Convention will apply anyway.[160]

More problematic is the applicability under Article 1(1)(b). A complete analysis of this topic is beyond the scope of this paper and is unnecessary for the purposes of our analysis;

[159] The USA, by exercise of the Article 95 reservation, is not bound by Article 1(1)(b).

nevertheless, a few comments on this issue are appropriate at this juncture. The reference to the rule of private international law of the *forum* may have the effect to render the Convention applicable even if both parties have their place of business in non-contracting States, when the conflict rules lead to the law of a third contracting state.[161]

The CISG itself limits its scope of application *rationae materiae*. According to Article 4, the Convention is not concerned with (a) the validity of the contract or of any of its provisions or of any usage and (b) the effect which the contract may have on the property in the goods sold.[162] Thus, questions such as lack of legal capacity, misrepresentation and lack of due care,[163] duress, mistake, unconscionability, public policy, validity of standard terms, validity of choice of *forum* clauses are left to the otherwise applicable local law, namely the domestic law as determined according to general rules of conflict of laws.[164]

Article 5 states that the CISG does not apply to the liability of the seller for death or personal injury caused by the goods to any person.[165] These matters are governed by the applicable domestic law, as determined by the conflict rules of the *forum*; since normally the claim for personal injury falls within tort law, "the applicable law is essentially the law of the place where the damage occurred".[166] If, however, the claim is based on contract law, the

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[160] JOHN HONNOLD, UNIFORM LAW FOR INTERNATIONAL SALES UNDER THE 1980 UNITED NATIONS CONVENTION 127 (2nd ed. 1991).
[161] *See* FRANCO FERRARI, supra *note* 1, at 35.
[162] *See* C.M. BIANCA & M. J. BONELL, COMMENTARY ON THE INTERNATIONAL SALES LAW – THE 1980 VIENNA SALES CONVENTION 46 (1987): "this article is a remainder of the existence of the difficult problem of the interplay between the convention and domestic law and delineating their respective spheres of application".
[163] *Id*. at 48.
[164] According to FRITZ ENDERLEIN & DIETRICH MASKOW, INTERNATIONAL SALES LAW 43 (1992), on questions related to the contractual validity, the statute of the contract will apply, *i.e*. the law which under the decisive conflict of law rules governs the contract. *See* also PETER SCHLECHTRIEM, COMMENTARY ON THE UN CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) 43 (1998).
[165] BIANCA & BONELL, *supra* note 162, at 49: "this article amplifies the general rule in Article 4 that the convention governs only the formation of contracts of sale and the rights and obligations of the seller and the buyer arising from such contracts". Therefore, all claims under Article 5 are to be settled "by rules of the applicable domestic law".
[166] SCHLECHTRIEM, *supra* note 164, at 50.

applicable law will be the proper law of the contract, meaning the law which would apply to the contract in the absence of the CISG.[167] On the other hand, damages caused by defective goods to other goods or property are within the scope of the Convention.[168]

6.3. Party Autonomy (Article 6)

A central provision of the CISG is Article 6, pursuant to which "the parties may exclude the application of this Convention or, subject to article 12, derogate from or vary the effect of any of its provisions".[169]

Unlike the carriage of goods conventions previously analyzed in this paper, the CISG has no force of law and its provisions are not mandatory to the parties.[170] The uniform law recognizes party autonomy as a general principle[171] and therefore it necessarily plays the role of supplementary material, applicable only if and to the extent that the parties do not choose a different statute for the contract of sale.[172] The only exception to the parties' right to derogate from the CISG is Article 12, which states that the freedom of form principle set forth in Article 11 "does not apply where any party has his place of business in a Contracting State which has made a declaration under Article 96", which in effect gives a correspondent reservation power to the contracting states.

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[167] *Id.*
[168] Handelsgericht Zürich, 26.4.1995, UNILEX.
[169] *See* FRANCO FERRARI, supra *note* 5, at 147, according to whom "the primary source of the rules governing international sales contracts is party autonomy".
[170] *See id.* at 147.
[171] ENDERLEIN & MASKOW, *supra* note 164, at 59; FRANCO FERRARI, *supra* note 1, at 109.
[172] *See* Stanton Heidi, *How to Be or not to Be: the United Nations Convention on Contracts for the International Sale of Goods, Article 6*, 4 Cardozo J. Int'l & Comp. L. 423, 434, who also says that the Convention plays "a supporting role, supplying answers to problems that the parties have failed to solve by contract". *See* BIANCA & BONELL, *supra* note 162, at 51, according to whom one of the basic principle of the convention is that it applies "only to the extent that no contrary intention of the parties can be established". *See* also SCHLECHTRIEM, *supra* note 164, at 53.

Parties' right under Article 6 to exclude the convention in its entirety, even if all the requirements for its applicability do occur, "is an application of a generally recognized principle of private international law, according to which the parties to an international contract of sale of goods are permitted to choose the applicable law".[173] For example, the 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods states in Article 7 that " a contract of sale is governed by the law chosen by the parties"; the 1980 Rome Convention on the Law Applicable to Contractual Obligations similarly says in Article 3 that "the contract shall be governed by the law chosen by the parties".

6.3.1. Express exclusion with or without choice of the applicable law

The CISG does not determine how the parties to an international sale can or must exclude, or derogate from, the applicable uniform law.[174]

Of course there is no problem when parties expressly agree on the total or partial exclusion of the CISG. However, the problem is which law will govern the contract instead of the CISG. Two situations are here possible. If the parties do not choose any different law to replace the excluded CISG, the applicable domestic law must be determined in accordance to the conflict of laws rules of the *forum*;[175] but if these rules lead to the law of a Contracting State, the "non-uniform, domestic sales law of that State governs the contract".[176] On the other hand, if the parties while excluding the CISG have made a choice of the applicable non-uniform law, this law will govern the contract, provided that such a choice is valid under the law of the *forum*.[177]

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[173] BIANCA & BONELL, *supra* note 162, at 54.
[174] For an analysis of problems connected to the explicit exclusion of the CISG by the parties *see* FRANCO FERRARI, *supra* note 1, at 120.
[175] FRANCO FERRARI, *supra* note 5, at 167.
[176] SCHLECHTRIEM, *supra* note 164, at 54. HONNOLD, *supra* note 160, at 126; BIANCA & BONELL, *supra* note 162, at 59.

6.3.2. Implicit exclusion

Beside express exclusion, it is possible that the parties' intention not to apply the CISG remains implied but still recognizable. Even if there is no provision in the CISG allowing such a form of exclusion, there is no doubt about its validity.[178] But it is necessary that the parties indicate clearly, even though not expressly, their intention. To recognize such an intention is not always easy, but both doctrine and case law have recognized some typical situations. For example, the choice of the law of a contracting State is not considered to amount to an exclusion of the uniform law, because the CISG has become part of the national domestic law for international sales in the contracting States.[179] Thus, in order to exclude the Convention, the parties must "clearly indicate that they intend to choose the law governing domestic sales as a proper law of the contract".[180] On the other hand, an agreement on the application of the law of a non-contracting State will usually amount to an implied exclusion of the convention.[181] Other ways to exclude implicitly the Convention have been identified in the use of general conditions or standard form contracts "whose content is influenced by principles and rules typical of the domestic law of a particular State",[182] even if in this last case other circumstances have to be evaluated in order to ascertain the parties' intent (*e.g.*, the parties' actual knowledge of the

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[177] SCHLECHTRIEM, *supra* note 164, at 54 believes that the validity of a choice of law derives from the law which the parties have agreed should apply to the contract.
[178] *Id.*; *see* also FRANCO FERRARI, *supra* note 5, at 151-152, according to whom the lack of express reference to the possibility of an implicit exclusion has the meaning "to discourage courts from too easily inferring an implied exclusion or derogation".
[179] ENDERLEIN & MASKOW, *supra* note 164, at 48; SCHLECHTRIEM, *supra* note 164, at 55. The indication of the law of a contracting State must be interpreted not only as making applicable the CISG but also as determining the law applicable to the issues not governed by the Convention itself, thus avoiding to have to resort to the complex rules of private international law. In this sense, *see* also FRANCO FERRARI, *supra* note 5, at 159-160.
[180] BIANCA & BONELL, *supra* note 162, at 56.
[181] ENDERLEIN & MASKOW, *supra* note 164, at 49, who add that it is recommendable for the parties excluding the Convention to replace it because otherwise the applicable domestic law will have to be determined by using the rather vague conflict of law rules".
[182] BIANCA & BONELL, *supra* note 162, at 57.

existence of the Convention, the use of the same general conditions or standard forms in previous transactions, and the choice of a *forum* located in a non-contracting State).

Another issue is to be addressed: under which law is to be judged the validity of the exclusion or of the derogation? The question has to be solved by reference to a particular domestic law: either the law that would govern the contract in the absence of the convention or the law chosen by the parties as the proper law of the contract. Of course the possibility to choose a particular law depends on the rules of private international law of the *forum*.[183]

6.4. Applicable Law Provisions

Pursuant to Article 28, "if, in accordance with the provisions of this Convention, one party is entitled to require performance of any obligation by the other party, a court is not bound to enter a judgment for specific performance unless the court would do so under its own law in respect of similar contracts of sale not governed by this Convention". Article 28 is clearly a conflict of laws rule, one of the very few of the CISG.[184]

For a better understanding of this provision, it is necessary to recall briefly the CISG scheme in case of a breach of contract by the parties. The main obligations of the parties are: for the seller, the delivery of the goods, the handing over of documents and the transfer of the property in the goods (Article 30); for the buyer, the taking delivery of the goods and the payment of the contract price. Article 45 (for seller's breach) and Article 61 (for buyer's breach) determine the remedies available to the parties. Basically, the buyer has the right to require performance, to declare the contract avoided, to reduce the price, and to claim damages. The seller may require performance, declare the contract avoided or claim damages. In essence, the

[183] *Id*. at 60.
[184] In the same way *see* ENDERLEIN & MASKOW, *supra* note 164, at 122.

promisee "may either require the promisor to perform the underlying obligation or he may claim damages on account of the failure to perform"[185].

The promisee has the right to require performance as soon as the obligation becomes due by the promisor;[186] even when the promisee could declare the contract avoided,[187] he may still insist on performance. In both situations, the promisee has the right to claim damages under Article 74.

The CISG follows the civil law approach, which favors specific performance as the general remedial rule and considers the right to claim damages only as a secondary remedy.[188] The common law approach, which considers specific performance only as an exceptional remedy in case of a special interest of the promisee (commercial uniqueness), is disregarded.[189]

Article 28 is understandable in this context: it is a compromise between the civil law and common law views on remedies for failure to perform,[190] even if commentators from both sides stress the fact that the practice is quite close.[191] On the one hand the promisee has a right to require performance under the CISG, on the other hand the enforceability of this right does not depend on the Convention but on a particular local law: the *lex fori*. Thus, "Courts of Contracting States which grant specific performance only as an exceptional remedy are not

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[185] SCHLECHTRIEM, *supra* note 164, at 198.
[186] *See* Article 46(1) for the buyer and Article 62 for the seller.
[187] *See* Article 49 and Article 64.
[188] SCHLECHTRIEM, *supra* note 164, at 199; the same view is expressed by BIANCA & BONELL, *supra* note 162, at 232 ("Specific performance is granted only exceptionally at the court's discretion as an equitable relief").
[189] *See* for example UCC 2-716(1): "specific performance may be decreed where the goods are unique or in other proper circumstances". *See* SCHLECHTRIEM, *supra* note 164, at 200: "…it is considered to be preferable and more reasonable in economic terms to liquidate the contract rather than to compel the promisor to perform".
[190] SCHLECHTRIEM, *supra* note 164, at 200; speak of compromise also BIANCA & BONELL, *supra* note 162, at 236.
[191] According to HONNOLD, *supra* note 160, at 277, even if the remedy of specific performance is more used in civil law jurisdiction, for reasons of efficiency "remedies to coerce performance are seldom employed even in domestic commerce". BIANCA & BONELL, *supra* note 162, at 233 say that the practical difference is small, because "the difficulties and delays in obtaining the very goods contracted for will in most cases<discourage the aggrieved party from suing for specific performance" in civil law systems. *See* also ENDERLEIN & MASKOW, *supra* note 164, at 121.

required to alter fundamental principles of their judicial procedure".[192] There is a broad agreement on the point that the purpose of Article 28 is to give common law courts the possibility to refuse specific performance when it would be against "basic common law principles".[193] The Convention on this point seems to accept the common law view that distinguishes between obligation and remedy for its nonperformance, between ascertainment of a right (under the uniform provisions) and its enforceability (left to the national law of the *forum*).[194]

Thus, under Article 28, a court seised of a case where the promisee brings an action for specific performance must dispose of the in the same manner as it "would do so under its own law in respect of similar contracts of sale".[195]

The reference to the court's "own law" deserves some analysis. As a prominent commentator correctly pointed out, "usually questions outside the scope of the CISG are governed by the domestic rules of the jurisdiction that is selected by principles of private international law".[196] In applying this provision, the problem arises whether Article 28 refers immediately to the domestic law of the *forum* or to the law applicable under rules of private international law of the *forum*. A practical example may be useful at this juncture. Suppose State X is the *forum* for an international sale between two parties having their place of business in States X and Y; assuming that the Convention is applicable, the issue is then whether Article 28 refers to the whole law of State X, including its rules of private international law that might invoke the rules on specific performance of State Y? Writers agree on the point that the

[192] SCHLECHTRIEM, *supra* note 164, at 200.
[193] *Id*. at 205.
[194] *Id*. at 206.
[195] *See id.* ,according to whom "a case is "similar" where a contract would give rise to the same obligations on the promisor".
[196] HONNOLD, *supra* note 160, at 272.

expression "own law" means the "domestic law of the *forum* state, excluding its private international law".[197] Therefore, a court must only look at the law of the *forum*, just as it had to deal with a national contract; the court must not apply its own conflict of laws rules and verify whether the law of the *forum* "would have been applicable if the contract had not been subject to the Convention".[198] A different law constituting the statute of the contract is irrelevant.

So, where the substantive law of the *forum* allows in the particular situation the specific performance of the promisor's obligation, then the court will enforce the promisee's action; "the court is not to decide the matter as it would if there were no Uniform Sales Law, but as it would under its own law".[199] A consequence of this mechanism is that an agreement between the parties in favor of specific performance, in theory valid under Article 6, will not bound a court whose law does not provide such a remedy for similar national contracts.[200]

In practice and generally speaking, a civil law court is very likely to permit an action claiming specific performance, whereas a common law court is as much as likely to dismiss such an action (since damages are considered an adequate remedy in most instances). In the U.K., under the Sales of Goods Act 1893, a court may enter a judgment or decree for the specific performance of contract "to deliver specific or ascertained goods", whereas generic goods seem to be out of this provision. The action to compel delivery under the Uniform Commercial Code is less strict and allows specific performance "where the goods are unique or in other proper circumstances". As far as the seller's action to recover the price is concerned, UCC 2-709(1)(b) provides that the seller may recover the price "of goods identified to the contract if the seller is

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[197] SCHLECHTRIEM, *supra* note 164, at 205. *See* HONNOLD, *supra* note 160, at 273, who relies on the substantially identical provisions in the 1964 Sales Convention and believes that Article 28 is to be understood to "invoke the rules on specific performance of the forum".
[198] SCHLECHTRIEM, *supra* note 164, at 205.
[199] *Id*.
[200] BIANCA & BONELL, *supra* note 162, at 239.

unable after reasonable effort to resell them at a reasonable price or the circumstances reasonably indicate that such effort will be unavailing".

According to a leading commentary, a court does not have any discretion in entering a judgment for specific performance: when the *lex fori* does not give the judge the power to enter a judgment for specific performance, there is no room for him to grant such a remedy on other grounds, for example the internationality of the contract.[201] Since Article 28 is a conflict rule, once a particular national law becomes applicable, it must be applied; the only discretion allowed is that granted under national law, Article 28 does not add anything more. This strict position is not shared by another leading commentary, according to which the wording "the court is not bound to do so" would mean that "nothing prevents it from entering a judgment for specific performance in cases in which formerly it refused to do so".[202] Thus, common law courts might go further in international contract cases than they do in domestic cases.

Article 28 does not face the problem of enforcement of a judgment for specific performance. The question is left "to the procedural law of the country where enforcement is sought".[203] An interesting situation can arise in relation to the 1968 Bruxelles Convention, now constituting a law common to the European Union countries: a judgment for specific performance of a member state will be enforceable in the U.K. even when in cases in which an English court would not have granted such a remedy.

Even if Article 28 does not mention it, the provision is applicable to arbitral tribunal as well. The "own law" is here the law which governs the arbitral procedure, in most cases meaning the law of the place of arbitration.[204]

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[201] SCHLECHTRIEM, *supra* note 164, at 207.
[202] BIANCA & BONELL, *supra* note 162, at 237.
[203] *Id*. at 238.
[204] SCHLECHTRIEM, *supra* note 164, at 208.

Another applicable law provision is to be found in Article 42, a provision dealing with the seller's obligation to "deliver goods which are free from any right or claim of a third party based on industrial property or other intellectual property". This particular duty is expression of the seller's general obligation to deliver conforming goods pursuant to Article 35. This specific duty is limited in two ways. First, the goods must be free only from those rights and claims "of which at the time of the conclusion of the contract the seller knew or could not have been unaware" (Article 42(1)). Second, and more important to this analysis, the seller is only responsible for rights and claims based on the law of particular places: pursuant to Article 41(1)(a), if the parties contemplated that the good would be resold or otherwise used in a particular State, the seller is responsible only for rights or claims based on industrial or intellectual property under the law of that State; if the parties did not contemplate any particular place where resale transactions would occur or where the goods would be used, Article 42(1)(b) limits the buyer's protection to rights and claims "under the law of the State where the buyer has his place of business".

This provision is clearly intended to protect the buyer's commercial interests. The provision does not simply protect the buyer generically where his place of business is located, but extends to safeguard his contractual expectations to resell or use the goods in a third country. Article 42 makes applicable the domestic industrial/intellectual property law either of the buyer's State or of a different third State to which the buyer, at the time of the contract, intended to make use of the goods.

6.5. Gap Filling under the CISG

The CISG is the first of the conventions examined in this paper that faces the gap-filling issue with an *ad hoc* provision.[205] Article 7(2) is an innovative provision for at least two reasons. First, it implicitly distinguishes between two different kinds of gaps: internal gaps and external gaps, by an explicit definition of the former ones.[206] Second, it gives a two-step solution to fill internal gaps (as defined in Article 7(2)), thus indicating also a means to fill external gaps. A separate analysis is therefore necessary.

6.5.1. Internal Gaps

Article 7(2) defines internal gaps as "questions concerning matters governed by this Convention which are not expressly settled in it". The Convention disposes that this kind of questions, presenting a close connection with the uniform law, "are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in conformity with the law applicable by virtue of the rules of private international law". Thus, in the CISG is not possible to resort immediately to the national law referred to by the applicable conflict of laws rules when an internal gap is found. These questions, touched by the uniform law but without any solution, are to be dealt with first in accordance to the Convention itself, through the resort to general principles, ("general principles rule"). Only after this first inquiry has not brought to any result, the CISG allows (and imposes) the recourse to the domestic law applicable by virtue of the rules of private international law.

This mechanism presents two problems: first, it is necessary to determine when a gap is internal in the sense of Article 7(2) or external, namely when a matter is governed by the Convention or not and; second, and even more problematic, it is necessary to identify the

[205] For the importance of this innovation *see* FRANCO FERRARI, *supra* note 1, at 127.
[206] For the distinction between internal and external gaps *see* also *id.* at 151.

"general principles" according to which such questions must be settled. The CISG provides us with no guidance, so both questions are left to interpretation by the courts and generally accepted principles underlying contract law.[207]

Only after this research has failed,[208] even for internal gaps the Convention allows parties to resort to the applicable national law, determined pursuant to the conflict of laws rules of the *forum*.[209] It has to born in mind, however, that under the Convention the recourse to the applicable national law in these circumstances "is not only admissible, but even obligatory".[210]

Two examples of internal gaps can be useful to see how the Article 7(2)'s mechanism actually works. A very representative case is the question of the rate of interests on sums in arrears. Under Article 78, "if a party fails to pay the price or any other sum that is in arrears, the other party is entitled to interest on it". The CISG, however, does not say anything about any preferred methodology for calculating the rate of interest. The qualification of such a gap as internal or external has been actually debated by scholars; in our opinion, however, it should be considered an internal gap.[211] The problem is that there is no specified approach in the CISG to determining applicable interest rates. Thus, as Article 7(2) mandates, the applicable law is the non-unified law, meaning the law which would be applicable to the sale were the contract not

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[207] General principles already identified are: the principle of good faith; the principle of party autonomy; the principle of informality (the freedom of form); the right to interest on sums of money not paid; the principle of full compensation in damages; the principle of reasonableness; the principle of mitigation in limiting the loss resulting from a breach; the prohibition of *venire contra factum proprium*, namely to contradict one's previous conduct or representation on which the other party has reasonably relied; the principle of the seller's place of business as a general place of payment. On this topic see especially Franco Ferrari, *General Principles and International Uniform Commercial Law Conventions: a Study of the 1980 Vienna Sales Convention and the 1988 UNIDROIT Conventions on International Factoring and Leasing*, 10 PACE INT'L L. REV. 157, 170-176. *See* also SCHLECHTRIEM, *supra* note 164, at 67, 208.

[208] *See* HONNOLD, *supra* note 160, at 150, who comments that the second option, the private international law rule, was added because of the doubt that "general principles of the convention could always be found".

[209] SCHLECHTRIEM, *supra* note 164, at 66, 208. *See* HONNOLD, *supra* note 160, at 150, according to whom the general principles rule is "intended to limit a too quick turn to national law by the courts". According to BIANCA & BONELL, *supra* note 162, at 83, the common principle rule should be born in mind especially by common law courts, which are used to turning easily to domestic law when a case is not specifically regulated by the Convention.

[210] BIANCA & BONELL, *supra* note 162, at 83.

governed by the Convention.[212] Another internal gap, on the contrary, has been dealt with by adopting an internal solution, namely by recourse to general principles - the burden of proof. In the CISG, there is no general provision expressly dealing with the burden of proof issue. But some specific provisions contain wordings that are expressions of general principles on the burden of proof and these basic principles can be used in order to fill the gap.[213] From Article 79(1), which deals primarily with exemption from contractual liability, and Articles 39-39 (dealing with examination and rejection of defective goods by the buyer), it is possible to synthesize the general rule that a party who wants to exercise a right must prove the facts on which this right is based.[214]

The preference accorded to the general principles rule discussed in the foregoing paragraph is easily understood when one contemplates the difficulties that references to private international law creates in international transactions: "the uncertainties of the rules of private international law, the difficulty of ascertaining foreign law and the possible incongruity between pieces of domestic law and the overall plan of the Convention".[215] Moreover, an effort to fill in the gaps through the general principles on which the CISG is based is consistent with the mandate of Article 7(1) to interpret the Convention with regard to its international character and the need to promote uniformity in its application.

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[211] Accordingly, *see* FRANCO FERRARI, *supra* note 5, at 213.

[212] Oberlandesgericht München, 3.4.1994, UNILEX. For a complete analysis of the various positions on the issue see in particular Franco Ferrari, *Uniform Application and Interest Rates under the 1980 Vienna Sales Convention*, 24 GA. J. INT'L & COMP. L. 467.

[213] *See* Franco Ferrari, *Das Verhältnis zwischen den Unidroit-Grundsätzen und den allgemeinen Grundsätzen internationaler Einheitsprivatrechtskonventionen*, in JURISTEN ZEITUNG, 1998, n.1, 13.

[214] See SCHLECHTRIEM, *supra* note 164, at 47. See also Ullrich Magnus, *Stand und Entwicklungen des UN-Kaufrechts,* in ZEITSCHRIFT FÜR EUROPÄISCHES PRIVATRECHT, 1995, 207, who expressly refuses the recourse to private international law in order to fill the gap on burden of proof. In the same sense the case law, see Handelsgericht Zürich, 26.4.1995, UNILEX; Landgericht Landshut, 5.4.1995, UNILEX; Oberlandesgericht München, 8.3.1995, UNILEX; Oberlandesgericht Innsbrück, 1.7.1994, UNILEX; a comprehensive formulation of this principle can be found in Tribunale di Vigevano, 12.7.2000, UNILEX ("*ei incumbit probatio qui dicit, non qui negat*").

6.5.2. External gaps

The mechanism above described, on the contrary, does not apply to the other kind of gaps, namely to questions concerning matters which the Convention does not govern or which it expressly exclude from its scope of application. Such gaps, beyond the area of the gap-filling rule under Article 7(2), are to be settled directly by applying the national non-unified law designated by the private international law of the *forum*.[216]

As already discussed in this analysis, Article 4 excludes from the CISG's scope of application *rationae materiae* the validity of the contract or of any usage and Article 5 makes the Convention not applicable to the liability of the seller for death or personal injury caused by the goods.

In addition to these questions, there are many others not expressly excluded but implicitly not covered by the Convention, which have been identified over the years by the courts: existence of an agency relationship[217], right of set-off,[218] assignment of receivables,[219] statute of limitations,[220] validity of a penalty clause,[221] validity of a settlement agreement,[222] assumption of debt,[223] novation,[224] estoppel.[225]

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[215] HONNOLD, *supra* note 160, at 153. *See* also SCHLECHTRIEM, *supra* note 164, at 66, 208.
[216] BIANCA & BONELL, *supra* note 162, at 75.
[217] Landgericht Hamburg, 29.9.1990, UNILEX.
[218] Oberlandesgericht Koblenz, 17.9.1993, UNILEX.
[219] Oberlandesgericht Hamm, 8.2.1995, UNILEX.
[220] ICC Court of Arbitration, 23.8.1994, UNILEX.
[221] ICC Court of Arbitration, n. 7197/1992, UNILEX.
[222] Olandgericht Aachen, 14.5.1993, UNILEX.
[223] Oberstergerichtshof, 4.4.1997, UNILEX.
[224] ICC Court of Arbitration, n. 7331/1994, UNILEX.
[225] Rechtsbank Amsterdam, 5.10.1994, UNILEX.

6.6. Conclusion

The CISG is the first of the conventions under our analysis that does not deal with transportation and that, being not mandatory, expressly and broadly recognizes party autonomy, by allowing parties both to exclude the applicability of it and to limit or derogate from one or more of its provisions (and recognizing therefore the *substitutive function* of private international law). The CISG is also the first law expressly adopting private international law as a general instrument to integrate and to complete the overall discipline of international sale of goods, by means of the gap-filling rule provided for by article 7 (2) (*subsidiary function*). The importance of such new approach und utilization of private international law is confirmed by the strong impact on subsequent uniform law conventions: the Ottawa conventions on international factoring and international leasing, as well as the recent New York assignment convention (which goes even further), are all based on the CISG approach, which seems to have established a point of not return in the field of the relationship between uniform substantive law and private international law. The CISG, thus, represents the watershed in our paper between two completing different approaches to uniformity in international commerce.

CHAPTER 7

UNIDROIT CONVENTION ON INTERNATIONAL FINANCIAL LEASING

AND

UNIDROIT CONVENTION ON INTERNATIONAL FACTORING

(OTTAWA CONVENTIONS), 1988

7.1. Introduction

In the year 1974, the International Institute for the Unification of Private Law (UNIDROIT) began working on two draft conventions on international leasing and international factoring. In May 1988, during a Diplomatic Conference held in Ottawa, these two projects were brought to a conclusion by the adoption of the Convention on International Leasing (thereinafter "the Leasing Convention")[226] and the Convention on International Factoring (thereinafter "the Factoring Convention").[227]

In the present study about the relationship between international uniform law and conflict of laws rules, we will analyze these two Conventions (the "Ottawa Conventions") in a single chapter. Several reasons justify this approach. The Ottawa Conventions have been prepared by the same international institution and in the same period of time. Their structure is almost identical: both contain a chapter entitled "Sphere of Application and General Provisions", followed by a chapter on "Rights and Duties of the Parties". Only the Factoring Convention

[226] The Leasing Convention is in force in Belarus, France, Hungary, Italy, Latvia, Nigeria, Panama, Russian Federation, Republic of Uzbekistan. For an updated list of the contracting states, refer to http://www.unidroit.org.
[227] The Factoring Convention is in force in France, Germany, Hungary, Italy, Latvia, Nigeria. For an updated list of the contracting states, refer to http://www.unidroit.org.

provides an additional chapter on a particular issue, the "Subsequent Assignments". Both Conventions end with the Chapter on "Final Provisions"; their length is not particularly extended, only 23 Articles for the Factoring Convention and 25 for the Leasing Convention. More important, however, both uniform laws present the same approach to conflict of laws issues.

7.2. Ottawa Conventions' Scope of Application

The Ottawa Conventions deal with situations presenting an element of internationality and therefore potentially conflicting. The goal of both laws to overcome the uncertainty possibly deriving from such contractual situations is made very clear already from their Preambles, where it is stressed on one hand "the importance of removing certain legal impediments to the international financial leasing of equipment" and on the other hand "the importance of adopting uniform rules to provide a legal framework that will facilitate international factoring".

7.2.1. Leasing Convention's Scope of Application

Article 1 of the Leasing Convention defines the scope of application *rationae materiae*. According to this provision, "leasing" is a transaction "in which one party (the lessor), (a) on the specifications of another party (the lessee), enters into an agreement (the supply agreement) with a third party (the supplier) under which the lessor acquires plant, capital goods or other equipment (the equipment) on terms approved by the lessee so far as they concern its interests, and (b) enters into an agreement (the leasing agreement) with the lessee, granting to the lessee the right to use the equipment in return for the payment of rentals". Paragraph 2 specifies other characteristics that the financial leasing transaction must include, such as the (a) the lessee's specification of the equipment and selection of the supplier without reliance on the skill and

judgment of the lessor; (b) the acquisition of the equipment by the lessor in connection with a leasing agreement which, to the knowledge of the supplier, either has been made or is to be made between the lessor and the lessee; and (c) the taking into account, in the calculation of the rentals payable under the leasing agreement, of the amortisation of the whole or a substantial part of the cost of the equipment.

The Convention provides therefore a "description" rather than a mere "definition", of the leasing transaction,[228].which is due both to the particularly strong economic character of the leasing transaction (which requires flexibility), and to the international character of the text in which the description is embodied, a result of a compromise between different legal systems and different legal definitions of the same transaction. In sum, the leasing transaction considered by the Convention is a triangular relationship that involves (*i*) a *supplier* (who sells the equipment to the lessor), (*ii*) a *lessor* (who finances the purchase of the equipment and lease it to the lessee) and (*iii*) a *lessee* (who specifies the equipment and pays rentals to the lessor for the right to use it) and two contracts, namely (*a*) the contract between the supplier and the lessor for the purchase of the equipment and (*b*) the contract between the lessor and the lessee for the lease of the same equipment.[229]

As already mentioned, the Convention applies only to the *international* leasing. Article 3 states that it applies when the lessor and the lessee have their places of business in different States and: (*a*) those States and the State in which the supplier has its place of business are

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[228]Aldo Frignani, *Convenzione Unidroit sul Leasing Finanziario Internazionale (1988)*, in LE CONVENZIONI DI DIRITTO DEL COMMERCIO INTERNAZIONALE 151-167, 152 (Ferrari ed., 2002).

[229] *See* David A. Levy, *Financial Leasing under the Unidroit Convention and the Uniform Commercial Code: a Comparative Analysis*, 5 IND. INT'L & COMP. L. REV. 267, 272. The connection established between these two contract was commented by Jerzy Poczobut, *International Financial Leasing, The UNIDROIT Project-From Draft (Rome 1987) to Convention (Ottawa 1988)*, RABELS ZEITSCHRIFT FUR AUSLÄNDISCHES UND INTERNATIONALS PRIVATRECHT, 724 (1987): "a great disappointment is the absence in the Draft Convention of provisions as to the applicable law to which international leasing is secondarily subordinate; such provisions really

Contracting States; or (*b*) both the supply agreement and the leasing agreement are governed by the law of a Contracting State.

Like the CISG, the Leasing Convention first defines when the transaction may be considered international by means of a subjective criterion (the place of business of the parties to the lease); then it states the (two alternative) conditions of applicability. Respect to the conditions of applicability, it is interesting to point out that the condition *sub* (*b*) is designed to make the Convention applicable even in the case that no party to the transaction has its place of business in a contracting state. The reason is that, since it is necessary and sufficient that both contracts of the transaction, the lessor-lessee contract and the lessor-supplier contract, be under a law of a contracting state, such condition may be satisfied "either through affirmative choice of law, or by virtue of conflict rules".[230] Article 3(1)(b) therefore "permits parties who are not located in contracting states to have the Convention apply to their relationship through the use of appropriate choice of law clauses";[231] if the lessor and the lessee have their place of business in different (non contracting) states, choice of law clauses in the leasing and in the supply contract can make applicable the law of a contracting state. This mechanism is possible, however, only when "the conflict of laws rules of the forum recognize party autonomy in selecting the law applicable to the contracts".[232]

7.2.2. Factoring Convention's Scope of Application

As far as the scope of application *rationae materiae* is concerned, Article 1 describes the "factoring contract" as a contract concluded between the *supplier* and the *factor*, pursuant to

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should be a supplement to international regulations. The reference to the subordinately applicable law under this convention should be of particular significance, as the convention introduces a new type of contractual linkage".

[230] *Id.* at 274. Even though the statement cited is correct in the result, it is to be noticed that the choice of law by the parties is itself a rule of conflict of laws; even more, it is the main rule of conflict of laws. *See* for instance the *1980 Rome Convention on the Law Applicable to Contractual Obligations*, Article 3.

[231] Ronald Cuming, *Legal Regulation Of International Financial Leasing: the 1988 Ottawa Convention*, 7 ARIZ. J. INT'L & COMP. L. 39, 50.

which: (*a*) the supplier will assign to the factor receivables arising from commercial contracts of sale of goods made between the supplier and its customers (debtors); (*b*) the factor is to perform at least two functions among finance for the supplier, maintenance of accounts relating to the receivables, collection of receivables, protection against default in payment by debtors;[233] (*c*) notice of the assignment is to be given to debtors.[234]

Article 2 deals with the territorial scope of application. The Convention applies when the receivables assignment pursuant to a factoring contract arise from a contract of sale of goods between parties (supplier and debtor) that have their place of business in different States and: (*a*) these States and the State of the factor are Contracting States; or (*b*) both the sale contract and the factoring contract are governed by the law of a Contracting State.[235] Like in the case of the Leasing Convention, the criterion of applicability *sub* (*b*) could make the uniform law applicable even if none of the parties to the transaction has its place of business in a contracting state. It will be necessary, as already seen, to identify the laws applicable to the sale contract and to the factoring contract by virtue to the conflict rules of the *forum*.

It is also interesting to point out that the "internationality" of the factoring is made *per relationem*: it is actually based not on the factoring contract but on the underlying sale contract.[236] Therefore, in order to have an international factoring, it is necessary to have first an international sale of goods. No doubt, then, that the internationality of the sale contract has to be

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[232] *Id.*

[233] It is to consider as "factoring" under the Convention, therefore, even a transaction where the factor merely collects the receivables and maintains accounts, which would never be considered "factoring" under any national legal system. *See* Marco Torsello, *Convenzione UNIDROIT sul Factoring Internazionale (1988),* in LE CONVENZIONI DI DIRITTO DEL COMMERCIO INTERNAZIONALE 119-138, 123 (Ferrari ed., 2002).

[234] This requirement makes the Convention not applicable to the so called non-notification factoring.

[235] This type of applicability ("indirect applicability" as opposed to the "direct applicability" under (a) makes the Convention applicable even when one of the three parties to the factoring transaction is not located in a Contracting State. *See* Torsello, *supra* note 233, at 124.

[236] *See* G. FOSSATI & A. PORRO, IL FACTORING at 228 (1994).

determined according to the subjective criterion of the "different places of business of the parties" set forth by Article 1 of the CISG.[237]

7.3. Party Autonomy

Both the Ottawa Conventions expressly recognize party autonomy. They are not intended, therefore, to be mandatory.[238] The extent to which such autonomy is allowed is, however, different in the two Conventions and has to be separately analyzed.

Starting with the Leasing Convention, Article 5 states that "*the application of this Convention may be excluded only if each of the parties to the supply agreement and each of the parties to the leasing agreement agree to exclude it*" (Paragraph 1). In addition to the general right to exclude the Convention, subject to the consent of all the actors of the leasing transaction, Article 5 also provides a more limited right. Where the absence of a common will does not permit to (totally or partially) exclude the Convention, "*the parties may, in their relations with each other, derogate from or vary the effect of any of its provisions except as stated in Article 8(3) and 13(3)(b) and (4)*". The parties to a specific relationship within the more complex leasing transaction, namely supplier-lessor or lessor-lessee, may still exercise their contractual autonomy by derogating from or by varying any uniform provision.[239] Only three provisions do not recognize party autonomy: Article 8(3), dealing with the lessor's warranty of the lessee's quiet possession of the equipment where the superior title, right or claim is not derived from an act or omission of the lessee); Article 13(3)(b), according to which damages must not be substantially in excess of those that the lessor would have recovered had the lessee performed the

[237] On this point and for an analysis of this both economical and legal connection *see* Torsello, *supra* note 233, at 119-120.
[238] On this point *see* FRANCO FERRARI, *supra* note 19, at 91.
[239] Roy M. Goode, *Conclusion of the Leasing and Factoring Conventions*, J.B.L. 1988, Jul, 347-350, 350.

leasing agreement in accordance with its terms;[240] and article 13(4), which states that where the lessor has terminated the leasing agreement, it shall not be entitled to enforce a term of that agreement providing for acceleration of payment of future rentals.[241]

Party autonomy under the Factoring Convention is, on the contrary, less flexible. No derogation, variation or partial exclusion is allowed but, according to Article 3, the application of the Convention may be excluded "*only as regards the Convention as a whole*".[242] Moreover, since the factoring transaction involves at least three subjects (factor, supplier, debtor and sometimes subsequent assignees) and two bilateral contracts (the sale contract and the factoring contract), the application of the Convention may be excluded by the parties to the factoring contract or by the parties to the sale contract "*as regards receivables arising at or after the time when the factor has been given notice in writing of such exclusion*".[243]

7.4. Private International Law and Gap-Filling

As far as gap-filling is concerned, both the Ottawa Conventions contain the same rule, which is derived literally from Article 7 of CISG. Leasing Convention's Article 6(2) and Factoring Convention's Article 4(2) state that "*questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of such principles, in conformity with the law*

[240] *See id*. at 350, according to whom the court has the power "to strike down a liquidated damages clause which provides for damages substantially in excess of those required to compensate the lessor for the loss of his bargain".
[241] *See id*. at 350 ("though he is entitled to have the value of these [rentals]"). See also David A. Levy, *Financial Leasing under the Unidroit Convention and the Uniform Commercial Code: a Comparative Analysis*, 5 IND. INT'L & COMP. L. REV. 267, 275, according to whom "the Leasing Convention thus follows the traditional priciple of freedom of contract subject to limited mandatory provisions".
[242] According to FOSSATI & PORRO, *supra* note 236, at 229 it is necessary, in order to reduce conflicts between the parties and to optimize the course of business, a restriction of the party autonomy, at least with respect to some fundamental matters.
[243] Article 3(1)(b).

applicable by virtue of the rules of private international law".[244] It can therefore be affirmed about the Ottawa Conventions the same as for the CISG: these uniform laws are not intended to be exhaustive codes.[245]

Some general principles are common in both uniform laws. For example, (*i*) the principle of good faith in the international trade[246], (*ii*) the principle of maintenance of "a fair balance of interests between the different parties" to the leasing or factoring transaction,[247] and (*iii*) the principle of party autonomy.[248]

More specifically, within the Factoring Convention have been recognized the principle of *favor cessionis* (even in the presence of a *pactum de non cedendo* between the supplier and the debtor) and the principle of debtor protection (which prohibits placing the debtor in a worse position as result of the assignment).[249] As far as the Leasing Convention is concerned, the following principles have been recognized: protection of lessee's interests, the mitigation principle and the principle of *favor contractus*.[250]

Where general principles cannot be found, gaps (both as to matters governed but not settled, *i.e.* internal gaps, and as to matters not within the scope of the Conventions, *i.e.* external gaps) are to be filled by recourse to the domestic law as determined by the conflict of laws rules of the *forum*.[251] In the cases in which the *1980 Rome Convention on the Law Applicable to*

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[244] The first paragraph of both provisions contains the usual stating on interpretation: "in the interpretation of this Convention, regard is to be had to its object and purposes as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade".
[245] Torsello, *supra* note 233, at 125.
[246] Frignani, *supra* note 228, at 156.
[247] *See* the *Preambles*.
[248] *Contra* FRANCO FERRARI, *supra* note 19, at 127, according to whom the party autonomy allowed by the Factoring Convention is too limited to be considered as expression of a general principle.
[249] Torsello, *supra* note 233, at 125. Franco Ferrari, *supra* note 207, at 177-179.
[250] *See* Franco Ferrari, *supra* note 207, at 179-181.
[251] For example, the Leasing Convention's Preamble implicitly considers the Convention not applicable to "accounting and taxation issues", *see* Cuming, *supra* note 231, at 43. According to the final declaratory clause in the Preamble, the States parties to this Convention recognize "the desirability of formulating certain uniform rules relating primarily to the *civil and commercial law* aspects of international financial leasing" [emphasis added]. As

Contractual Obligations is applicable, for example, the relationship between assignor and assignee of a receivable is governed by the law applicable to the contract made between them (*lex contractus*). The law applicable to the underlying contract is determined according to the same *Rome Convention*, which makes applicable the law chosen by the parties (Article 3) or, in the absence of such choice, the law of the state with which the contract has the closest connection. The law applicable to the receivable, on the contrary, determines the receivable's negotiability and the relationship between assignee and debtor, namely the law that governs the sale contract underlying the assignment (*lex obligationis*).[252]

7.5. Applicable Law Provisions

The Factoring Convention does not provide for any conflict rule, even though the matter was discussed during the work sessions.[253] Only the Leasing Convention contains specific conflict rules. Article 4(2) states that the Convention does not cease to apply when the equipment has become a fixture to or incorporated in land and that "*any question whether or not the equipment has become a fixture to or incorporated in land, and if so the effect on the rights inter se of the lessor and a person having real rights in the land, shall be determined by the law of the State where the land is situated*" (*lex rei sitae*). The convention expressly refers to a national law for property rights, an area which is also expressly excluded from the scope of application of the Vienna Convention and left to national rules.[254]

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far as the Factoring Convention is concerned, there are gaps regarding the validity of the factoring contract, conflicts among several assignees, conflicts between the factor and supplier's creditors, relationship between the factor and the supplier's bankruptcy. *See* FERRARI, *supra* note 207, at 124; Torsello, *supra* note 233, at 125.

[252] For a statement about the necessity to have recourse to private international law and an analysis of the relationship between the Factoring Convention and the Rome Convention, s*ee* ERMANNO CALZOLAIO, IL FACTORING IN EUROPA 129 – 131 (1997).

[253] *See id.*, at 143.

[254] *See* Article 4(b) of the Vienna Convention, according to which the Convention is not concerned with "the effect which the contract may have on the property in the goods sold".

Article 7 deals with the lessor's real rights in the equipment against lessee's creditors. These rights, however, must be exercised according to the rules of the applicable law. Article 7(3) determines that the applicable law is the law of (*a*) the state where a ship is registered; (*b*) the state in which an aircraft is registered pursuant to the Convention on International Civil aviation done at Chicago in 1944; (*c*) the state in which the lessee has its principal place of business in the case of an equipment of a kind normally moved from one State to another; or (*d*) the state in which the equipment is situated in all other cases.

Other provisions then expressly refer to the law applicable by virtue of the rules of private international law to determine the existence and the extent of particular rights and duties of the parties (*see* Articles 7(5)(b) and 8(4)).

7.6. Provisions Implying Recourse to the Applicable Law

In addition to the provisions that expressly contain a conflict rule, there are also provisions in the Conventions, whose actual content can be determined only by recourse to the domestic applicable law. Since such provisions do not provide any specific conflict rule, the applicable law is necessarily to be determined by virtue of the private international law of the *forum*.

For example, under Article 10(1) of the Leasing Convention, "*the duties of the supplier under the supply agreement shall also be owed to the lessee as if it were a party to that agreement and if the equipment were to be supplied directly to the lessee*". Such duties can be of great importance to the lessee: if the law applicable to the supply agreement provides some warranties of quality or performance of the equipment, these warranties will benefit also and mainly the lessee. Moreover, "the lessee has an interest in the extent to which the applicable law

permits the supplier to exclude or contract out of obligations with respect to the quality and performance of the goods".[255] It is therefore necessary to identify the law applicable to the supply agreement, which is a contract for the sale of goods. This contract is clearly governed by the national law determined by the private international law of the *forum*, which may be a national law, for instance when the parties have their place of business in the same state, or it may be a uniform international law like the Vienna Convention for the sale of goods.

The determination of the applicable domestic law is also relevant with respect to the lessor-lessee relationship. Article 12 specifies the remedies available to the lessee against the lessor for defective performance by the supplier (right to reject the equipment; right to withhold rentals payable under the leasing; right to terminate the leasing and recover any sums paid in advance; lessor's right to remedy). After listing the remedies, Article 12 states that "*a right conferred by the previous paragraph shall be exercisable in the same manner and shall be lost in the same circumstances as if the lessee had agreed to buy the equipment from the lessor under the same terms as those of the supply agreement*". This provision, clearly, "prescribes a choice of law rule rather than a substantive rule of law"[256]. This mechanism however may cause some problems. For example, what happens when the applicable law of sale does not recognize the right of cure of the lessor-seller?[257] How could a law regulate the exercise of a right that it does not recognize? The approach according to which such a right would not be exercisable at all seems to be inconsistent with the purpose of the Convention. A better approach is therefore

[255] Cuming, *supra* note 231, at 53.
[256] *Id*. at 57. Article 12(2) has been criticized because of its necessary reference to a different law, which does not favor uniformity.
[257] This is the situation when the Sale of Goods Act, the sale law in the United Kingdom, applies. There is no problem, however, when the applicable law is the Vienna Convention, since the seller's right to cure is expressly stated in article 48. However, the right to cure under CISG can be exercise differently, for example, from the UCC, which also provides the seller with the right to cure (§ 2-508) but under different circumstances.

simply not to adopt this law to determine the manner in which the right will be exercised.[258] This *lacuna* could actually be avoided by the parties by inserting a clause in the leasing agreement whereby the lessee, by accepting the goods, waives his rights to rejection or termination pursuant to article 12.[259]

The Factoring Convention, in its Article 10, deals with the debtor's right to recover a sum in case of non-performance or defective or late performance of the contract of sale of goods. The Convention, however, does not provide any definition or regulation of the breach of the sale contract; it is necessary, therefore, to apply the *lex contractus* to be identified by virtue of the conflict rules of the *forum*.[260] The Convention does not simply refer to the applicable law, but limits itself the debtor's right to recover; the debtor is bound to recover first from the supplier and only after such unsuccessful attempt may bring action against the factor. Thus, Article 10 has a dual nature. On the one hand, it is a substantive provision that regulates and limits the debtor's right to recover; on the other hand, it is a conflict rule as to the reference to the breach of the underlying sale contract and to the existence of the recovery action.[261]

7.7. Conclusion

The Ottawa Conventions are broadly debtors to the CISG.[262] Both are not intended to be mandatory and do recognize party autonomy, even though the Leasing Convention does that in a wider way, according to the CISG model, and the Factoring Convention limit the parties' choice to a "take-it-or-leave-it" option. Both are intended to be not an exhaustive and complete

[258] Cuming, *supra* note 231, at 58.
[259] Levy, *supra* note 241, at 282 ("as a matter of sound business practice, the lessor will require the lessee to verify in writing prior to the payment of the supplier that it received and accepted the equipment, that the equipment is conforming as specified, and that the lessee agrees to be bound by its normally absolute obligation to pay under the leasing agreement").
[260] FERRARI, *supra* note 207, at 305.
[261] *Id*. at 332.

discipline of the relevant subject matters and do provide the same "two level" gap-filling rule: recourse to general principle where possible, otherwise external solution by recourse to the (domestic) law as determined by private international law of the *forum*.

The role of the non-uniform applicable law is also recognized by the Leasing Convention, which contains specific conflict rules (the *lex rei sitae* or other connecting factors regarding the lessor's real rights in the equipment against the lessee's creditors) directly determining the domestic law governing particular issues. Moreover, the application of several provisions in both Conventions necessarily implies the prior determination of the substantive applicable law, an issue that is to be dealt with by means of the applicable conflict rules (not specified by the Conventions).

Even though the impact of the Ottawa Conventions on international trade cannot still be determined, it's difficult to predict their significant success, especially if compared with the experience of the CISG. As a careful literature has pointed out,[263] with specific reference to the Factoring Convention but with considerations that may be well extended also to the sister convention on Leasing, it seems that these uniform laws have consolidated the common basis already existing in the most important legal systems rather than establishing new uniform solutions for issues presenting significant differences.[264] For example, the Factoring Convention does not face issues like the relationships between different factoring companies (the so called "*interfactors agreements*") or conflicts between the factoring company and third parties having rights on the assigned credits,[265] issues that are differently disciplined at international level and that therefore may frequently give rise to conflicts and would need a uniform rule. What just

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[262] *See* Torsello, *supra* note 233, at 138.
[263] ERMANNO CALZOLAIO, *supra* note 252, at 144; Torsello, *supra* note 233, at 137.
[264] ERMANNO CALZOLAIO, *supra* note 252, at 145.
[265] *Id*. at 144.

mentioned should confirm, on one hand, the intrinsic limit of uniform (substantive) conventions as the only instrument to face conflicting issues in international trade (especially in cases – like the Ottawa Conventions – where the uniform discipline is quite brief) and, on the other hand, the need to a new approach to the use of private international law, an example of which is the convention analyzed in the next chapter, the last one of this paper.

CHAPTER 8

UNITED NATIONS CONVENTION ON THE ASSIGNMENT OF RECEIVABLES IN INTERNATIONAL TRADE, 2001

8.1. Introduction

The final uniform law examined in this paper is the *United Nations Convention on the Assignment of Receivables in International Trade* (hereinafter referred to as the "Assignment Convention"), adopted in its final version in New York by the General Assembly on 12 December 2001.[266] The underlying purpose of this Convention, like other international uniform law in its respective field, is to foster, promote and document international agreement on some basic rules on assignment of receivables by (a) removing legal obstacles to certain international financing practices (*e.g.* by validating assignment of future receivables and bulk assignments, and by partially invalidating contractual limitations to the assignment of receivables); (b) enhancing certainty and predictability regarding to the law applicable to some key issues (priority among competing claims) and (c) by harmonizing domestic assignment regulations.[267]

[266] 85th General Assembly plenary meeting, New York, 12.12.2001, Resolution A/RES/56/81. The Uncitral Convention on the Assignment of Receivables in International Trade has been signed or ratified by four states (Liberia, Luxembourg, Madagascar and United States of America) by January 2007. Since a number of five actions are required for entry into force, the Convention is not yet in force.

[267] According to one of the main draftsmen of the Convention, Spiros V. Bazinas, *Lowering the Cost of Credit: the Promise in the Future UNCITRAL Convention on Assignment of Receivables in International Trade*, 9 TUL. J. INT'L & COMP. L. 259, 263, "the purpose of this law was to remove legal obstacles to financing transactions by eliminating uncertainty as to the validity of international assignments or assignments of international receivables".

There is still very little commentary on the Convention because it has been only recently adopted and is not yet in force.[268] In addition, there are no judicial decisions yet rendered. Nevertheless, the Convention presents an original approach to the relationship between uniform substantive law and private international law. It not only contains a reference to private international law as *ultima ratio* gap filling method, which was already present in the CISG and in the two Ottawa Conventions on Factoring and Leasing. Even more, the Convention contains a very innovative chapter entitled "*Autonomous conflict-of-laws rules*",[269] which provides several conflict rules dealing with issues related to the main subject matter of the assignment, such as the form of a contract of assignment, the mutual rights and obligations of the assignor, the assignee and the debtor, *etc.*.

For the first time, conflict rules are used not just occasionally within a single provision to deal with a specific problem, but are considered uniformly as a body of rules existing within a uniform commercial law convention. The Convention, however, goes even further. Pursuant to Article 1(4), Chapter V on "Autonomous conflict-of-laws rules" applies to assignments of international receivables independently of the occurrence of the territorial requirements, *i.e.* "irrespective of whether the assignor or the debtor is located in a State party to the Convention".[270] This means, in other words, that Chapter V is, in fact, an independent "mini" private international law convention.[271]

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[268] The Convention will entry into force upon the deposit of five instruments of ratification, acceptance, approval or accession.

[269] In the comment of one of the main drafters, Franco Ferrari, *The UNCITRAL Draft Convention on Assignment in Receivables Financing: Applicability, General Provisions and the Conflict of Conventions*, 3 (2000), at http://www.law.unimelb.edu.au/mjil/issues/archieve/2000/2ferrari.html, the Convention is in this field "innovative" and Chapter V is "a rare occurrence in substantive law conventions".

[270] Bazinas, *supra* note 267, at 259.

[271] In his comment about the Draft Convention in the year 2000, Ferrari, *supra* note 216, at 3, expressing a strong criticism about including Chapter V in the final version, said: "one can only hope that it will be deleted, above all because, according to the current version of the *Draft Convention*, Chapter V would be applicable – unless a specific reservation were declared – in a Contracting State independently of whether or not the territorial requirements are

8.2. Scope of Application

Pursuant to Article 1(1), the Convention applies (*i*) to assignments of international receivables and (*ii*) to international assignments of receivables if, at the time the contract of assignment is concluded, the assignor is located in a contracting State. "Assignment" is defined (Article 2(a)) as the transfer by agreement from the assignor to the assignee of all or part of or an undivided interest in the assignor's contractual right to payment of a monetary sum ("receivable") from the debtor. Receivable is, therefore, "defined broadly to include payment rights arising from any contract".[272] In particular, under the Convention, there is no doubt that assignments of future receivables and bulk assignments constitute valid assignments.[273]

More important is then the definition of the "internationality" requirement.[274] Article 3 qualifies a *receivable* as international if the assignor and the debtor are located in different States. An *assignment* is deemed to be international, again under Article 3, if the assignor and the assignee are located in different states.[275] In both situations, the criterion is subjective and is the location of the two involved parties in two different states. In order for the Convention to apply, it is then necessary that the assignor, who is the party present both in the original contract and in the contract of assignment, be located in a contracting state.

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met". The final version of the Convention as adopted by the General Assembly of the United Nations, however, has maintained Chapter V without any changes.

[272] *Bazinas*, supra note 267, at 259.

[273] *Id.*

[274] *See* Ferrari, *supra* note 269, at 5, who notices that for many years, the drafters of international uniform commercial law conventions have been directing their efforts merely to covering situations which can somehow be defined as "international"".

[275] In this case, the Convention is applicable even if the assignor and the debtor have their place of business in the same state.

8.3. Party Autonomy

Like the CISG and (at least one of) the Ottawa Conventions, the Convention at hand expressly and broadly recognizes party autonomy. Under Article 6, "*the assignor, the assignee and the debtor may derogate from or vary by agreement provisions of this Convention relating to their respective rights and obligations*". Since the assignment necessarily involves not only the two parties to it, but also a third party (the debtor), Article 6 adds that the agreement derogating or varying any provision "*does not affect the rights of any person who is not a party to the agreement*". Unlike the CISG[276] or the Ottawa Factoring Convention,[277] however, the parties may not exclude the Convention as a whole.

The Convention, therefore, is not intended as a mandatory regime for the international assignment of receivables, but only as a non-comprehensive code,[278] whose application is supplementary to the contractual party autonomy.

8.4. Convention and Gap-Filling

Like in the most recent uniform commercial law conventions, the drafters have been conscious of the fact that the Convention does not constitute an exhaustive set of rules and that therefore guidance in filling the gaps was necessary.[279] Accordingly, Article 7(2) states: "*questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in absence of*

[276] Article 6.
[277] Article 3.
[278] This very obvious but important comment is also made by Bazinas, *supra* note 267, at 294.
[279] *See* Ferrari, *supra* note 269, at 15.

such principles, in conformity with the law applicable by virtue of the rules of private international law".[280]

Even if the Convention has not yet received widespread attention, it is possible to recognize at least some of the principles on which it is based. The Preamble, for example, stresses that one of the purpose in drafting the Convention is the necessity to ensure *adequate protection for the debtor*.[281] Accordingly, Article 15(1) states that the assignment does not affect rights and obligations of the debtor, including the payment terms contained in the original contract, Article 18(1) says that, in a claim by the assignee against the debtor, "*the debtor may raise against the assignee all defences and rights of set-off arising from the original contract, or any other contract that was part of the same transaction, of which the debtor could avail itself as if the assignment had not been made and such claim were made by the assignor*". In other words, the debtor may not be put in a worse position merely because of the assignment.[282] *Party autonomy* seems also to be a general principle of the Convention. Not only does Article 6 characterize party autonomy as a general principle, but other provisions also make clear that parties have the right to "structure their transactions to meet their needs".[283] *Good faith* is also a principle expressly referred to in the Convention, as Article 7(1) states that the Convention must be interpreted having regard to promote the observance of good faith in international trade. Another general principle that can be easily found is then that of *favor cessionis*. The Convention gives effectiveness to assignments "*of more than one receivable, future receivables or parts of or undivided interests in receivables*" (Article 8(1)) and "*notwithstanding any*

[280] The Conventions uses the same wording of the CISG (Article 7(2)), the Ottawa Factoring Convention (Article 4(2)) and the Ottawa Leasing Convention (Article 6(2)).
[281] The principle of debtor protection is then embodied in Article 17 (Debtor's discharge by payment).
[282] Ferrari, , *supra* note 269, at 17.
[283] Bazinas, *supra* note 267, at 266. See Article 19, under which debtor and assignor may agree not to raise defences on rights of set-off. *Contra* Ferrari, *supra* note 269, at 16, in whose opinion the impossibility for the parties to

agreement between the initial or any subsequent assignor and the debtor or any subsequent assignee limiting in any way the assignor's right to assign its receivables" (Article 9(1)). Anothyer key-principle is, finally, the *facilitation of access to lower-cost credit*.[284]

8.5. A Specific Conflict Rule: Article 22 on "*Competing Rights*"

Before discussing Chapter V, we find a specific conflict rule in Section III of Chapter IV, dealing with third parties' rights and obligations. Article 22 states that "*the law of the State in which the assignor is located governs the priority of the right of an assignee in the assigned receivable over the right of a competing claimant*" (*lex cedentis*).

This provision gives us a chance to touch a more general question, namely whether the reference to the a particular domestic "law" in an international convention is intended to comprehend the private international law of that state or merely its substantive law. The Convention provides us with a clear answer. Article 5, which deals with definitions and rules of interpretation, clarifies under paragraph (*i*) that "law" means only the law in force in a state "*other than its rules of private international law*'. Thus, for a judge applying the Convention will be not only unnecessary, it will also be prohibited to apply a substantive law other than that expressly referred to in Article 22.[285]

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exclude *in toto* the Convention would render unsustainable to think the party autonomy is a general principle upon which the Convention is based.

[284] Bazinas, *supra* note 267, at 265.

[285] It is interesting to note that only another uniform commercial law contains a definition of "national law" and it is opposite from that here at hand. The 1980 CIM on international carriage of goods by rail expressly states in Article 10(2) that national law must be intended as *including the rules relating to conflict of laws*.

8.6. The Autonomous Conflict-of-Law Rules

The real innovation of the Convention is, however, the introduction of a part completely dealing with conflict rules. Actually, Chapter V seems to be a "mini" private international law convention.

8.6.1. Scope of Application

According to Article 26, Chapter V applies (*a*) to matters that are within the scope of the Convention as provided in article 1(4), *i.e.* to assignments of international receivables and to international assignments of receivables; (*b*) and to matter that are otherwise within the scope of the Convention but not settled elsewhere in it. Two elements are here to be highlighted for the reader. First, Article 1(4) states that the provisions of Chapter V apply "*independently*" of the territorial requirements set forth in paragraphs 1 to 3 of Article 1 (*i.e.*, when the assignor or the debtor are located in a Contracting State). Thus, Chapter V applies every time that the "internationality" requirement for the receivables or for the assignments is met, even though the substantive rules of the Convention are not applicable. Accordingly, a *forum* in a contracting state dealing with international assignments or international receivables will be bound to apply Chapter V, even if the rest of the Convention is not applicable because, for example, at the time of conclusion of the contract of assignment the assignor was not located in a contracting state (Article 1(a)). Second, a *forum* dealing with an internal gap, *i.e.* a gap within the scope of the uniform law but not settled in it and that cannot be filled in by recourse to any general principle, will have to apply not the substantive law applicable by virtue of the rules of its private international law (*lex fori*), but the law applicable by virtue of the rules stated in Chapter V.[286]

[286] Similarly *see id.* at 288, according to whom "where the provisions of chapter V apply to transactions that are within the scope of the material law provisions of the Convention, they apply only to matters not settled in the other provisions of the Convention". Another question is to be addressed: as professor Ferrari noticed, the rule on the gap-filling in Article 7(2) should be applicable also to Chapter V, since the Convention does not provide any limitation.

The "traditional" criterion of the private international law of the *forum*' remains of course applicable for the external gaps, *i.e.* for the gaps outside the scope of the Convention. We have here, therefore, two different kinds of private international law: (*i*) the "uniform" private international law set forth in the Convention, and (*ii*) the domestic private international law of the *forum*.[287]

8.6.2. The Conflict Rules

Chapter V provides a specific conflict rule for every issue it faces. As far as the *form of the contract of assignment* is concerned, Article 27 encompasses two cases.

(*a*) When a contract is concluded between persons who are located in the same state, the agreement is valid "*if it satisfies the requirements of either the law which governs it or the law of the State in which it is concluded*". This provision refers to the case where internationality lays in the receivable and not in the assignment. In such a situation, the governing law is the law which governs the contract; this law has to be determined by the *forum*, but it is very likely to be the law of the states where the parties are located. If under this law the contract is not formally valid, and if it is concluded in another state, the law of this State is also applicable. This provision is quite clearly intended to favor the formal validity of the assignment and its reason is to be found in the general principle of the *favor cessionis*. (*b*) The second case faced by article 27 is the probably more frequent situation where the contract in concluded between parties located in different states. The governing law is that which governs the contract (determined by

If it is true, "one has to wonder whether the drafters are aware of this: do they really want to oblige the interpreters to identify general principles of private international law upon which the [at the time this has been written] *Draft Convention* is based?". *See* Ferrari, *supra* note 216, at 16.

[287] According to Ferrari, *supra* note 269, at 17, this is an open question: "one must wonder" – he says – "which private international law is to be taken into account in identifying that domestic law: the original domestic law, that laid down by the *Draft Convention*, or, maybe both?". The ideal solution, for the commentator, would have been the deletion of Chapter V from the *Draft Convention*, which however has not happened.

the private international law of the *forum*) or the law of one of the states. Again, this provision tries to favor the validity of the assignment.

With respect to the law applicable to the *mutual rights and obligations of the assignor and the assignee*, Article 28 states that the first applicable law is the law chosen by the parties. In the absence of such a choice, the governing law is the law of the state with which the contract of assignment is most closely connected. The common law criterion of the "proper law" is therefore here adopted by the Convention.

The *relationship between the assignee and the debtor* is governed by the law governing the original contract (Article 29). This provision is clearly based on the general *principle of debtor protection*. The assignment, because it is a transaction to which the debtor is not a party, should not make worse or in any way change the debtor's contractual position without his consent. The Convention, therefore, refers to the law already governing the position of the debtor. It avoids, however, indicating how to identify the proper law of the original contract; it has been said that "it would be inappropriate to attempt to determine the law governing the wide variety of contracts that might be at the origin of the receivable, such as contracts of sale, insurance contracts, and contracts relating to financial markets operations".[288] An example can be useful. If the receivable comes from an international contract of sale of goods (as it can easily be in international trade) and the necessary requirements are met, this law might be the CISG. However, the CISG seems not to be the proper law to solve questions as between an assignee and his debtor, such as "*contractual limitations on assignment*" or "*the conditions under which the assignment can be invoked against the debtor*" (Article 29). Thus, it will be necessary to determine the law that would apply to the sale contract if the CISG were not applicable. For example when the *1980 Rome Convention on the Law Applicable to Contractual Obligations* is

applicable, the governing law is that of the state where the seller (the creditor) has his principal place of business. The governing law under Article 29 should often be, therefore, the law of the assignor.

Article 30 deals with the law applicable to *priority*. This could be quite surprising, since "the Convention's primary rule dealing with priority issues is a conflict-of-laws rule".[289] Such solution could be problematic in the course of business and of course it does not promote uniformity of results. The contracting states may avoid such inconvenient outcome by opting the *Annex* containing substantive priority rules based either on registration or on the time of the contract of assignment or on the time of notification of assignment. Nevertheless, a clear conflict rule is much more advantageous than many possible different rules depending on the different *forum*.[290] Article 30 provides a rule different from a traditional conflict of law approach (law chosen by the parties or law governing the receivable):[291] in case the receivable has been assigned to more than one assignee, the governing law is the law of the state in which the assignor is located. Every priority conflict has to be dealt with by a single and easily pre-determinable law. The provisions of the law of the assignor are applicable notwithstanding mandatory rules of the law of the *forum*. Paragraph 3 deals with the conflict of laws in case of an insolvency proceeding commenced in a state other than the state of the assignor, whose law governs according to paragraph 1. In this case, however, "*any preferential right that arises, by operation of law, under the law of the forum State and is given priority over the rights of an*

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[288] Bazinas, *supra* note 267, at 289.
[289] *Id*. at 286.
[290] *See id*.: "a clear conflict-of-laws rule has economic value in that by informing potential parties to financing transactions about the applicable law it would allow parties to obtain priority. This would be a significant improvement compared with the present situation where parties often do not know which law applies to priority issues and, as result, must meet the requirements of several jurisdictions".
[291] *Id.*

assignee in insolvency proceedings under the law of that State may be given priority notwithstanding paragraph 1".

Article 31 mitigates the conflict between the law applicable to the rights and obligations of the three subjects of an assignment (Articles 28 and 29) and the mandatory rules of the law of the *forum* or of the law of another state with which the matter has a close connection. The Convention gives precedence to the mandatory rules, whose application cannot be restricted by the application of the law as determined by the uniform conflict rules of Articles 28 and 29.

The last Article of Chapter V (Article 32) states that the application of a provision of the law determined by the uniform conflict rules "*may be refused only if the application of that provision is manifestly contrary to the public policy of the forum State*".

8.7. Conclusion

The Convention on the Assignment of Receivables contains elements common also to other international conventions, such as the CISG and the two Ottawa Conventions: the recognition of the party autonomy, the provision of specific applicable law rules and the adoption of the general gap-filling principle by means of private international law.

What is totally new is the part on autonomous conflict of law rules. For the first time, specific conflict rules which directly determine the domestic governing law are organized within an autonomous chapter. Furthermore, this chapter is made applicable even when the substantive part of the Convention cannot be applied. This outcome can be criticized, since it renders a simple chapter of a substantive law convention a "mini" private international law convention[292] and it allows a very wide application to laws other than those of the assignor. Moreover, the

[292] Chapter V allows considering the Assignment Convention as a "mixed substantive law and private international law convention", even though some scholars refer to it to a "choice of law convention" *tout court*.

Convention's conflict rules could be difficult to reconcile with the provisions of the *1980 Rome Convention on the Law Applicable to Contractual Obligations* for the cases in which this last one applies. It can be already said that some states will exercise the right to make a reservation in order to limit the scope of application of Chapter V only to those cases in which the whole of the Convention is to be applied or even in order not to be bound by Chapter V at all. [293]

Nevertheless, Chapter V and its broad scope of application have a particular meaning: they are a new way to deal with the issue of uniformity and predictability. The Preamble of the Convention makes clear that a general goal of this uniform law – which is valid for any uniform law – is "*the promotion of international trade through the minimization of legal uncertainties*".[294] It is also expressly recognized that "*problems created by uncertainties as to the content and the choice of legal regime applicable to the assignment of receivables constitute an obstacle to international trade*".[295] Uniformity is a goal that can be reached not only by enacting uniform substantive laws, but also – and maybe better – by providing clear and specific *ad hoc* international uniform conflict rules.

[293] The Gran Duchy of Luxembourg has declared pursuant to Article 39 that it does not wish to be bound by Chapter V.
[294] Ferrari, *supra* note 269, at 4.
[295] *See* Preamble (*emphasis added*).

CHAPTER 9

CONCLUSIONS

This paper has analyzed a seventy year long history of attempts to unify certain important areas of international commercial law. We have tried to make evident that, from the very beginning of such attempts, international drafters had always to deal with the problem of a possible different choice of law by the parties and of the proper use of private international law.

The first group of conventions here analyzed, dealing with different forms of international carriage, presents a very strict approach to private international law. All these conventions expressly state that they are mandatory when regulating matters within their scope of application and that any different choice of law by the parties is just "null and void".[296] Party autonomy, the main private international law connecting factor,[297] is therefore barred. Nevertheless, such conventions do contain provisions that make applicable a law other than the uniform discipline:[298] the Warsaw Convention in five cases makes applicable the (substantial) law of the forum; the Hamburg Rules refer in specific cases to the law of the port of loading, the law of the port of discharge, the law of the place where the bill of loading was issued and the law of the forum; the CMR provides several connecting factors such as the law of the forum, the law of the place where the contract was made and the law of the place where the goods are situated;

[296] *See* ANGELO PESCE, *supra* note 22, at 34.

[297] That party autonomy is the first connecting factor in private international law is confirmed, for instance, by article 2 of the *The Hague Convention on the law applicable to international contracts for the sale of goods* of 1955 and by article 3 of the *Rome Convention on the law applicable to contractual obligations* of 1980. *See* also ANTONIO MALINTOPPI, *supra* note 3, at 18 and FRANCO FERRARI, *supra* note 5, at 147-148.

[298] *See* ANTONIO MALINTOPPI, *supra* note 3, at 33, according to whom such (instrumental) provisions are with no doubt "private international law rules".

finally, the CIM refers to the law of the forum, the law of the place where the contract was made, the law of the place where the contract was to be performed and the law of the place where the goods were situated on a specific time. It appears clear that this group of conventions intends to achieve uniformity by granting the most effective and exclusive force to the unified rules and by strongly limiting the recourse to non-uniform rules. Only direct applicable law provisions are provided, so that the role of private international law is limited and "under control". In fact, such uniform rules are drafted to be an autonomous and mandatory system, impermeable and preempting any other rule not expressly referred to.[299]

The second group of laws analyzed in this paper has a very different approach to extern rules. All of them – the CISG, the two Ottawa Conventions and the Assignment Convention – expressly recognize party autonomy (even though not in the same width) as a factor to make applicable a different law or to limit or even to exclude the application of the uniform rules. The mandatory character of the carriage conventions is replaced by the opportunity for merchants to adapt the rules to their needs (and to their relevant contractual power). Private international law is also the common instrument provided in order to fill in the gaps: not only external gaps, for which private international law is the only possible way, but also internal gaps, so that the uniform discipline becomes in fact less uniform than expected. Finally, the role of private international law in the field of uniform laws is brought even further in the Assignment Convention, which not only governs some key issues (such as the priority among competing claimants) by means of conflict of law provisions but also sets forth an autonomous set of applicable law rules that may be made applicable by the parties even independently from the application of the uniform substantive rules.

[299] Such character of carriage conventions is justified by the social function of the carriage of goods; *see id.* at 40.

This journey through some of the most important commercial law conventions of the last seventy years should then allow us to make some final considerations and to suggest an answer to the key question that has been formulated in the introduction to this paper, namely which type of relationship between private international law and international conventions can serve uniformity in international trade at best.

Unification of substantive rules is not the ultimate answer to the need for uniformity in international commercial legal traffic. Even it is to recognize that uniform commercial law conventions are a significant and unavoidable instrument to set a common ground of rules to govern international transactions[300] and therefore to promote certainty and predictability in international trade, uniform laws are nevertheless not sufficient to achieve the goal of uniformity because of their intrinsic incapacity to provide rules for all the issues deriving from an international contract.[301] This lack of uniform substantive rules may be actually sometimes necessary to provide uniform conventions with a certain degree of flexibility and make them suitable for adoption by a larger number of states.[302] We have seen then that private international law, an instrument that by itself fails "to reach a satisfactory degree of simplicity and predictability" [303] as usually leading to diverging and conflicting results, is the way to deal with issues that cannot be solved within uniform laws.

Is therefore uniformity in international commercial law a mirage? We think that this is a matter of approach. Uniform substantive law and private international law are both tools that should be used together in order to reach the highest possible level of uniformity and they should

[300] Some authors speak about "superiority of uniform substantive rules over private international law". *See* MARCO TORSELLO, COMMON FEATURES OF UNIFORM COMMERCIAL LAW CONVENTIONS 249 (2004).
[301] *See* ANTONIO MALINTOPPI, *supra* note 3, at 31.
[302] For this consideration *see* MARCO TORSELLO, *supra* note 300, at 211.
[303] *See id.* at 5.

not be considered as conflicting.[304] If international conventions are the best instrument to establish a fundamental basis of common rules to be accepted by the largest possible number of countries, private international law - when properly used - is on the other hand the suitable way to deal with matters that, due to their specificity, may find a better solution at a national level.[305] As we have seen in this paper, private international law is not irrelevant even in presence of uniform laws,[306] that are helpful but represent often only a starting point of the complex legal work of determining the overall legal discipline of an international commercial transaction - a work which becomes more complicated and whose results are less certain when the impact of private international law is just ignored. Drafters of international conventions should therefore not ignore such impact but on the contrary should make any efforts in order to control it and to use conflict rules to support the application of uniform provisions.[307]

According to our suggestion, international drafters should therefore consider private international law just as another way to grant uniformity and try to coordinate applicable law provisions and substantive disciplines in the same international instrument. Of course the uniformity granted by this approach works at two different levels. If uniform substantive rules make certain the final legal provision to be applied, uniform applicable law provisions make certain only the rule leading to a particular (non-uniform) provision which may vary from case to

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[304] For a similar statement *see id.* at 53 ("the relationship between private international law and uniform substantive law should be studied in terms of coordination, rather than comparison of the respective solutions").

[305] According to *id.* at 249 " private international law has a relevant role to play even in those areas where the substantive law has been unified".

[306] *See* expressly the analysis carried out in this paper at 32.

[307] On this point is significant the statement of a leading author, according to which "it is a myth – rather than reality – that uniform substantive law conventions do exclude – or at least substantially reduce – the need to have recourse to private international law rules, a myth that will raise transaction costs for the party that relies upon it"; *see* FRANCO FERRARI, CISG AND PRIVATE INTERNATIONAL LAW, THE 1980 UNIFORM SALES LAW. OLD ISSUES REVISITED IN LIGHT OF RECENT EXPERIENCES 21 (2003).

case.[308] However, the conflict provisions will be uniform and certain in advance and parties to an international contract should be able to predict the final rule to be applied, a result that can be hardly obtained when no uniform applicable law provision is provided.

Our position, therefore, is that uniformity in international trade can be served at best by an intelligent coordination of both instruments. An example of such approach is the Assignment Convention, where unification of substantive law is carried out together with unification of private international law provisions related to the matter.[309]

[308] According to FRANCO FERRARI, *supra* note 19, at 14, a total unification of disciplines concerning matters governed by international conventions, if private international law becomes relevant, is not achievable.
[309] Scholars use the term of "combined method" to describe the technique of unification of private international law and substantive law in the same international instrument. *See* MARCO TORSELLO, *supra* note 300, at 257.

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