

***Lex Voluntatis* and the International Character of Trade Contracts: Can Consent Create Internationality?**

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Abstract

*This study analyzes the role of the *lex voluntatis* principle in determining the law applicable to international trade contracts, with the objective of critically examining the thesis that parties may “internationalize” a purely domestic contract by merely choosing a foreign law. Using a comparative and doctrinal method, the research draws on key instruments of uniform law (The 1980 Rome Convention, Regulation (EC) No. 593/2008, The 1994 Inter-American Convention of Mexico City) as well as the Romanian Civil Code. The findings demonstrate that the choice of law does not constitute the source of a contract’s international character but rather a mechanism for resolving pre-existing conflicts of laws. The so-called “voluntary internationalization” of a domestic contract is, in this respect, a legal sophism, as it conflates the effect of party autonomy with its basis. The study reaffirms the objective nature of internationality and the need to preserve the distinction between contractual freedom and genuine elements of extraneity, subject to public order and mandatory rules.*

Keywords: *lex voluntatis; internationality; conflict of laws; party autonomy; private international law; legal sophism.*

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1. The International Character of Trade Contracts and the Issue of the Applicable Law

Internationality represents the defining feature that distinguishes the international trade contract from the domestic commercial contract.

Not every foreign element confers an international character upon a contract. Relevant are only those factual components that generate a conflict of laws in space—namely, the situation in which two or more legal systems could each claim the application of their own rules to the same contractual relationship².

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² As highlighted in the specialised literature, “what is essential is that the respective legal relationship contains a foreign element of sufficient intensity to remove that relationship from the exclusive competence of a single national legal system, thereby rendering several legal systems potentially applicable.” — Virgiliu Anghelescu, Alexandru Deteșan, Ervin Hutira, *Contracte comerciale internaționale* (Academy Publishing

This delimitation has direct implications for the court or arbitral tribunal, which will not automatically apply domestic law, but the law designated by the conflict-of-laws rules. In the absence of an international element, no conflict of laws arises, and the dispute remains purely domestic.

Romanian legislation expressly enshrines this distinction. According to Article 2557 of the Civil Code, private international law relations include commercial relationships containing foreign elements, while Article 369 of the Code of Civil Procedure provides that arbitration is international when it arises from a private-law relationship containing such an element.

Doctrine has outlined two major approaches to defining internationality³:

- a) a traditional, juridical-formal approach, centred on criteria relating to the parties, the object, or the place of performance;
- b) a modern, economically inspired approach, focusing on the effects of the operation on the economy of several states⁴.

Within the first approach (the juridical-formal one), the criteria used to determine the international character are classified into two main categories:

- criteria relating to the parties, when the parties — natural or legal persons — have different nationalities or citizenships, or have their domicile or registered office in different states;
- criteria relating to the object of the contract, when the goods, works, or services that form the object of the contract cross state borders and thereby enter international commercial circulation.

Criteria relating to the parties are included in several multilateral conventions. For instance: the United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980) provides, in Article 1(1), that it applies to sales contracts between parties having their places of business in different states; the European Convention on International Commercial Arbitration (Geneva, 1961) adopts the same criterion, requiring that the parties to the arbitration agreement have their seats in different contracting states; the Washington Convention (1965) on the Settlement of Investment Disputes between States and Nationals of Other States considers a dispute international when the investor has the nationality of a state different from that of the host state.

Criteria relating to the object are typically found in international conventions on transport. The Montreal Convention (1999) on international air carriage defines as international any transport whose points of departure and destination are located in the

House, Bucharest, 1980), 37.

³ Edoardo Ferrante, “Voluntas and Lex Contractus in the Interpretation of Standard Clauses,” in Tommaso dalla Massara (ed.) *Individual Will and the Civil Law Tradition: Rethinking Lex Privata*, (London: Routledge, 2026), <https://doi.org/10.4324/9781003669869>.

⁴ In this regard, see: Jean-Michel Jacquet, *Le contrat international* (Dalloz, Paris, 1999), 5–13; Jean-Marc Mousseron, Jacques Raynard, Régis Fabre, and Jean-Luc Pierre, *Droit du commerce international: Droit international de l'entreprise*, 2nd ed. (Litec, 2000), 12–14; Stéphane Chatillon, *Droit des affaires internationales*, 3rd ed. (Vuibert, 2002), 173–178; Stéphane Chatillon, *Le contrat international*, 2nd ed. (Vuibert, 2006), 10–15; Jacques Béguin and Michel Menjucq (eds.), *Droit du commerce international* (Litec LexisNexis, 2005), 3–5.

territories of two different states, while the CMR Convention (1956) establishes the same principle for road transport. Similar rules appear in the Uniform Rules Concerning the Contract of International Carriage of Goods by Rail (CIM), as well as in the United Nations Convention on the Carriage of Goods by Sea (Hamburg, 1978).

The second conception of an economic nature, holds that what confers internationality on a contract is not necessarily the plurality of juridical foreign elements, but the international commercial interests that the contract affects. This criterion was formulated in French case law as early as 1927, in the *Pélissier du Besset* decision, which defined the international contract as one that produces “a flow and reflux across the borders of a state.” Later, the French Court of Cassation, in *Mardelé* (1930) and *Dambricourt* (1931), held that an arbitration is international when “it brings into play the interests of international commerce”⁵. This criterion was subsequently adopted by the French legislature, being incorporated into Article 1492 of the New Code of Civil Procedure: “Arbitration is international when it brings into play the interests of international commerce.” (“*Est international l’arbitrage qui met en cause les intérêts du commerce international.*”)

2. Rules and Principles Governing the Determination of the Law Applicable to the International Contract

Uniform and National Regulatory Framework. At the international level, two fundamental instruments of uniform conflict-of-laws regulation have emerged, applicable to commercial contracts containing an element of internationality: the 1980 Rome Convention on the Law Applicable to Contractual Obligations and the Inter-American Convention on the Law Applicable to International Contracts, adopted in Mexico City in 1994.

The Rome Convention, signed on 19 June 1980 under the auspices of the European Economic Communities, represented the first unification of conflict-of-laws rules in the field of contractual obligations, providing a common reference framework for the Member States. It directly inspired subsequent national legislation (including Romanian Law no. 105/1992 on the regulation of private international law relations) and has remained an essential doctrinal reference point. As of 17 December 2009, the Convention has been replaced by Regulation (EC) No. 593/2008 of the European Parliament and of the Council (“*Rome I*”), which adopts its structure and develops it in the form of an instrument directly applicable in the Member States of the European Union, including Romania.

The Rome I Regulation forms part of the broader effort of the European Union to consolidate a unified European legal area, where the free movement of goods, persons, services, and capital presupposes a uniform conflict-of-laws framework. Since unifying substantive law proved difficult, the EU legislator opted for the harmonisation of conflict rules, thereby ensuring predictability and legal certainty for cross-border

⁵ Bogdan Cristian Trandafirescu, *Cadrul uniform al contractului de comerț internațional*, Universul Juridic Publishing House, Bucharest, 2019, p. 26.

commercial operations.

At the national level, the *Romanian Civil Code*⁶ (Book VII – Provisions of Private International Law) establishes its own system of conflict-of-laws rules, fully aligned with the philosophy of the Rome Convention and the Rome I Regulation. Within the domestic legal order, the Civil Code has a subsidiary character: it applies only insofar as the Rome I Regulation is not applicable or does not provide an express solution.

The Inter-American Convention of Mexico City (1994), adopted under the auspices of the Organization of American States (OAS), represents a parallel model of uniform conflict-of-laws regulation, with similar inspiration, confirming the global trend toward unifying rules on determining the applicable law in international contracts.

The Relationship Between the Rome I Regulation and Domestic Law. In the Member States of the European Union, including Romania, Regulation (EC) No. 593/2008 (“Rome I”) has priority and direct applicability in the field of civil and commercial contracts containing a foreign element. The conflict-of-laws rules in the Civil Code apply only subsidiarily, in situations that fall outside the scope of the Regulation or where the Regulation does not offer an express solution.

According to the *general principles of private international law*, international trade contracts are governed, as regards their substance and effects, by the law chosen by the parties (in accordance with the *lex voluntatis principle*). In the absence of such a choice (even tacit), the applicable law is determined according to subsidiary solutions, generally based on the idea that the contract should be governed by the law of the state with which it has the closest connection.

Designation of the Applicable Law by the Parties (The Lex Voluntatis Rule). Regulation (EC) No. 593/2008 (Rome I) enshrines in Article 3 the parties’ freedom to designate the *lex contractus* (for the entire contract or for parts of it), through an express choice or one “clearly demonstrated” by the terms of the contract and the circumstances. The choice may also be made subsequently, with retroactive effect, provided that it does not prejudice the form of the contract or the rights of third parties. Rome I does not require the chosen law to have an objective connection with the contract (full autonomy), but maintains the applicability of mandatory rules of the state naturally connected to the situation and of EU law provisions from which no derogation is permitted.

The Inter-American Convention (CIDIP, 1994), Articles 7–8, establishes the same rule: express or clearly inferred choice; possibility of subsequent modification, again with the limit of protecting third-party rights.

The Romanian Civil Code (Book VII, Article 2640) follows the same logic: freedom of choice (express or clearly resulting from the circumstances), without requiring a territorial connection, and subject only to the usual limits of public policy. Both pre- and post-1989 Romanian practice has consistently validated the *lex voluntatis*.

⁶ Law No. 287/2009 on the Civil Code was published in the Official Gazette of Romania, Part I, No. 511 of 24 July 2009, was amended by Law No. 71/2011, and was corrected in the Official Gazette of Romania, Part I, No. 427 of 17 June 2011 and Part I, No. 489 of 8 July 2011. The Civil Code entered into force on 1 October 2011.

The *lex voluntatis* rule, by its legal nature, does not constitute an original right of the parties to a contract with law-creating effects; just like the principle of contractual freedom in private law (which is itself a right granted to the parties by statute) *lex voluntatis* is a conflict-of-laws norm, expressly regulated both in national legislation (the state's private international law) and in international legal instruments (international conventions and, respectively, the EU Rome I Regulation).

Determining the Lex Contractus in the Absence of a Choice by the Parties.

We make the following observations:

a) The Rome I Regulation transforms the traditional presumption of the characteristic performance into a structured rule with two components:

- fixed conflict-of-laws rules for eight categories of contracts (Article 4(1)(a–h)). Essentially, the applicable law is that of the habitual residence of the debtor of the characteristic performance, with two deliberate reversals favouring the typically weaker party: franchise contracts (law of the franchisee's habitual residence) and distribution contracts (law of the distributor's habitual residence).

- for atypical or hybrid contracts (Article 4(2)), the law of the debtor of the characteristic performance applies.

This technique enhances predictability compared to the old Rome Convention. Moreover, Article 4(3)–(4) introduces the “closer connection” clause: if the circumstances clearly indicate a different natural law of the transaction, the court may apply it. In the same spirit of protection and systemic coherence, Rome I includes special rules for specific matters (carriage of goods/passengers; consumers; employment; insurance), while retaining the characteristic performance as the guiding logic.

b) The Inter-American Convention (CIDIP) provides that, in the absence of a choice by the parties, the contract is governed by the law of the state with which it has the closest ties, thereby expressly adopting the principle of proximity (Article 9.1). For determining this law, however, the Convention lays down no presumption and no list of contracts for which a specific law should be identified. It simply leaves it to the forum to determine the *lex contractus*, taking into account all relevant objective and subjective elements, in order to identify the law of the state with which the contract has the closest connection (Article 9.2).

c) The Romanian Civil Code (Article 2641) likewise enshrines the rule of the closest connection, practically operated through the characteristic performance; and where circumstances so require, the law of the closer connection is applied.

3. Doctrinal Opinions on the Element of Internationality. The Theory of Voluntary Internationalisation

In the doctrine of international commercial law, a question of subtle theoretical significance (yet with clear practical implications) concerns the moment at which the element of internationality arises. The debate focuses on whether this element must pre-exist the parties' manifestation of will, or whether, on the contrary, it may be generated through the very choice of the applicable law.

The well-known theorist Jean-Christophe Pommier formulated the question as follows: “Must the international character of the contract predate the operation of the conflict-of-laws rule, or may the parties, through their concordant will, internationalise an internal contract” (having all its elements located within a single state)?⁷

The Premises of the Theory. Supporters of this orientation start from an extensive interpretation of the principle of party autonomy, considering that the freedom of the parties should manifest not only in the designation of the applicable law, but also in determining the international nature of the contract. It has been argued that the parties may confer an international character upon the contract solely through their manifestation of will, by designating the law of a foreign state as the applicable law. Thus, a contract located, through all its objective elements, within the legal order of a single state would become an international contract exclusively by means of this voluntary choice. The element of internationality would no longer be an objective fact, but the exclusive result of the parties’ common consent⁸.

The parties may have practical reasons for “internationalising” their contract: the desire to benefit from a more stable or neutral commercial law, to access an international arbitral jurisdiction, or to avoid the application of certain mandatory rules of the internal law (normally applicable).

From this perspective, internationality would not be merely an objective fact; it could also stem from a subjective option founded on the concordant will of the parties.

Doctrinal Arguments and Textual Foundations. This theory was supported (at the time of its formulation) primarily through the interpretation of Articles 1(1) and 3(3) of the 1980 Rome Convention on the law applicable to contractual obligations⁹.

According to Article 1(1), the Rome Convention “shall apply to contractual obligations in any situation involving a choice between the laws of different states,” and according to Article 3(3): “The fact that the parties have chosen a foreign law, whether or not accompanied by the choice of a foreign forum, shall not prejudice the application of the mandatory rules of the law of the state with which all the other elements of the situation are connected at the time of the choice.”¹⁰ Some authors considered that this text indirectly recognises the possibility of internationalising the contract through the choice of law, as it seems to admit the hypothesis of a contract objectively located in a

⁷ Jean-Christophe Pommier, *Principe d'autonomie et loi du contrat en droit international privé conventionnel* (Economica, 1992), 130.

⁸ Agostino Curti-Gialdino, *La volontà delle parti in diritto internazionale privato*, Recueil des cours de l'Académie de droit international, vol. 137 (1972); Jean-Luc Elhoueiss, „L'élément d'extranéité préalable en droit international privé”, *Journal du Droit International* 1 (2003): 39-85; for a presentation of the thesis of the internationalization of the domestic contract (having all elements located in a single state) see also Pommier, *Principe d'autonomie et loi du contrat en droit international privé conventionnel*, pp. 131–133.

⁹ For the presentation of this issue, we rely on the provisions of the 1980 Rome Convention, even though it has since been replaced by Regulation (EC) No. 593/2008, because at the time the thesis under analysis was formulated, the Rome I Regulation did not yet exist—not even in draft form.

¹⁰ The equivalent provisions in the Rome I Regulation are found in Article 9(3): “Where all the elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the parties’ choice shall not prejudice the application of the provisions of the law of that other country which cannot be derogated from by agreement.”

single state, but governed (through the will of the parties) by a foreign law¹¹.

In French doctrine, the idea was also expressed through the concept of “subjective internationality,” in opposition to “objective internationality” determined by traditional foreign-element criteria. It was argued that, in an open legal economy, the will of the parties may create a legal relationship with an international dimension if it brings into play the interests of international commerce.

This orientation was further reinforced by certain recent soft-law instruments, such as the Hague Principles on Choice of Law in International Commercial Contracts (2015), which, in Article 2(4), allow the parties to choose any law, “even in the absence of a connection between the chosen law and the parties or the transaction.” Although the Principles nonetheless presuppose the international character of the relationship, supporters of the voluntarist theory saw in this formulation an argument for broadening party autonomy to the point where it could itself become a criterion of internationality.¹²

4. Internationalisation Through the Choice of the Applicable Law – A Legal Sophism

The view according to which a domestic contract could become “international” solely by means of an *electio juris* clause is, in essence, an inversion of the logical order of private international law – a legal sophism¹³. The conflict-of-laws rule does not create the plurality of legal orders; it presupposes it. Party autonomy operates only in the presence of a real foreign element; it does not substitute for it. Hence the conclusion: the choice-of-law clause is permissible only if the legal relationship presents, prior to and independently of the parties’ will, an objective connection with several legal

¹¹ According to Jacquet, *Le contrat international*, 7–8. “The Rome Convention does not resort to the notion of international contract to determine its scope. Not only does it not provide a firm definition of an international contract, but it accepts that it be applied to a contract the elements of which are located in a single State. [...] The true criterion retained by the Rome Convention (for its application) is the contractual obligation arising in a situation presenting a conflict of laws and not the international contract. Moreover, the decisive notion of the conflict of laws is a subjective one, since it can only be based on the designation by the parties of an applicable law, even when the contract does not present any element of foreignness in the traditional sense of the term. The Rome Convention applies to international contracts, within the meaning of French private international law (and that of most other countries). But it also applies to domestic contracts for which the parties have decided to designate a foreign law, thereby causing a conflict of laws within the meaning of the Convention.”

¹² See Alex Mills, *Party Autonomy in Private International Law* (Cambridge University Press, 2018), 212.

¹³ Sophism – “Common meaning: a false argument that presents an appearance of truth and rigour, generally formulated with the intention of deceiving. Logic: an apparently valid argument, that is, one that conforms to the rules of logic yet is nevertheless incorrect. [...] In Greece, in the 5th century BC, the Sophists were itinerant teachers who travelled from city to city, offering for a fee instruction in the art of rational argumentation in both private and public affairs. Their teaching was intended for young men called to play a role in the democratic assemblies of the Greek city-states, in which power belonged to the one who spoke and persuaded the majority of citizens most effectively. [...] Through the vehement critique undertaken by Plato, Greek sophistry acquired the poor reputation of being the practice and theory of a rule-less discourse, seeking — through dubious means — to seduce the audience and even to praise opinion rather than to attain truth.” Elisabeth Clément, Chantal Demonque, Laurence Hansen-Love, and Pierre Kahn, *Filosofia de la A la Z: Dicționar enciclopedic de filosofie* (ALL Publishing House, Bucharest, 2000), 484–485.

systems.

The Conceptual Argument. Private international law is naturally triggered when there exists a plurilocalised situation (parties in different states, place of performance or delivery in another state, goods situated abroad, cross-border economic flows, etc.). In the absence of such an objective given, the relationship remains a domestic contract, governed by the law of the forum, with the parties free to derogate only from the dispositive rules of that law. To admit that the mere choice of a foreign law could generate “internationality” would amount to transforming *lex voluntatis* from a mechanism for selecting the applicable law into a criterion of internationality—thereby dismantling the entire conflict-of-laws architecture¹⁴.

The Arguments from International Texts are: (Systematic Interpretation)

a) The 1955 Hague Convention on the law applicable to the international sale of corporeal movable property provides in Article 1(4): “The mere declaration by the parties concerning the application of a law or the jurisdiction of a court or arbitral tribunal shall not be sufficient to confer an international character upon the contract of sale within the meaning of paragraph 1 of this article.”

The 1986 Hague Convention on the Law Applicable to Contracts for the International Sale of Goods reiterates the same idea in Article 1(b).

b) The 1980 Rome Convention, in the much-debated Article 3(3), did not offer the possibility of internationalising a contract that is objectively located within a single state; on the contrary, it merely restates an old rule of private law. Most norms belonging to private law are dispositive (permissive and supplementary), and parties may derogate from them, the only limit being the mandatory rules that safeguard public order and good morals (Art. 11 Civil Code). Thus, the parties are free to determine the content of the contract and may exclude dispositive rules, replacing them with the legal norms of another state — incorporated into the contract — yet the contract remains subject to the legal system in which it is located, the limit on party autonomy being that state’s mandatory rules.

Returning to Article 3(3) of the Rome Convention, in light of the above, it merely restates the principle of contractual freedom found in domestic law. In other words, the parties to a contract located in a single state may exclude the dispositive rules normally applicable and replace them with other norms, but the contract nevertheless remains governed by the legal system of the state where it is objectively located, and the mandatory rules of that state prevail.

c) Regulation (EC) No. 593/2008 – Rome I preserves the earlier structure:

(i) Scope: contractual obligations, civil and commercial, “in situations involving a conflict of laws” (Art. 1);

(ii) *Lex voluntatis*: Art. 3 (including paragraphs 3–4, which protect national mandatory rules and EU law when all relevant elements are located in a single state / within the EU).

¹⁴ In this regard, see Pommier, *Principe d'autonomie et loi du contrat en droit international privé conventionnel*, 133–141; Henri Batiffol and Paul Lagarde, *Traité de droit international privé*, 8th ed., vol. II (LGDJ, Paris, 1993), 274 ff.; Jacquet, *Le contrat international*, 31–63; Mousseron, Raynard, Fabre, Pierre, *Droit du commerce international: Droit international de l'entreprise*, 10–82.

The text presupposes the existence of a conflict of laws; it does not generate one through choice.

Across international conventions and in the Rome I Regulation alike, the choice of the applicable law does not constitute the source of the international character of the legal relationship. It is merely a conflict-of-laws rule intended to resolve a conflict of laws already existing.

The Essential Distinction: Electio Juris vs. “Incorporation”. In a purely domestic contract, the parties may incorporate clauses drawn from a foreign legal system (references to a foreign practice, standard, or normative model). But this is a matter of contractual content, not a true conflict-of-laws designation. Incorporation functions within the law of the forum and yields to its mandatory rules. *Electio juris*, by contrast, presupposes in advance the existence of a conflict of laws. Confusing these two levels creates the illusion of a possible voluntary internationalisation — which is, quite clearly, erroneous.

5. Conclusions

A systematic examination of the main instruments of private international law — the 1955 and 1986 Hague Conventions, the 1980 Rome Convention, and the current Regulation (EC) No. 593/2008 (Rome I) — unequivocally confirms that the choice of the applicable law is not the source of a contract’s international character, but a conflict-of-laws rule designed to resolve a conflict of laws already in existence. The *lex voluntatis* rule operates after the emergence of the foreign element; it does not generate it.

In this context, the thesis of a so-called “voluntary internationalisation” of a contract by the mere insertion of an *electio juris* clause proves not only erroneous, but a genuine legal sophism. It inverts the logical order of private international law, transforming the conflict rule from an instrument of resolution into a generator of the conflict of laws. Such a perspective distorts the true purpose of the *lex voluntatis* principle and undermines the coherence of the entire conflict-of-laws system.

Beyond its theoretical inconsistency, this theory is also incompatible with positive law, as demonstrated above.

Accordingly, the “internationalisation” of a domestic contract through the choice of a foreign law constitutes a legal reasoning error: the will of the parties cannot create the conflict of laws; it acts only within the limits that such a conflict provides. In reality, *lex voluntatis* expresses contractual freedom within an already international relationship, and not the power to transform a purely domestic one into an international contract.

Thus, this theory remains a legal sophism — an apparently coherent logical construction, yet lacking normative foundation, one that substitutes effect for premise and turns a rule of application into a criterion of existence.

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