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Party Autonomy in a Modern Context: A Critical
Analysis of its Scope under the Rome I Choice of Law
Rules and Some Contemporary Considerations

Simeona Kostova

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AUTHOR AFFILIATIONS

LL.M. Student at the University of Aberdeen

Winner of the 2022 Jonathan Fitchen Prize for best Undergraduate Dissertation

CORRESPONDING AUTHOR

Simeona Kostova, LL.B.

Email: simeona.kostova@outlook.com

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1. Introduction

The globalization of the economy, particularly the growth of cross-border trade, poses challenges to the realm of conflict of laws as it is nearly impossible to regulate every aspect of international contracts uniformly. As such, allowing parties to an international contract to construct their agreement in a desirable form by selecting the governing law becomes an exceptionally useful tool to overcome this difficulty. Upholding the freedom to choose the *lex contractus* enables the parties to tailor their contract according to their needs, which in turn increases the likelihood of them honoring the agreed terms as they have a degree of control over the allocation of the litigation risks. This is particularly beneficial to private international law as it promotes international commerce and encourages legal security and predictability. Against this background, it is unsurprising that the concept of party autonomy possesses omnipresence within this area of law. In simple terms, it entails that priority is afforded to the intention, the choice of the contracting parties. The practicability of this principle in choice of law rules for contractual obligations is notable under the Rome I Regulation as it is bedrock of the regime.¹ Preserving the freedom to choose the governing law on a textual level allows for the promotion of party autonomy as a tool rather than a classical principle of law, as well as for the attainment of broader commercial goals.

Due to its significance, party autonomy has been widely explored by academics within the context of choice of law rules, including under the Rome I regime.² The majority of academics however, tend to focus on a limited doctrinal and occasionally, comparative, assessment of the limitations posed onto the concept under Rome I's choice of law rules. This dissertation places party autonomy in the center of its analysis in order to make an all-round evaluation of how effective the Regulation is in preserving the doctrine's prominent position in conflict of laws. There is particular deficit in the discussions on *dépeçage*, non-state law and limitations with regards to how these points nurture the position of party autonomy as the bedrock. The effectiveness of implicit choice in upholding the parties' will is also overlooked. Furthermore, with the digitalization of the world and the rise of legal tech, this paper attempts to put party autonomy in a modern context by addressing a particular question raised by the Permanent Bureau of the Hague Conference, namely whether party autonomy could be adapted to encompass semi-automated or fully-automated contracts.³

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) [2008] OJ L 177/6, Recital 11.

² Ulrich Magnus and Peter Mankowski, *Rome I Regulation: Commentary* (Otto Schmidt 2017); Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (University Press 2015); Symeon C Symeonides, *Codifying Choice of Law Around the World: An International Comparative Analysis* (Oxford University Press 2014); Franco Ferrari and Stefan Leible, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier de Gruyter 2009).

³ Permanent Bureau, 'Proposal for the Allocation of Resources to Follow Private International Law Implications relating to Developments in the Field of Distributed Ledger Technology, in particular in relation to Financial Technology' Council on General Affairs and Policy (2020), 2-3.

Accordingly, the aim of this paper is, firstly, to review the Rome I rules on choice of law with regards to how satisfactory they are in safeguarding party autonomy and prove that they are an adequate mechanism for preserving the freedom of the parties to select the governing law. In order to nuance this principle with some contemporary considerations, it additionally seeks to determine that smart contracts provide a suitable platform for the exercise of party autonomy.

This paper is divided into four sections following the introduction whereby Chapter 2 explores the centrality of party autonomy, highlighting its essence and applicability. It provides a brief overview of its historical importance, followed by an analysis of its legal implications and sources to illustrate the immense practicability of the norms of party autonomy. Chapter 3 provides a critical assessment of the scope afforded to party autonomy in choice of law rules, specifically by analysing express and implied choice within the Rome I framework to showcase that this concept constitutes the heart of the Regulation. The next sub-chapters offer an examination of the *dépeçage* rules and the ability to incorporate non-state law by reference through Recital 13⁴ so as to re-enforce the hospitability of Rome I towards party autonomy. Finally, it provides evidence that the limitations of party autonomy under this regime constitute exceptions, thus supporting the view that party autonomy remains ‘the Rule’.⁵ Chapter 4 is devoted to discussing whether smart contracts are able of being construed as a digital continuance of party autonomy, regardless of whether they are blockchain-based or fully and partly automated. This chapter focuses on examining how the parties’ freedom to nominate a governing law would be manifested in the context of smart contracts in a manner that preserves its significance. The final chapter concludes the findings of this paper by restating that party autonomy is central to the facilitation of international trade and is afforded satisfactory scope under the Rome I Regulation whereby even limitations of this concept constitute exceptions. It reiterates that smart contracts are fit to integrate choice of law clauses and hence, preserve the ever-developing concept of party autonomy even in the emergence of legal tech on an international scale. This would paint a picture of how party autonomy, through its dynamic nature, is able to keep its crown in private international law.

2. Party Autonomy: An Outline of its History, Implications, Sources and Applicability

2.1 From Egypt to 21st Century: A Historical Snapshot of the Essence of Party Autonomy

This paper puts party autonomy as the centrepiece of its analysis of Rome I and some contemporary matters that raise the question of the parties’ choice of law autonomy. To reflect

⁴ Rome I, Recital 13.

⁵ Jan-Jaap Kulpers, ‘Party Autonomy in the Brussels I Regulation and Rome I Regulation and the European Court of Justice Developments’ (2009) 10 *German Law Journal* 1505, 1518.

its centrality accurately, it is reasonable to begin by providing an overview of the essence of private autonomy throughout the centuries to facilitate a comprehensive discussion of its modern operation in private international law.

Party autonomy is understood to be the entitlement of the parties to select the applicable law that shall determine “the existence and validity of, and their rights and obligations arising from, the contract”.⁶ Put simple, it is the freedom to choose the governing law that will apply to the contract itself and any future disputes arising from it. This principle has ancient origins that can be traced back to an Egyptian decree that stated that contracts in Egyptian are subject to Egyptian law and courts and those written in Greek are subject to Greek law and courts.⁷ Regardless of whether this decree has been designed to ultimately address conflict of laws per se, it is indicative that the parties’ choice of language leads to a choice of applicable law. Without prejudice to the contribution of numerous scholars across Europe,⁸ Dumoulin’s stance on party autonomy is of particular importance. He stipulates that the will of the parties is what should be the decisive element in determining the governing law.⁹ From here on, we can identify a solidification of the favourable position of party autonomy in matters concerning the applicable law of the contract. Perhaps most notably, it is Mancini that advocates for party autonomy most actively in the mid-19th century.¹⁰ His endorsement of the parties’ freedom to select the governing law in matters that are already left to the parties is what gave rise to a more universal acknowledgement of this concept.¹¹ From a British perspective, 19th century English courts also examined the parties’ entitlement to choose the *lex contractus*, which gave rise to the doctrine of ‘proper law’.¹² More recently, the landmark case of *Vita Foods*¹³ has affirmed that the choice of law shall be upheld provided that it is bona fide, legal and not contrary to public policy. This illustrates how party autonomy as a freedom to choose the governing law essentially constitutes a legal theorem as its crux has largely remained the same throughout history.

It is clear that the essence of party autonomy is the freedom of the parties to select the governing law, regardless of its level of regulation and stipulation. The historical development of party autonomy itself is deserving of an ample analysis but for the purposes

⁶ Akinwumi Ogunranti, ‘The Scope of Party Autonomy in International Commercial Contracts: A New Dawn?’, 25-26, <<https://DalSpace.library.dal.ca/handle/10222/73287>> accessed 25 February 2022.

⁷ *ibid* 27.

⁸ eg Huber, Savigny, Kant.

⁹Yuko Nishitani, ‘Party Autonomy in Contemporary Private International Law’ (2016) 59 36, 6; Ogunranti, (n6) 26-28.

¹⁰ Nishitani (n9) 7.

¹¹ *ibid*.

¹² Trevor Hartley, *International Commercial Litigation: Texts, Cases and Materials on Private International Law* (2nd edn, Cambridge University Press 2015), 625.

¹³ *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 227 (PC).

of this discussion it is to be noted that its extensive history is reflective of its overall importance in international law.

2.2 Party Autonomy: A Tale of Legal Tales

Examining party autonomy as a legal principle itself would offer a fragmented discussion as it would render it hollow. That is to say that party autonomy encompasses fundamental aspects of the rule of law such as legal certainty and predictability and freedom of contract that make it valuable. Regardless of whether such principles are deemed as justifications or implications of party autonomy, antecedents or descendants respectively, they form its substance and they ought to be analysed in order to fully appreciate the function of private autonomy in our later discussion.

Firstly, as noted by Prof. Wolff,¹⁴ party autonomy stems from the doctrine of freedom of contract in the sense that just as parties are allowed to enter into an agreement and create rights and duties, they are at freedom to determine the applicable law to their contract. In other words, party autonomy is an extended freedom to regulate the terms and conditions as it derives from the substantive freedom of contract.¹⁵ Naturally, this freedom is subject to jus cogens, public policy objectives and other State-specific limitations. Nonetheless, party autonomy in a choice of law context, albeit similarly regulated, stems from the parties' mutual agreement to fetter their freedom to achieve a beneficial commercial goal. Importantly, party autonomy as a contemporary conflict of laws tool for determining the governing law is to be distinguished from the parties' primary contractual freedom as it fundamentally refers only to their consent to provide for a choice of law clause in the contract.¹⁶ In essence, the autonomy to select the applicable law originates from the traditional notion that the parties' are best suited to protect their contractual interests but it is itself the *causa causans*¹⁷ in conflict of laws. The freedom to select the applicable law is therefore rooted in the doctrine of freedom of contract but its function in cross-border contracts stands separate.

Secondly, legal predictability and certainty are paramount reasons for the application of party autonomy. Enabling parties to choose the governing law averts uncertainties of unforeseeable jurisdictions and allows for better transaction planning. Party autonomy in choice of law removes constitutional and arbitral uncertainties¹⁸ that could arise from the absence of a choice or the utilisation of closest connection tests. In simple terms, it allows the parties to anticipate the effects of the obligations they have agreed to. As such, party autonomy facilitates predictability and certainty both in a legal and commercial sense.¹⁹ Moreover, as

¹⁴ Martin Wolff, *Private International Law*. (2nd edn, 1950), 414.

¹⁵ Peter Nygh, *Autonomy in International Contracts* (Clarendon Press 1999), 8.

¹⁶ Nishitani, (n9) 8.

¹⁷ Nygh (n15) 1.

¹⁸ Ulrich Magnus and Peter Mankowski, *Rome I Regulation: Commentary* (Otto Schmidt 2017), 106.

¹⁹ Roy Goode, 'The Codification of Commercial Law' (1988) 14 Monash U L Rev, 135.

emphasised by Mankowski,²⁰ a clear determination of the applicable law saves resources and time for the dispute resolver. Additionally, choice of law autonomy enhances international uniformity by allowing the parties to select standard governing laws in certain sectors,²¹ such as English law in maritime dealings. This dual effect of permitting a choice of law explains the universal applicability of party autonomy as it transforms it from a term of legal theory to a ‘proven working-horse’.²² In other words, enforcing a choice of law clause enhances the pillars of law, namely legal certainty and predictability whilst boosting business efficiency as it allows for better risk calculation based on the selected law.

Clearly, party autonomy carries in itself indispensable legal underpinnings and practical utilities that render it an all-embracing tool of conflict of laws. In fact, its justifications or implications are what make party autonomy the ‘master’²³ of private international law.

2.3 Sources and Applicability of Choice of Law Autonomy

Having explored the reasons for the appeal of party autonomy, it is best that this principle is put into context to better illustrate its authority in conflict of laws. It is through choice of law clauses and agreements that party autonomy expresses its merits. Prof. Nygh rightfully notes that national laws are the starting point that enables parties to utilise the value of their choice of law freedom²⁴ as it stands true that party autonomy is not a free-floating source. In light of the fact that party autonomy is not illimitable or independent, one ought to turn their attention to how this freedom manifests itself in choice of law clauses within the boundaries of existing legal systems.

As party autonomy needs a medium to give effect to it,²⁵ it is plausible to argue that this medium should exist within the legal system itself, whether that be in line with the traditional view that *lex fori* rules are the onset or in support of the view that international instruments suffice as a source, specifically conventions and internationally agreed regulatory frameworks. Hence, both international and national orders are sources for party autonomy with the specific exception of international principles, custom and other uncodified variations of *lex mercatoria* as they have proven insufficient.²⁶ As it is the law of the forum that ratifies conventions and permits the utilisation of international frameworks, the distinction between international and national orders as a source is merely a linguistic one.²⁷ It is, after all, the *lex*

²⁰ Magnus and Mankowski (n18) 107.

²¹ Nishitani (n9) 10.

²² Magnus and Mankowski (n18) 104.

²³ Matthias B Lehmann, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws’ [2008], 389, <<https://www.semanticscholar.org/paper/Liberating-the-Individual-from-Battles-between-in-Lehmann/dab27dd08dfa88e934dc0e04a76dc892848149aa>> accessed 25 February 2022.

²⁴ Nygh (n15) 31.

²⁵ *ibid.*

²⁶ *ibid* 36.

²⁷ *ibid.*

fori that is the fountainhead. Inasmuch as party autonomy requires a particular rule to give effect to it, there is a plethora of examples of statutory law of the forum or international conventions and codified frameworks that prove that the parties' choice materialises through application of established rules. For example, signatories to the Mexico Convention will give effect to Article 7²⁸ which enables parties to select the governing law of contract. The same is true for the HCCH Principles²⁹ whereby effect will be given to the parties' autonomous choice of governing law provided that the arbitral institution in question has incorporated the Principles or there is implementation legislation present.

More importantly, as the focus of this paper will shift specifically to the role of party autonomy within the Rome I Regulation, it is important to note that the Rome tradition fits well within the accepted source theory. This is evidenced by Prof. Lagarde's work on party autonomy whereby he essentially states that the rules of the Rome Convention give effect to the freedom to make a choice of law.³⁰ This is subject to the qualification that it has been ratified in the particular jurisdiction. Accordingly, as the Rome I Regulation preserves the centrality of party autonomy, it is to be deduced that it serves an appropriate source for the exercise and facilitation of the parties' choice of law freedom as it applies at national level.

All things considered, party autonomy does not exist in a vacuum simply because of its universally acknowledged character. As it is a complex mixture of justifications and not a self-sustaining source of freedom, it becomes apparent that its value can only be appreciated through the lens of legislative incorporation. For these reasons, an extensive discussion on party autonomy within Rome I will now follow to illustrate whether the regime is successful in reflecting its international significance.

²⁸ The Inter-American Convention on the Law Applicable to International Contracts 1994 (Mexico Convention), art 7.

²⁹ Hague Principles on Choice of Law in International Commercial Contracts 2015.

³⁰ Paul Lagarde, 'Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980' [1991] *Revue Critique de Droit International Privé* 287, 300; Nygh (n15) 33.

3. A Critical Assessment of the Significance of Party Autonomy in Choice of Law Rules under Rome I

This chapter will build onto Chapter 2 to paint a more practical picture as the Regulation's textual mechanism will be examined in light of party autonomy and its foundational implications. This analysis aims to showcase the centrality of party autonomy within the Rome I choice of law regime by dissecting its provisions to illustrate its hospitality in upholding the freedom of the parties to select the governing law. This will be achieved by, firstly, exploring express and implied choice in order to highlight the flexibility afforded to the parties' choice, followed by a sub-chapter dedicated to *dépeçage* to emphasise just how accommodating the Regulation is. The fourth sub-chapter will evaluate how the incorporation of non-state law enhances the notion that party autonomy ought to be granted a sufficient scope of operation to satisfy the commercial needs of cross-border parties. Lastly, an exploration of Rome I's limitations on party autonomy will demonstrate that these parameters constitute exceptions, thereby preserving the primacy of party autonomy within the regime.

3.1 Parties' Express Choice of Applicable Law

This sub-chapter seeks to evaluate the treatment of the parties' choice *per se*, specifically whether it is prescribed a certain form under the regime. This would be indicative of the position of Rome I towards party autonomy as a stricter approach to the expression of the choice will inevitably restrict the exercise of party autonomy whilst a more liberal one would be beneficial. This section will prove that the Regulation falls into the latter category.

The predisposition of the Regulation to uphold the parties' choice of governing law is clearly reflected in Article 3³¹ whereby consideration is first and foremost given to the choice of the parties. This very first sentence of Article 3, coupled with Recital 11 provide a textual basis for the centrality of party autonomy as they essentially make it the 'cornerstone'³² of this legal framework.

This position is advanced through the Article's liberality as to the form of the actual choice as both implicit and express choices are accommodated for.³³ Whilst providing for an express mode of choice is common, the Rome I Regulation goes a step further as it does not stipulate particular formal requirements, thereby allowing choices expressed orally to fall within its scope as ascertained in *Derek Oakley v Ultra Vehicle Design*.³⁴ It is at this point that academics discuss the tension between Article 3(1) and Article 3(5)³⁵ in conjunction with Article 11³⁶ to rebut statements in favour of Rome I's liberality towards formal validity. Whilst paragraph 1

³¹ Rome I, art 3.

³² Rome I, Recital 11.

³³ Rome I, art 3(1).

³⁴ [2005] EWHC 872 (Ch).

³⁵ Rome I, art 3(5).

³⁶ Rome I, art 11.

of Article 3 prescribes no formal validity prerequisites, paragraph 5 refers to Article 11 which stipulates that the formal validity of the contract is satisfied if it meets the requirements of the law that governs its substance under the Regulation. The tension stems from the hypothetical situation whereby the contract is successfully challenged under the law prescribing the formal validity conditions as it then raises the question of whether the invalid contract in turn invalidates the choice of law clause. This legal contention is not afforded a uniform resolution by academics. This, however, does not affect the end result as either solution preserves the choice made by the parties. Whilst some academics fortify the primacy of Article 3(1) based on the supremacy of EU law over domestic requirements,³⁷ others simply resort to the distinction between the contract itself and the choice of law.³⁸ It can be submitted that the latter view is preferable as it evades suggestions that Rome I offers conflicting provisions on the issue of formal validity. Regardless, both solutions achieve a stricter protection of party autonomy by affording precedence to the choice of law made by the parties. This strengthens the view that the position of party autonomy within Rome I is superior as both interpretative mechanisms of understanding the tension between Article 3(1) and Article 3(5) assert that the choice of law is protected from formal validity encumbrances. To illustrate this point further, Article 25 of the Brussels I Recast,³⁹ which similarly incorporates party autonomy, contains formal requirements for forum selection agreements. This can serve as a foil to appreciate Rome I's leniency towards the form of the express choice. Evading the use of rigid set of modalities enhances the centrality of party autonomy by widening its scope of application.

Building onto this point, the Regulation contains no requirements for a geographical nexus that relates to the choice of law clause, subject to the exception of contracts for the carriage of passengers⁴⁰ and insurance.⁴¹ As discussed by Prof. Symeonides, Rome I, on this point, is not only in sync with the developments in private international law but it also demonstrates a particularly loose view of the need for connection,⁴² thus it sets an example for enhancing the parties' flexibility in contracting as it does not restrict the choice to a geographical formula. Consequently, it re-instates the superiority of party autonomy as a fundamental principle on a supra-national level⁴³ due to the lack of a specific geographical requirement.

³⁷ Graf-Peter Calliess, *Rome Regulations: Commentary* (2nd ed., Wolters Kluwer 2015), 94.

³⁸ Richard Plender, *The European Private International Law of Obligations* (Fifth edition / edited by Michael Wilderspin, Sweet & Maxwell, Thomson Reuters 2020), 6-081.

³⁹ Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters [2012] OJ L 351 (recast) (Brussels I Recast), art 25.

⁴⁰ Rome I, art 5.

⁴¹ Rome I, art 7.

⁴² Symeon Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective' (Social Science Research Network 2010), 524-525, <<https://papers.ssrn.com/abstract=1697372>> accessed 21 November 2021.

⁴³ Lukáš Grodl, 'International Perspective on Party Autonomy in Contractual Choice of Law' (2019), 49, SSRN <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3465208> accessed 21 January 2022.

Moreover, this paper submits that, contrary to what commentators such as Prof. Calliess have suggested,⁴⁴ paragraph 3 of Article 3 in fact furthers the fundamental role of party autonomy within Rome I and supports its overall liberality. The provision states that where the parties have made a choice as to the governing law of the contract but all other elements of relevance to the situation are connected to a country other than that of the chosen law, the choice of the parties shall not prejudice the application of non-derogable provisions of the law of the other country.⁴⁵ Therefore, arguments that the express choice, and party autonomy in turn, is essentially limited by the international character of the situation certainly hold merit as they reflect the wording of Article 3(3). However, as noted by Prof. Heinze,⁴⁶ Article 3(3) in actuality permits a choice that is wholly unconnected to the contract and the limitation of party autonomy in favour of preserving mandatory rules⁴⁷ itself constitutes a narrow exception. This view is supported by Prof. Symeonides, who highlights that the use of the word 'all' itself suggests that the provision is construed narrowly.⁴⁸ On a textual level, Article 3 provides solidification of party autonomy by avoiding to grant a *carte blanche* to the application of domestic non-derogable provisions. This line of reasoning has been utilised by Blair J in *Banco Santander*⁴⁹ whereby it was affirmed that priority is afforded to the choice of the parties and that Article 3(3) is not applicable if the situation at the time of the choice possessed international elements that prevented it from being classed as purely domestic. To put this into context, allowing party autonomy to be trumped by mandatory rules where a degree of connection to a particular country is present undermines legal certainty as it sets aside the choice made by the parties. Employing a broader interpretation of paragraph 3 whereby an international element displaces the applicability of this limitation is in line with the supremacy of party autonomy. Such an approach is reasonable as it firstly, upholds a fundamental component of the Regulation as per Recital 11, secondly, it re-enforces legal predictability and certainty, which are extensions of the modern construct of party autonomy as discussed in Chapter 2 and lastly, it reflects international commercial needs as it recognises the trans-border nature of trade.

For all these reasons, it is to be deduced that the freedom of parties to make an express choice of a governing law is adequately safeguarded under Article 3 of Rome I to accurately reflect the primacy of party autonomy.

⁴⁴ Calliess (n37) 104.

⁴⁵ Rome I, art 3(3).

⁴⁶ Christian Heinze, 'Contracts' in Paul Torremans and others (eds), *Cheshire, North & Fawcett: Private International Law* (Fifteenth Edition, Oxford University Press 2017), 707.

⁴⁷ *ibid.*

⁴⁸ Symeonides (n42) 526.

⁴⁹ *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA and others* [2016] EWCA Civ 1267 [411] (Blair J).

3.2 Parties' Implied Choice of Applicable Law

To strengthen the conclusion that party autonomy is afforded sufficient scope, an examination of implicit choice under Article 3 will now follow. The ability of the parties to choose the governing law explicitly is rather limiting on party autonomy unless complemented by the option to establish an inferred choice. As such, this second component is necessary to achieve an all-round evaluation of the scope of party autonomy in Rome I.

The Regulation provides for an inferred choice to be deemed a valid applicable law provided that it is "demonstrated by the terms of the contract or the circumstances of the case".⁵⁰ This does not merely serve as an alternative to express choice but it serves as an additional mechanism for the expansion of party autonomy as it avoids the need to resort to a geographical nexus when an express choice is not present or alternatively, to determine the governing law under the rules of Article 4.

For the implicit choice to embody the true meaning of party autonomy, however, the process of drawing the inference shall not be concerned with a hypothetical choice. As the Regulation imposes a requirement for clear demonstration, the implicit choice ought to be an actual choice rather than a judicial exercise of the contractual liberty to make a choice on behalf of the parties. Since the provision for an inferred choice is largely similar to that of the Rome Convention, the Guiliano-Lagarde Report⁵¹ is an appropriate source. It confirms that where no clear intention to select a governing law is made, the court cannot concern itself with determining which law the parties could have potentially chosen. Hence, this is in harmony with the spirit of party autonomy in a choice of law context as it is the parties' choice which is determinative to confer jurisdiction,⁵² rather than an exercise of judicial discretion. To put this into context, since the test to determine an implicit choice of law ought to be objective to be in line with the essence of party autonomy as per Lord Toulson,⁵³ the implied choice can stem from either the terms of the contract itself or the circumstances of the case. For these reasons, academics like Prof. Beaumont⁵⁴ and Calliess⁵⁵ deem it more appropriate to describe the choice as 'clearly demonstrated' rather than implicit due to its linguistic crux. This is suggested in order to affirm a distinction between ascertaining an inferred choice and utilising the rules under Article 4. Nevertheless, it is reasonable to submit that inferred choices are appropriately protected in practice and the issue of blurring the lines between establishing an inferred choice

⁵⁰ Rome I, art 3(1).

⁵¹ Report on the Convention on the law applicable to contractual obligations by Mario Giuliano, Professor, University of Milan, and Paul Lagarde, Professor, University of Paris (Guiliano-Lagarde Report) I OJ C 282, art 3 para 3.

⁵² Nygh (n15) 1.

⁵³ *Lawrol v Sandvik Mining and Construction Mobile Crushers and Screens Ltd* 2013 EWCA Civ 365 [31] (Lord Toulson).

⁵⁴ Alexander Anton, *Private International Law* (3rd ed. / by P.R. Beaumont and P.E. McEleavy., WGreen/ Thomson Reuters 2011), 449.

⁵⁵ Calliess (n37) 97.

and utilising the guidelines under Article 4 is mostly hypothetical. This is evident in *Amin Rasheed* whereby Lord Diplock⁵⁶ ruled that the inference ought to be an ‘ineluctable deduction’ from the terms of the contract that are the actual carrier of the parties’ intention. This, coupled with the need to ascertain the implicit choice within the ‘factual matrix’ of the case, as per *Hellenic Steel Co v Svolamar Shipping Co Ltd*⁵⁷ indicates that the protection of the choice and, in turn party autonomy, is heavily interlinked with the finding of the tacit will of the parties and the Giuliano-Lagarde guidance is largely followed.

Furthermore, it is worth noting that the use of the words ‘clear’ and ‘demonstrated’ appease concerns over the blurring of the lines with Article 4 as the wording of the Regulation itself suggests a stricter burden of proof. The objectivity vested into the meaning of these words overcomes the readily applicable phraseology of ‘reasonable certainty’ as it constricts the judicial leeway in deducing tacit choice.⁵⁸ To rephrase, as Rome I’s use of ‘clearly demonstrated’ aligns with the guidance in the Giuliano-Lagarde Report and is deemed, as Beaumont describes it, an ‘appropriate standard’⁵⁹ in comparison to the Rome Convention’s ‘reasonable certainty’ formulation, it is to be concluded that concerns over ambiguity are put to rest. This is true in view of the treatment of implied choice in above-examined case law, and through the updated language of Rome I. In light of this, it is appropriate to acknowledge that the position of party autonomy in the Regulation against the background of the procedural finding of a tacit choice is appropriately safeguarded as the standard is objective, thus ensuring that true implied choice is determined and contractual predictability is preserved.

Building onto this point, the current regime is successful in addressing the commercial context of the case⁶⁰ as it allows for the use of jurisdiction clauses and trade practices to indicate a real choice. The effect of this is two-fold. Firstly, by placing party autonomy within the commercial framework of the case, Rome I equates it to a workable tool of international law rather than a mere term of legal theory. Secondly and most importantly, it expands the margin of ascertaining that the parties have indeed made a choice on the applicable law. This stands true because jurisdiction clauses and previous dealings constitute factual indications of *consensus ad idem* on the governing law, whereby both fall within the ‘circumstances of the case’. Again, this is not to suggest that such factors can be indicative of a real choice on their own and it is appropriate that they are interpreted in conjunction with all other relevant factors, as ruled in *Samcrete Egypt v Land Rover*.⁶¹ Recital 12⁶² itself affirms that the consideration ought to be given

⁵⁶ *Amin Rasheed Shipping Corp v Kuwait Insurance Co* (The Al Wahab) [1984] AC 50, Lord Diplock at p 62.

⁵⁷ *Hellenic Steel Co v Svolamar Shipping Co Ltd* (The Komninos S) [1991] 1 Lloyd’s Rep 370.

⁵⁸ Brooke Marshall, ‘Reconsidering the Proper Law of the Contract’ (2012)13 *MelbJIntLaw* 18, 13-14.

⁵⁹ Anton (n54) 449-450.

⁶⁰ Anton (n54) 6-030.

⁶¹ *Samcrete Egypt Engineers and Contractors Sae v Land Rover Exports Ltd* [2001] EWCA Civ 2019.

⁶² Rome I, Recital 12.

to exclusive choice of court agreements as an indication for a choice of law but upholds the need for an objective evaluation of all other elements. This co-relates to the need to ascertain a true tacit choice, discussed previously, as it avoids reliance on a presumption based on a jurisdiction clause. As such, it begs the question of whether it would have been appropriate to include some specifications on the weight attributed to the jurisdiction clause to avoid granting excessive judicial leeway. Nevertheless, the analysis concludes that the use of 'clearly demonstrated' as a standard for inferred choices is a sufficiently objective formula that circumvents this deficit as it necessitates a reliance on a commercially, legally and factually viable indications of implied choice.

Finally, to wrap up the present discussion, it is worth noting that Rome I is particularly advantageous in promoting party autonomy in choice of law context by allowing an inferred choice to be determined, specifically when contrasted with the Hague Convention which requires a non-express choice to be unambiguously evident from the terms of the contract.⁶³ By drawing a parallel between the two regimes, the general pre-disposition of Rome I in finding a real choice of the governing law, regardless of whether it is express or implied, is emphasised. Consequently, the application of party autonomy is enhanced as it is not contained in a rigid mode of expression as it is in the Hague Convention.

Overall, the scope afforded to party autonomy in the Rome I Regulation is sufficiently flexible to allow for both an explicit and an inferred choice and as such it is a satisfactory ground for the practical operation of the parties' contractual freedom to select the governing law. But does that flexibility extend to allowing the parties to split their choice of governing law?

3.3 Dépeçage and Party Autonomy

Dépeçage in essence entails a splitting of the applicable law, meaning that different laws could apply to different choice-of-law issues. As the nature and scope of dépeçage are highly complex, this discussion focuses on voluntary splitting of the law, namely dépeçage agreed by the parties, to showcase how its function within Rome I enforces the centrality of the parties' choice-of-law autonomy. This discussion is needed to supplement the findings of the previous sub-chapters in an attempt to provide a comprehensive assessment of Rome I's provisions with regards to its suitability in conserving the significance of party autonomy.

Considered to be neither intrinsically good or bad by the 1972 Expert Group⁶⁴ and academics like Prof. Symeonides,⁶⁵ dépeçage has historically lacked legislative authorization. The reasons for the reservation towards the severance of the applicable law can be summarized in two main points. Firstly, it does not fit in with the European approach as discussed by Fallon

⁶³ Convention of 15 June 1955 on the law applicable to international sales of goods (Hague Convention), art 2.

⁶⁴ Guiliiano-Lagarde Report (n51) 4.

⁶⁵ Symeon C Symeonides, 'Broad or Narrow Choice of Law: Issue-by-Issue Choice and Dépeçage', *Codifying Choice of Law Around the World* (Oxford University Press 2014), 221.

and Erauw⁶⁶ as it perhaps endangers the application of mandatory provisions if it is maliciously used. Additionally, the common law traditions are also hostile to *dépeçage* as evident from *Shamil* whereby the Court of Appeal noted that two different laws cannot viably govern the whole contract.⁶⁷ The Court of Appeal in *Centrax* expressed an agreement with the proposition that severance of the applicable law is inconvenient in cases of frustration, termination or breach of contract.⁶⁸ Therefore, the utilisation of *dépeçage* clashes with some foundational understandings of different legal systems and as such, it is unsurprising that it lacks encouragement. The second point raises practical questions over illogical use of *dépeçage* that results in an incoherent choice of law,⁶⁹ i.e., whether splitting the law is reasonable in a contractual sense.

This section does not seek to deny the merit of such criticism but it aims to illustrate how voluntary *dépeçage* can advance party autonomy. In simple terms, providing a legislative basis for *dépeçage* ensures that the parties' freedom to allocate the governing law is safeguarded as it upholds the notion of legal certainty and predictability.

Article 3(1) stipulates that the choice of law can relate partly or wholly to the contract. The parties are therefore allowed to split the applicable law, namely to choose different laws that apply to separate parts of the contract. Importantly, the Rome I Regulation acknowledges *dépeçage* in its narrow sense, i.e., the parties' choice to apply the particular law to a part of the contract.⁷⁰ The effect of this is two-fold. Providing *dépeçage* with a legislative basis preserves its indisputable link to freedom of contract, as noted by Callies,⁷¹ which is itself interlinked with the principle of party autonomy, as explained in Chapter 2. As a consequence of this interconnection of principles, the parties' freedom to allocate the governing law in a suitable manner is enhanced since the Regulation acknowledges the merits of *dépeçage* as an extension of the principle of party autonomy.⁷²

This, then, begs the question of whether the Regulation manages to implement these advantages of *dépeçage* in its aim to further party autonomy in a manner that addresses the above-mentioned concerns. The answer to this question is vital as it will ascertain whether the link between *dépeçage* and party autonomy can be subjected to further criticism, which would undermine the rationale behind Rome I's pro-*dépeçage* stance. The ultimate approach would be to permit *dépeçage* insofar as the choice of the parties to 'scissor up' the applicable law is

⁶⁶ Johan Erauw and Marc Fallon, *Belgian Report*, III; Symeon C Symeonides, 'Broad or Narrow Choice of Law: Issue-by-Issue Choice and *Dépeçage*', *Codifying Choice of Law Around the World* (Oxford University Press 2014).

⁶⁷ *Shamil Bank of Bahrain v Beximco Pharmaceuticals* [2004] 1 WLR 1784 at [40].

⁶⁸ *Centrax Ltd v Citibank NA* [1999] 1 All E.R. (Comm) 557.

⁶⁹ Symeonides, 'Broad or Narrow Choice of Law: Issue-by-Issue Choice and *Dépeçage*' (n65) 222.

⁷⁰ Amin Dawwas, '*Dépeçage* of Contract in Choice of Law: Hague Principles and Arab Laws Compared' (2021) 17 *Journal of Private International Law* 473, 476-479.

⁷¹ Callies (n37) 102.

⁷² Magnus and Mankowski (n18) 211.

substantiated by a coherent reflection of the contract's economic and legal separability. Indeed, this important qualification underlies the Regulation's position towards the splitting of the law.⁷³ By framing *dépeçage* within the contractual and economic reality of the agreement, the regime quietens academic concerns over the potential illogical nature of a split governing law as it contains a pre-requisite for the relevant contractual elements to be autonomous *per se*, thus mitigating the risk of contradictions. Additionally, the argument that the severance of the governing law creates unpredictability or at the very least legal complexity seems largely theoretical since the number of cases whereby *dépeçage* is utilized remains small.⁷⁴ The pivotal point here remains with the need to allow for *dépeçage* in order to serve other paramount choice-of-law values⁷⁵ such as the need to allow for the legitimate exercise of the parties' contractual freedom, the promotion of the ideal choice-based form of international law,⁷⁶ etc. Put simply, Article 3 permits the splitting of the law 'at the choice of the parties'.⁷⁷ This emphasis generates reasonable support for *dépeçage* as it links it back to the cornerstone of the Regulation, namely party autonomy. In other words, Rome I's textual stipulation of *dépeçage* ultimately safeguards the legitimate expectation of the parties, which forms part of the choice of law values, and as such, ensures that legal predictability and certainty are honoured. This is particularly satisfactory as it is achieved in a way that places the separability of the contractual elements as the basis for upholding a split choice.

The reasonableness of the regime is also evident through its lack of an overly-liberal approach towards *dépeçage* as it did not reproduce the Rome Convention's Article 4⁷⁸ which allowed for judicial *dépeçage*. This is significant in the sense that the Regulation promotes party autonomy through the link between *dépeçage* and the parties' choice as that is the only instance where splitting of the applicable law is allowed. This is in line with Professor Reese's⁷⁹ suggestion that expanding *dépeçage* will materialize through narrower guidelines that promote a satisfactory development of choice of law rules. In other words, this indicates that the Regulation is successful in promoting party autonomy through *dépeçage* as it employs a similar narrow strategy when permitting the splitting of the law. Additionally, the Regulation eliminates risks of potential misuse of *dépeçage* that could threaten the application of overriding mandatory requirements via Article 9, which states that nothing can restrict the application of overriding mandatory rules.⁸⁰ This corroborates the argument that Rome I

⁷³ Guiliiano-Lagarde Report (n51) 17.

⁷⁴ Calliess (n37) 103.

⁷⁵ Willis LM Reese, 'Dépeçage: A Common Phenomenon in Choice of Law' (1973) 73 *Columbia Law Review* 58, 60.

⁷⁶ Magnus and Mankowski (n18) 210.

⁷⁷ Christopher Morse, 'The EEC Convention on the Law Applicable to Contractual Obligations' in *Yearbook of European Law* 1982, 118.

⁷⁸ 1980 Rome Convention on the law applicable to contractual obligations, art.4.

⁷⁹ Reese (n75) 59.

⁸⁰ Rome I, art 9.

provides a balanced treatment of *dépeçage* as it acknowledges the need for reasonable restraint of the parties' choice to split the law.

To conclude, Rome I's receptiveness towards the splitting of the law solidifies the centrality of party autonomy as it intrinsically expands the scope of the parties' freedom in choice of law context. Through allowing parties to utilise *dépeçage*, albeit in a narrower extent, the Regulation upholds the parties' choice in a manner that promotes their contractual autonomy whilst making it practically viable by not overstepping rational legal boundaries such as the need to preserve mandatory rules and the need to place *dépeçage* within a commercially and contractually sensible framework.

3.4 Parties' Choice of Non-State Law

Exploring the primacy of party autonomy in the Rome I Regulation often engages the question of whether the parties' freedom to choose the governing law extends not only to splitting the law, as discussed previously, but also to selecting a non-State law. Interestingly, academics like Prof. Tang⁸¹ have expressed the view that perhaps the permission to utilise *dépeçage* can fortify the position of non-national laws within the regime as splitting the applicable law essentially breaks the stalemate of national laws and as such it is indicative that supra-national laws are equally adequate to be the governing law of the contract. Regardless of whether such arguments are sustainable, they emphasize that party autonomy is engrained into each of these tools for expressing it and they ought to be given a reasonable scope of application if party autonomy is to be regarded as the cornerstone of the Regulation.

To begin with, Rome I does not permit non-State law to be the applicable law, either by choice or default. Therefore, it comes as no surprise why academics have generally avoided to include a positive discussion on non-State law under their 'freedom of choice' chapter when analysing the Regulation's provisions.⁸² As the position of Rome I towards the relationship between non-State law and party autonomy stands particularly weak in comparison to the novel and welcoming Article 3 of the Hague Principles,⁸³ the majority of academic works regard the Regulation's stance as a limitation to the parties' choice. Simply because the position of the Rome Convention has been largely preserved by the Rome Regulation, however, does not mean that the compromissory nature of Recital 13⁸⁴ as a *voie indirecte*⁸⁵ to promoting the incorporation of non-State law shall be underestimated. On the contrary, the Regulation's inclusion of Recital 13 constitutes an attempt to further the parties' choice by giving regard to non-State law, especially when it is analysed in light of the silence of the

⁸¹ Zheng Sophia Tang, 'Non-state law in party autonomy – a European perspective' *Int. J. Private Law*, Vol. 5, No. 1, 2012, 31.

⁸² Magnus and Mankowski (n18) 247-311; Calliess (n37) 85-86.

⁸³ Hague Convention (n63) art 3.

⁸⁴ Rome I, Recital 13.

⁸⁵ Eckart Brödermann, 'The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – the Experience of a German Lawyer' (2011) 16 *Uniform Law Review* 589, 596.

Rome Convention. Recital 13 provides that the Regulation ‘does not preclude parties from incorporating by reference into their contract a non-State body of law’. Whilst the Convention fails to address the issue of non-State law, Rome I’s introduction of Recital 13 reflects, albeit to a limited extent, the importance of allowing parties to incorporate non-State law in their contract.⁸⁶ The insertion of this provision is not a meaningless legislative act for the sake of modernizing the Rome regime as the objective for its very introduction is linked to the need to accommodate for the parties’ freedom to designate non-state norms as the applicable law, something which has already garnered support in arbitration.⁸⁷ This is indeed the focal point of this discussion as this paper is not concerned with bringing arguments for or against the expansion of non-State law within Rome I but rather with assessing whether Recital 13 is a satisfactory vessel for the exercise of party autonomy. As the Recital seeks to answer to the commercial demand for the use of non-national law in international contracts, it cannot merely be disregarded. It is indicative of the parties’ will and in turn, closely connected to party autonomy as expressed under Article 3 and Recital 11. Accordingly, it ought to be viewed as a fully operational tool to boost the parties’ choice.

Despite academics like McParland who submit that a pro- non-national law interpretation of Recital 13 leads to inconsistencies with the legislative history of the Regulation,⁸⁸ namely the rejection of draft article 3(2),⁸⁹ it is reasonable to argue that reversing the general understanding of the position of non-State law within the Regulation can lead to a sound conclusion of the opposite nature. The general understanding of Recital 13 states that the reference to a body of non-State law in a choice of law clause is to be interpreted in view of the law of the country which is applicable to the contract under the Regulation, meaning that an incorporation of non-State law is merely part of the contractual terms and not in itself a choice of law. Nonetheless, this statement fundamentally asserts that where it is the intention of the parties to integrate non-State law into their contract and this incorporation is compliant with the applicable law under the Regulation, then due regard is to be afforded to Recital 13. Effectively, by being ‘subordinate’ to the applicable law of the contract, Prof Brödermann notes that Recital 13 is able to fulfill its role within the regime by affording parties a leeway⁹⁰ to utilizing non-State law as it will not be disregarded both due to its compliance with the choice of law rules and its connection to party autonomy. This line of reasoning can potentially

⁸⁶ Symeonides, ‘Party Autonomy in Rome I and II from a Comparative Perspective’ (n42) 540.

⁸⁷ Publications Office of the European Union, ‘Green Paper on the Conversion of the Rome Convention of 1980 on the Law Applicable to Contractual Obligations into a Community Instrument and Its Modernisation, COM/2002 (14 January 2003), 22.

⁸⁸ Michael McParland, *The Rome I Regulation on the Law Applicable to Contractual Obligations* (University Press 2015), 155.

⁸⁹ Giulia Sambugaro, ‘What law to choose for international contracts?’ *The European Legal Forum* (E) 3-2008, 126, 126- 127.

⁹⁰ Brödermann (n85) 596.

displace arguments that the Recital impliedly prevents non-State law to be the governing law⁹¹ as it remains perfectly valid that a non-State law chosen indirectly to be the applicable law can constitute a valid choice provided that it is recognised as such under the given system of laws. In other words, in cases where the parties have selected a particular national system of laws, which has ratified, implemented or is based on the desired non-State body of law, then the incorporation of non-State law through Recital 13 has practical implications that elevate this integration beyond a mere term of contract. For example, parties that seek to elect Sharia law as the governing law could choose Saudi Arabian law, which is based on Sharia, to satisfy the Regulation's requirement to have the law of a country as the applicable law. This example by Dr Bamodu⁹² helps contextualise the argument of Prof Brödermann.⁹³ It illustrates that a favorable interpretation of Recital 13 is a viable method to ensure that party autonomy in selecting non-State law is safeguarded whilst respecting the superiority of the applicable law under the Regulation. Therefore, the opinion that a favorable approach to Recital 13 is unsustainable⁹⁴ is unsubstantiated. Recital 14⁹⁵ itself confirms that the Regulation is designed in view of anticipated harmonisation projects. This enhances the position that non-State law possesses stronger relevance in the Rome Regulation than what Recital 13 gives away.

Overall, it is plausible to conclude that in so far as the legislative update of the Regulation permits it, the provision is satisfactory in allowing non-State law. This unequivocally correlates to the position of party autonomy as the cornerstone of Rome I as protecting the ability to choose non-State law means expanding the scope of the parties' freedom. Taking into account the existing legislative and academic reservations toward non-State law, the update of the Rome regime and indeed the hard law nature of the Regulation, the current scope afforded to party autonomy in allowing the parties to incorporate non-State law is adequate. The only qualification to this conclusion is that the more favorable approach discussed above is to be employed to accurately reflect the intent of the parties and hence, the centrality of party autonomy.

3.5 Limitations of Party Autonomy under Rome I

The discussion on whether Rome I provides a sufficient basis for the advancement of party autonomy has, so far, largely focused on exploring the different tools under the Regulation that facilitate the exercise of the parties' freedom to select the applicable law. It would be contrary to the objective of this paper not to address the limitations posed on party autonomy as that would undermine the accuracy of the conclusion. Therefore, this sub-chapter will

⁹¹ Helmut Heiss, 'Party Autonomy' in Franco Ferrari and Stefan Leible, *Rome I Regulation: The Law Applicable to Contractual Obligations in Europe* (Sellier - European Law Publishers GmbH 2009), 11-12.

⁹² Olugbenga Bamodu, 'The Rome I Regulation and the Relevance of Non-State Law' in Peter Stone and Youseph Farah, *Research Handbook on EU Private International Law* (Edward Elgar Pub 2015), 235-236.

⁹³ Brödermann (n85) 596.

⁹⁴ McParland (n88) 155.

⁹⁵ Rome I, Recital 14.

explore the restrictions of party autonomy under Rome I in light of their narrow scope in order to re-affirm the supremacy of this principle.

The freedom of the parties to choose the governing law has generally been limited in areas whereby protection for the weaker party is required, such as in consumer,⁹⁶ insurance⁹⁷, passenger⁹⁸ and employment contracts,⁹⁹ as well as in cases where certain public interests ought to be safeguarded.¹⁰⁰ This, then, raises the question whether these areas, which are deemed to be reasonable restraints on party autonomy, diminish its position as the cornerstone of Rome I. The answer to this is contained in the scope afforded to them. Put simply, a stricter interpretation of these limitations will uphold the centrality of party autonomy.

The case of *Unamar v Navigation Maritime Bulgare*¹⁰¹ perfectly illustrates the argument that party autonomy is the main rule whilst its restrictions are exceptions. As highlighted by the ECJ, the position of party autonomy within Rome I is to be regarded as ‘the’ cornerstone rather than ‘a’ cornerstone in order to effectively apply its significance in practice. Hence, the interpretation of Article 9(2), which states that nothing shall restrict the application of overriding mandatory provisions,¹⁰² shall be construed narrowly to reflect the primacy of the parties’ choice of law freedom. This means that party autonomy makes its limitations subordinate, thus supporting previous conclusions that its scope within Rome I adequately reflects its importance. Additionally, the same line of reasoning is employed by AG Szpunar,¹⁰³ who emphasizes that interference with the applicable law on the grounds of mandatory requirements under Article 9 shall be exceptional. The text of the Regulation itself, specifically Recital 37,¹⁰⁴ affirms that due to the *crucial* essence of overriding mandatory requirements, they need to be construed narrowly. As such, they entail a stricter threshold for application which in turn is indicative that these provisions, in their role of regulating party autonomy, shall legitimately be viewed as exceptions.

A similar restrictive treatment of Article 21 is present. The article is designed to protect fundamental interests under the term *ordre public* by allowing Member States to refuse the application of the specified law only if its application is manifestly incompatible with public policy interests of the forum.¹⁰⁵ Again, a literal reading of this provision reveals that the use

⁹⁶ Rome I, art 6.

⁹⁷ Rome I, art 7.

⁹⁸ Rome I, art 5.

⁹⁹ Rome I, art 8.

¹⁰⁰ Rome I, art 9.

¹⁰¹ Case C-184/12 *United Antwerp Maritime Agencies (Unamar) Nv v Navigation Maritime Bulgare* ECLI:EU:C:2013:663, para.49.

¹⁰² Rome I, art 9(2).

¹⁰³ Case C-135/15 *Hellenic Republic v Niki foridis* [2016] I.L.Pr. 39, Opinion of AG Szpunar, para 90.

¹⁰⁴ Rome I, Recital 37.

¹⁰⁵ Rome I, art 21.

of the words ‘only’ and ‘manifest’ render the application of Article 21 an exception to the normal operation of Rome I’s choice of law rules.¹⁰⁶ As noted by Mankowski, a narrow construction of this provision is in line with the Regulation’s objective to promote legal certainty and predictability¹⁰⁷ as it essentially limits the judicial discretion in utilising Article 21. Consequently, it can be stated that by preserving legal predictability the parties’ choice of law is adequately safeguarded.

Furthermore, as noted in previous sub-chapters, the treatment of Article 3(3) in *Banco*¹⁰⁸ reveals the same narrow approach whereby the provision is employed only where *all* other elements link the case to a country, other than the one whose law has been chosen. The use of the word ‘all’ again implies a high threshold for application, thus ensuring that priority is given to the choice of the parties. Without going into much detail, the same infrequency of application is relevant to Article 3(4)¹⁰⁹ as *any* link to a non-EU state will deem it inadmissible. These examples add to the overall argument as they serve as evidence that the stance expressed in Article 3(1), namely the priority afforded to the party’s choice, is the *lex superior* even when examined in light of legitimate instances where other interests ought to be protected.

An additional aspect that is worth reviewing is the protection of the weaker parties and how the choice-of-law can be limited in such cases. Described as falling within the over-protective category of legal regimes,¹¹⁰ the Rome I Regulation has garnered support for its effectiveness in protecting consumers. Without prejudice to its merits, however, it can be submitted that the Regulation does not entirely limit the scope of party autonomy in these protected categories. To put that into context, Article 6 establishes material and territorial requirements¹¹¹ that need to be satisfied in order to class the contract as consumer. A list of excluded contracts is also provided.¹¹² As such, the protection of consumers under the Regulation is not all-encompassing and thus, it does not displace the operation of party autonomy in its entirety. As for passengers and insureds, there are contravening opinions on the effectiveness of their protection under Rome I,¹¹³ which in turn makes it challenging to

¹⁰⁶ See fig. 3 in Symeon Symeonides, ‘Party Autonomy in Rome I and II from a Comparative Perspective’ (n42) 530.

¹⁰⁷ Magnus and Mankowski (n18) 823-824.

¹⁰⁸ *Banco Santander Totta SA v Companhia de Carris de Ferro de Lisboa SA and others* [2016] EWCA Civ 1267.

¹⁰⁹ Rome I, art 3(4).

¹¹⁰ Symeonides, ‘Party Autonomy in Rome I and II from a Comparative Perspective’ (n42) 532.

¹¹¹ Rome I, art 6(1); María Campo Comba, ‘The Rome I Regulation and Its Mechanisms of Protection of Consumers and Employees’ in María Campo Comba (ed), *The Law Applicable to Cross-border Contracts involving Weaker Parties in EU Private International Law* (Springer International Publishing 2021) <https://doi.org/10.1007/978-3-030-61481-2_3> accessed 18 February 2022.

¹¹² Rome I, art 6(4).

¹¹³ Symeonides, ‘Party Autonomy in Rome I and II from a Comparative Perspective’ (n42) 532; Giesela Ruhl, ‘The Protection of Weaker Parties in the Private International Law of the European Union: A Portrait of Inconsistency and Conceptual Truancy’ [J. Priv. Int’l L.] 10 (2014), 356-7.

judge the function of party autonomy in such instances. It is, however, possible to argue that in practice, a choice of law clause placed to circumvent mandatory rules, and hence detrimental to the weaker party, can be upheld. For example, a clause that meets the geographical requirements under Article 5(2)¹¹⁴ can be upheld even if it deprives the passenger of certain mandatory protection as the scope of the above-mentioned mandatory rules articles is particularly narrow. Despite the focus of this paper being on the supremacy of party autonomy in a choice of law context, the present author agrees with Prof. Symeonides¹¹⁵ and Prof. Ruhl¹¹⁶ that its place in weaker party contracts goes against the principle of transparency and it is advisable that its function in Articles 5-8 is subjected to further scrutiny. It is recommendable that the role of private autonomy in these articles is equally regulated across-the-board to establish legal predictability and certainty, which are per se implications of this party autonomy. Nevertheless, it is evident that the doctrine makes its way into provisions that ought to restrict it, thus strengthening its position.

In light of all these examples, one can discern that the role of private autonomy as the heart of the Regulation is preserved through the restrictive application of its limitations, especially in relation to mandatory rules. This conclusion does not aim to undermine the advantages of Rome I's targeted protection but rather illuminate the primacy of party autonomy in the context of the limited scope of its restrictions.

3.6 Summary

This chapter sought to dissect the provision of the Rome I Regulation in order to determine whether it provides satisfactory vessels for the expression of the parties' choice of law freedom. It explored express and implied choice of law to illustrate that the Regulation takes a flexible view on the mode of expression of the applicable law, thus allowing party autonomy to benefit from a wider scope of application. Both non-state law and *dépeçage* proved to be appropriate vehicles for party autonomy. The Regulation allows for the parties to both incorporate non-state law as part of their contract, or its liberality allows for indirect ways to select a governing non-state law, as well as to scissor up the applicable law, thereby allowing the parties to benefit from a wider margin of choice of law autonomy. It has also been established that the limitations posed on party autonomy possess a narrow scope or are subject to inherent flaws that essentially reinforce the supremacy of private autonomy. The findings of this chapter solidify the position of party autonomy as the heart of Rome I, which is indicative of its importance and utility in conflict of laws more generally.

But can this primacy be preserved in the digitalisation of contracts or is party autonomy finally going to face infeasible limits in the rise of legal tech?

¹¹⁴ Rome I, art 5(2).

¹¹⁵ Symeonides, 'Party Autonomy in Rome I and II from a Comparative Perspective' (n42) 533.

¹¹⁶ Ruhl (n113) 357.

4. The Evolving Substance of Party Autonomy: Smart Contracts as a Continuance of the Parties' Freedom of Choice

As the centrepiece of this paper, party autonomy has, thus far, been discussed in the context of its essence and historical development. Chapter 3 exclusively focused on the supremacy of party autonomy in Rome I and it was concluded that it is the bedrock of the regime itself and of conflict of laws more generally. Having established that party autonomy bears an important role in private international law and that it remains the foundational rationale for the implementation of choice of law rules, it is imperative that we consider whether private autonomy can preserve its importance in the face of the digitalisation of the world. This question is particularly relevant in the context of the rise of distributed ledger technology as the topic seems to be neglected.

In 2020, the Permanent Bureau of the Hague Conference raised numerous questions of whether party autonomy can be acclimated to apply to such technology.¹¹⁷ More specifically, if the parties' will can be extended to include the so-called smart contracts, then it is implicit that party autonomy should continue to enable parties to choose the law governing their smart contract, or more accurately the terms and conditions of their smart contract. The answer to this is of great importance to the heritage of party autonomy in private international law as its applicability faces uncertainties in the widespread use of smart contracts. This chapter seeks to address the deficit of academic discussions on whether party autonomy can be extended to encompass smart contracts.

This section focuses on analysing how party autonomy fits within smart contracts in a manner that preserves its flexibility and utility. For the purposes of this discussion, this paper assumes that smart contracts are not independent of the law¹¹⁸ and they are fully capable of amounting to a 'contract' in traditional legal terms. Put simply, smart contracts are a piece of software that enable, control and monitor the automated execution of legal agreements.¹¹⁹ Smart contracts include a variety of forms such as those that are blockchain-based, fully-automated or the combined type of Ricardian contracts.¹²⁰ Without going into a technical discussion, the

¹¹⁷ (n3) 2-3.

¹¹⁸ Giesela Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' in Benedetta Cappiello and Gherardo Carullo (eds), *Blockchain, Law and Governance* (Springer International Publishing 2021), 161; Florian Möslin, 'Conflicts of Laws and Codes: Defining the Boundaries of Digital Jurisdictions' in Ioannis Lianos and others (eds), *Regulating Blockchain: Techno-Social and Legal Challenges* (1st edn, Oxford University Press 2019), 285; The Cardozo Blockchain Project, "'Smart Contracts' & Legal Enforceability' Report (2018), 8, < <https://larc.cardozo.yu.edu/blockchain-project-reports/2/> >.

¹¹⁹ Primavera De Filippi, *Blockchain and the Law: The Rule of Code* (Harvard University Press 2018), 74; Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 160.

¹²⁰ Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 160; Cheng Lim, TJ Saw and Calum Sargeant, 'Smart Contracts: Bridging the Gap Between Expectations and Reality' < <https://www.law.ox.ac.uk/business-law-blog/blog/2016/07/smart-contracts-bridging-gap-between-expectation-and-reality> >.

essence of smart contracts entails a level of automation and they are enforceable either via the execution of a computer code or by legal enforcement of rights and obligations.¹²¹

4.1 Smart Contracts: Best Friends with Certainty and Predictability as the Main Implications of Party Autonomy

To begin with, the nature of smart contracts provides a suitable environment for the facilitation of the fundamental implications of party autonomy, namely legal certainty and predictability. Smart contracts are deemed to foster certainty due to their programming nature.¹²² Specifically, the use of computer languages mitigates the risks associated with the interpretational discretion of natural languages.¹²³ In simple terms, the decreased ambiguity of programming languages allows for a higher level of certainty when interpreting the terms of the smart contract. As such, it is reasonable to argue that due to precisions of the programming language of the contract, the dispute resolver would benefit from the certainty of the syntax in determining the parties' choice of applicable law. This could be especially valuable in establishing an implicit choice under Article 3 of Rome I. As discussed previously, the Regulation requires the non-explicit choice to be clear and demonstratable through the terms of the contract or the circumstances of the case.¹²⁴ Smart contracts would be able to satisfy the requirement for certainty as the inference of an implicit choice would derive, at least partly, from the unequivocal syntax. Additionally, the risks of an ambiguous choice, or lack thereof, as a result of the legal ignorance of coders¹²⁵ will likely be minimised as the contracting parties will presumably rely on legal services to aid the nomination of an applicable law.¹²⁶ Therefore, subject to the satisfactory co-operation between lawyers and coders, the scope for misinterpretation of the agreed terms is decreased. This in turn promotes legal certainty and predictability, both of which form the substance of party autonomy. The effect of this is two-fold. The confinement of the selected law in a piece of code would ensure a more authentic interpretation of the choice,¹²⁷ which safeguards the true meaning of party autonomy as it emphasises the 'actuality' of the choice. This, coupled with the fact that smart contracts guarantee maximum certainty due to their self-enforcing nature,¹²⁸ would allow the parties to benefit from a higher degree of predictability. Such statements are supported by the

¹²¹ Clifford Chance and European Bank for Reconstruction and Development, 'Smart Contracts: Legal Framework and Proposed Guidelines for Lawmakers' (2018), 6, <<http://www.ebrd.com/documents/pdf-smart-contracts-legal-framework-and-proposed-guidelines-for-lawmakers.pdf>>.

¹²² Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 177.

¹²³ Alexander Savelyev, 'Contract Law 2.0: "Smart" Contracts as the Beginning of the End of Classic Contract Law' (2017) 26 Information & Communications Technology Law 116, 13-14; Filippi (n119) 82.

¹²⁴ Rome I, art 3(1).

¹²⁵ Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 169.

¹²⁶ Law Commission, 'Smart legal contracts Advice to Government' (2021), 24, <<https://www.lawcom.gov.uk/project/smart-contracts/>>.

¹²⁷ Savelyev (n123) 13.

¹²⁸ *ibid* 15.

general practice to test the contract before deployment.¹²⁹ Equally, the dispute resolver will draw their conclusions based on a programming language with zero to minimal interpretational leeway, which would enable them to uphold the choice of law and promote legal predictability. One can, therefore, discern that smart contracts are an effective guarantee for the advancement of party autonomy as both legal predictability and certainty are vested into their programming language and automaticity, thus providing a greater degree of protection for the parties' choice of governing law.

4.2 Choice of Law Clauses in Smart Contracts: To Code or not to Code?

Whilst it is evident that the utility of smart contracts is advantageous for the promotion of party autonomy through the certainty and predictability afforded by the programming language, the practical incorporation of a governing law clause into a code brings some complexities. How can the parties to a smart contract exercise their autonomy to nominate an applicable law?¹³⁰ It has been suggested that the easiest way is to use the so-called Ricardian contract which combines natural legal language and an encoded smart contract.¹³¹ Such a contract would be an effective vehicle for both implied and express choice as the choice will be contained in the natural language contract whilst the performance obligations will be held in the source code. This would allow for the normal operation of choice of law rules¹³² and the discussion in Chapter 3 on the mode of choice will remain relevant if the Rome Regulation is employed.

While there is a general agreement on the suitability of hybrid smart contracts for the expression of a choice of law, there is more uncertainty as to whether a fully-automated smart contract can be an appropriate vessel for the exercise of choice of law autonomy. The key to this controversy lies with whether the jurisdiction in question recognises smart contracts as valid legal agreements. This is outside the scope of this discussion. Nevertheless, this paper accepts the Law Commission's confirmation that smart contracts can be subjected to the existing legal system.¹³³ Hence, in a legal sense, fully-encoded smart contracts can accommodate for a choice of law and it is only the technical issue that remains. Contrarily to Prof. Rühl's position that an algorithm cannot express a choice of law,¹³⁴ the so-called Turing

¹²⁹ Law Commission (n126) 36; Ethereum- Testing Smart Contracts < <https://ethereum.org/en/developers/docs/smart-contracts/testing/> >; Erfan Andesta, Fathiyeh Faghieh and Mahdi Fooladgar, 'Testing Smart Contracts Gets Smarter', *2020 10th International Conference on Computer and Knowledge Engineering (ICCKE)* (2020).

¹³⁰ Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 168.

¹³¹ Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 177, Law Commission (n126) 22.

¹³² Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 168-170; Law Commission (n126) 179.

¹³³ Law Commission (n126) 3.

¹³⁴ Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 168.

completeness can help transpose a choice of law into a code.¹³⁵ This essentially means that the majority of programming languages are capable of computing almost anything (Turing completeness) and as such, a choice of law clause can be expressed in code. Such technical capabilities of expressing a choice of law in a code contribute to the conclusion that party autonomy can indeed find a practical outlet in smart contracts as it does not face technical limitations.

As for the legal challenges of recognising a smart contract, which contains a choice of law clause, it is to be re-iterated that the Law Commission currently deems the traditional requirements for contract formation as appropriate for encompassing code-based contracts.¹³⁶ Accordingly, the retained text of the Rome I Regulation¹³⁷ will be applicable to choice of law matters and theoretically, should include clauses contained in smart contracts. Hence, the only problem that remains is the interpretation of choice of law clause contained in the legally recognised smart contract. Naturally, this is subject to how the programming languages would be 'translated' into ordinary legal language or whether expert coders would be engaged in the litigation process. Arguably, a simple way to tackle the complexity is to use natural language aids such as the incorporation of natural language comments in the code explaining the clause.¹³⁸ Additional business process documents related to the smart contract can be evidenced to aid the dispute resolver.¹³⁹

In brief, the practical operation of party autonomy in selecting the governing law of the contract finds a suitable host for its modernisation though the use of smart contracts as both the computing of such a code, and the law itself seem prepared to accommodate for choice of law clauses in smart contracts. Even more so, due to the viable operation of party autonomy in an algorithmic environment and the lack of formal validity requirements under Rome I, the Regulation shall be able to encompass smart contracts and thus, allow parties to utilise their freedom to select the law under Article 3.

4.3 The Unknowns in Blockchain- Based Smart Contracts: What Do They Have in Store for Party Autonomy?

It was established that smart contracts, particularly fully-encoded and hybrid ones, are in line with the merits of party autonomy and can serve as a ground for its modernisation. They are particularly designed to promote certainty and predictability whilst being equipped with the mechanisms to incorporate a choice of law clause to give effect to the concept of party

¹³⁵ Law Commission (n126) 183; Henrique Centieiro, 'Smart Contracts – Can We Just Get Straight to the Point?' (*Medium*, 30 April 2021) <<https://levelup.gitconnected.com/smart-contracts-can-we-just-get-straight-to-the-point-4c904d97630>> accessed 8 March 2022.

¹³⁶ Law Commission (n126) 73.

¹³⁷ The Law Applicable to Contractual Obligations and Non-Contractual Obligations (Amendment etc.) (UK Exit) Regulations 2019 (SI 2019/834) (Regulations).

¹³⁸ Law Commission (n126) 88-90, 184.

¹³⁹ *ibid* 88-89.

autonomy. However, it stands true that party autonomy faces greater uncertainties in relation to public blockchain smart contracts.¹⁴⁰ Simply put, blockchain is a method for recording data whereby each data is put into a timestamped block and each block of data is linked (chained) in such a way so as to ensure that the data stored is interlocked with the previous block.¹⁴¹ This is done to promote fidelity, security, traceability and immutability. Additionally, blockchains are decentralised networks, which simply means that there is no singular person or company controlling it. Ethereum, for example, is public blockchain that allows for smart legal contracts to be deployed in its network. It contains its own set of rules referred to as a protocol.

It is here that one uncertainty for party autonomy is identified. Can the contracting parties to a smart contract select the network's protocol to be the governing law as a way to exercise their autonomy?¹⁴² Partly, the answer lies with the fact that majority of authors agree that smart contracts do not exist outside the legal system,¹⁴³ meaning that the choice of law contained into such a contract ought to be that of a country. A parallel can be drawn between this situation whereby the parties cannot explicitly choose the protocol of the network as the governing law and the discussion on non-state law in Chapter 3. It is evident that in both cases there is a supranational element, either the protocol contained in a decentralised system or *lex mercatoria* such as international practices or religious law. In both cases party autonomy is limited to the selection of a body of state law.¹⁴⁴ Perhaps the issue could then be resolved by employing a similar mechanism of incorporation as that of Recital 13 of Rome I.¹⁴⁵ The Law Commission suggests that this is a viable solution.¹⁴⁶ However, unlike in non-state law cases, here there is no way to circumvent the limitation. To clarify, there is no body of state law that is based on the network's protocol that can be selected in order to satisfy the national law requirement and utilise the protocol as the governing law. This is perhaps one of the few examples of true limitation on party autonomy.

Additionally, selecting different governing laws for different parts of the smart contract currently stands in a legal lacuna. Whilst it has been ascertained that a choice of law clause can be expressed in code, which means that two clauses are perfectly operable in a technical sense, it is unclear how that would be executed. It would, arguably, create difficulties for both the coder and the dispute resolver in the sense that it would be challenging to clarify the

¹⁴⁰ Rühl, 'Smart (Legal) Contracts, or: Which (Contract) Law for Smart Contracts?' (n118) 177; Law Commission (n126) 187.

¹⁴¹ 'Blockchain Explained' (*Investopedia*) <<https://www.investopedia.com/terms/b/blockchain.asp>> accessed 8 March 2022; 'What Is Blockchain Technology? - IBM Blockchain | IBM' <<https://www.ibm.com/topics/what-is-blockchain>> accessed 8 March 2022; Law Commission (n126) v.

¹⁴² Law Commission (n126) 180.

¹⁴³ *ibid* 182-183.

¹⁴⁴ Andrew Dickinson, 'Cryptocurrencies and the Conflict of Laws' in David Fox and Sarah Green, *Cryptocurrencies in Public and Private Law* (University Press 2019), 5.37.

¹⁴⁵ Rome I, Recital 13.

¹⁴⁶ Law Commission (n126) 182.

applicability of each system of laws to different part of the contracts. Could natural language notes in the code suffice? Perhaps, business process documents would become more costly due to the complexity of allowing for such a splitting of the law. It is evident that party autonomy in the sense of allowing the parties to split the law of their smart contract could result in a series of legal and technical perplexities that could potentially undermine predictability and certainty. Moreover, the scissoring of the applicable (*dépeçage*) in smart contracts would create further difficulties if the blockchain-based contract incorporates the protocol of the network. How would its relationship with two systems of law be clarified in a way that makes economical, contractual and technical sense? This is all part of the issues that would need to be addressed if party autonomy is to be adapted to the perhaps not so futuristic development of contract law.

4.4 Summary

Party autonomy will continue to face uncertainties in the context of smart contracts but this should not undermine its flexible utility. As discussed in this chapter, it is apparent that choice of law clauses in smart contracts are in harmony with the software nature of the contract as they benefit from its certainty. Such clauses can be expressed in a multitude of ways to indicate the parties' autonomy to nominate a governing law to the smart contract. A good start to the modernisation of party autonomy should reflect the practicable operation of choice of law clauses in semi and fully-automated contracts as they provide a suitable environment for the malleability of part autonomy as a doctrine. Hence, party autonomy will definitely not be lost in the digitalisation of contracts but it would certainly require some legal clarifications or amendments in relation to on-blockchain smart contracts.

5. Conclusion

Having traced the historical development of party autonomy, how deeply rooted its sources are in national legal systems and the utility of its legal and business implications, it is nearly impossible to under-evaluate its significance in private international law. The findings of this analysis explain the omnipresence of party autonomy in choice of law matters as its effectiveness in overcoming applicable law issues in cross-border contracts is highlighted. It is, therefore, imperative that its role is re-examined in the context of applicable law legislation, particularly within the Rome I Regulation as it is determinative in almost all EU Member States. The findings of such an analysis are important as they would reveal whether party autonomy has preserved its centrality against the wide applicability of the Regulation. Put simply, if Rome I is accommodating to the parties' freedom to select the governing law, then party autonomy has safeguarded its supremacy in conflict of laws.

This paper approached the necessity to reevaluate the role of party autonomy in a modern context by assessing the provisions of Rome as regards whether they provide satisfactory scope to the vehicles of party autonomy. Particularly, it was established that both express and implied choice are afforded liberal applicability, which enhances the utility of party autonomy as it avoids constricting it to formal validity requirements. Furthermore, having ascertained that the parties are free to incorporate non-state law, albeit to a limited extent, and split their applicable law under Rome I proves that the Regulation has adequate mechanisms in place to preserve the centrality of party autonomy and promote its use. These sub-chapters address a particular deficit in the academic world as they place party autonomy at the center of assessing the scope of non-state law and *dépeçage* under Rome I. This sheds new light onto these two choice-of-law tools as they have, so far, been underestimated in their effectiveness to uphold party autonomy. This paper finalized its findings of Rome I by proving that the limitations posed onto party autonomy are narrow in scope and suffer from legal caveats that ultimately allow party autonomy to preserve its status as the bedrock of the Regulation. Lastly, it was established that party autonomy has a prospective place in the digitalisation of contracts and is capable of being coded into smart contracts. Its usefulness and importance will not be lost in the rise of automated contracts and, likely, its function will further be subjected to assessment against the growth of on-blockchain contracts.

To answer the question posed at the beginning of this paper, party autonomy is 'the Rule' under Rome I and its reign will continue in the context of smart contracts, thus maintaining its supremacy in private international law.

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